[***R. v. Tremblay, [2013] B.C.J. No. 959***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20G2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.B. Butler J.

Heard: October 29-31, November 1-2, 5-9, 19-22, 26, 29 and

December 4, 2012.

Oral judgment: February 22, 2013.

Docket: 25982

Registry: Vancouver

**[2013] B.C.J. No. 959** | 2013 BCSC 816

Between Regina, and Martin Daniel Tremblay

(164 paras.)

**Case Summary**

**Criminal law — Criminal Code offences — Offences against the administration of law and justice — Misleading justice — Obstruction of justice — Offences against person and reputation — Duties tending to preservation of life — Failure to provide necessaries of life — Criminal *negligence* — Causing death by criminal *negligence* — Wanton and reckless disregard — Trial of Tremblay, charged with two counts of criminal *negligence* causing death and two counts of attempting to obstruct justice — Tremblay provided three teenage girls with alcohol and powdered methadone at his home — Two of the girls passed out — Tremblay delayed seeking medical assistance and both girls ultimately died — Tremblay counselled two people to lie to the police and followed up with one — Tremblay's acts and omission substantially contributed to both girls' deaths — Tremblay found guilty of two counts of criminal *negligence* causing death and one count of attempting to obstruct justice.**

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| Trial of Tremblay, charged with two counts of criminal ***negligence*** causing death, two counts of failing to provide necessaries of life and two counts of attempting to obstruct the course of justice. Three teenage girls, Lalonde, Jackson and Marquardt, started drinking one afternoon. Tremblay, an adult drug dealer known to the girls, invited them to his home to party. He provided them with alcohol and powdered methadone. Soon after taking the drug, Lalonde and Jackson passed out. Tremblay delayed seeking medical assistance for the girls and both girls ultimately died of methadone and alcohol toxicity. The Crown took the position that Tremblay owed a duty of care to both girls as he was the adult in charge. The Crown further submitted that Tremblay clearly showed wonton or reckless disregard for the girls' safety and that his acts and omissions caused the deaths of both girls. The Defence took the position that the Crown failed to prove the essential elements of the charges beyond a reasonable doubt.  HELD: Tremblay found guilty of two counts of criminal ***negligence*** causing death and one count of attempting to obstruct justice.  He was found not guilty of one count of attempting to obstruct justice and the two counts of failing to provide necessaries of life were stayed pursuant to the Kienapple principle. Tremblay facilitated and encouraged the girls' dangerous behaviour and exercised control over their activities. Once the girls passed out, they were unable to withdraw from Tremblay's charge. He therefore had a duty to provide the girls with the necessaries of life. Tremblay showed a wanton and reckless disregard for the lives and safety of both girls. His failure to fulfill his duty to provide the necessaries of life to both girls was a substantial contributing cause to their deaths. Tremblay was therefore guilty of criminal ***negligence*** causing the deaths of both girls. Tremblay counselled Marquardt and PG, the maternal grandmother of his young daughter, to lie to the police. He followed up with PG to check if she had done so and he therefore specifically intended his statements to PG to obstruct justice. However, he did not follow up with Marquardt and it therefore could not be determined beyond a reasonable doubt that he intended his statements to her to obstruct justice. |

**Statutes, Regulations and Rules Cited:**

Child, Family and Community Service Act, *RSBC 1996, CHAPTER 46*,

Controlled Drugs and Substances Act, [*S.C. 1996, c. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB01-JJSF-220V-00000-00&context=),

Criminal Code, [*R.S.C. 1985, c. C-46, s. 139*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X64-9P71-JBT7-X4HK-00000-00&context=)(2), s. 215(1)(c), s. 215(2)(b), s. 219, s. 220(b)

Liquor Control and Licensing Act, [*RSBC 1996, CHAPTER 267*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5MS4-PW61-DYV0-G06J-00000-00&context=),

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)

Youth Criminal Justice Act, [*S.C. 2002, c. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JJD0-G4F1-00000-00&context=),

**Counsel**

Counsel for the Crown: Michaela E. Donnelly, Christie Lusk.

Counsel for the Accused: Don E. Morrison, Stephanie Vyas.

**Reasons for Judgment**

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| **G.B. BUTLER J. (orally)** |

**1**   The accused, Martin Tremblay, is charged with two counts of criminal ***negligence*** causing death, contrary to s. 220(b) 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=); two counts of failing to provide necessaries of life, contrary to s. 215(2)(b) of the *Criminal Code*; and two counts of attempting to obstruct the course of justice, contrary to s. 139(2) of the *Criminal Code*.

**2**  The first four counts centre on events which took place over a 24-hour period beginning around mid-day on March 1, 2010. I will commence my decision with my consideration of these four counts and will start by setting out the circumstances giving rise to those charges. I will discuss Counts 5 and 6 after explaining my decision on the first four counts.

**Counts 1 to 4**

**3**  On March 1, the two deceased girls, Kayla Lalonde ("Kayla") and Martha Jackson ("Martha"), planned to drink a 26-ounce bottle of gin. They started drinking in the early afternoon. They were soon joined by one of their friends, Justine Marquardt. Kayla was 16 years old at the time, while Martha and Ms. Marquardt were 17 years old.

**4**  Kayla and Martha had each known Mr. Tremblay for at least a few months. Mr. Tremblay is a drug dealer and, at the time, was in his mid-forties. Mr. Tremblay often invited Kayla, Martha, and other teen-aged girls to his residence. When he did so, he gave them alcohol and drugs and permitted them to use his home to party. At times, Mr. Tremblay also arranged for his driver, Les Sewell, to pick up and drive Kayla and others to his residence or wherever they wished to go. The girls appreciated the free alcohol, drugs and transportation. Kayla, in particular, had a close relationship with Mr. Tremblay. He gave her food, cigarettes, money, gifts and a cell phone. She referred to him as her "street dad". Kayla, Martha and some of their friends referred to him as "God". Kayla's list of contacts in her cell phone includes "God", and the number associated with that name is Mr. Tremblay's number. The girls referred to his residence as "God's house" and described Mr. Sewell as "God's driver".

**5**  Mr. Tremblay learned through an exchange of text messages that Kayla and Ms. Marquardt were drinking in the early afternoon on March 1. He invited the girls to come to his home to party. By 15:00, the girls were at Mr. Tremblay's home in Richmond. By 16:00, Kayla and Martha were drunk and Ms. Marquardt was so intoxicated she had blacked out. She has no memory of events after the early afternoon. Between 17:00 and 17:30, Kayla spoke by cell phone to her girlfriend A.D. and said that she had just snorted a line of cocaine and MDMA which had been given to the girls by Mr. Tremblay. Shortly after 17:00, Martha spoke by cell phone to her friend Kayla Gambler. Martha said that she had done a line of cocaine and MDMA with Kayla. In fact, the drug the girls consumed was powdered methadone.

**6**  Throughout the afternoon, Kayla and Martha communicated with their friends by text messages or phone calls. As a result of those messages and the expert evidence regarding cell towers, it is possible to trace the girls' movements and have some understanding of their activities during the day. However, after 17:30, all communications from Kayla and Martha stopped. They passed out shortly after taking the drug. Ms. Marquardt blacked out earlier in the afternoon and likely passed out about the same time as Kayla and Martha. The three girls were left in the house with Mr. Tremblay and P.G., the maternal grandmother of Mr. Tremblay's young daughter who had also been in the residence. However, P.G. was recovering from an alcohol and cocaine binge. She remained in one of the bedrooms for most of the evening and night. She did not participate with Mr. Tremblay and the girls when they were drinking and the girls took the drug.

**7**  During the evening of March 1, Mr. Tremblay left the house and drove into Vancouver to make a rent payment. He left the girls alone to sleep off the effects of the alcohol and the drug. Sometime after his return, he noticed that Kayla was having difficulty breathing. He did not call 911 but called Mr. Sewell to ask for his assistance. Mr. Tremblay and P.G. then placed Kayla in Mr. Tremblay's car and he drove to Rumble Street in Burnaby where they met Mr. Sewell. Mr. Tremblay, with the assistance of others, lifted Kayla out of the car and placed her on the ground. He returned to his home with P.G. Mr. Sewell immediately called 911 and the police and paramedics attended.

**8**  Sometime after Mr. Tremblay returned to his residence, Ms. Marquardt woke up and was feeling very sick. On four separate occasions, Mr. Tremblay drove to a nearby Tim Hortons to get apple juice for Ms. Marquardt. At the residence, Mr. Tremblay checked on Martha, who was lying on a mattress on the living room floor and remained passed out. Eventually, he went to his bedroom and Ms. Marquardt fell asleep. Martha was left on the mattress.

**9**  At 08:00 on March 2, Mr. Tremblay and P.G. woke up. Mr. Tremblay realized that Martha was in distress and asked P.G. to check on her. P.G. asked Ms. Marquardt to look at Martha. Eventually, someone called 911 and the police and paramedics came to the house.

**10**  The emergency health professionals were not able to revive either Kayla or Martha. Both died of methadone and alcohol toxicity.

***Criminal Code* Provisions for Counts 1 to 4**

**11**  Criminal ***negligence*** is defined in s. 219 of the *Criminal Code* which provides, in part:

1. (1) Every one is criminally negligent who
2. in doing anything, or
3. 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.

**12**  The legal duty relied upon by the Crown with respect to Counts 1 and 2 is the duty set out in s. 215 of the *Criminal Code*. That section creates the offence of failing to provide the necessaries of life. It provides in part:

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

...

1. to provide necessaries of life to a person under his charge if that person
2. is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
3. is unable to provide himself with necessaries of life.
4. Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

...

1. with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

**13**  In *R. v. J.F.*, [*2008 SCC 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DD-00000-00&context=) at para. 37, Fish J. describes the proper two-stage analysis for cases where the accused, like Mr. Tremblay, is charged with both criminal ***negligence*** and failing to provide the necessaries of life:

[37] I agree with McIntyre J. that where criminal ***negligence*** is "piggy-backed" onto an alleged failure to provide the necessaries of life -- as it was explicitly in *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=), and, in effect, here as well -- the analysis may be expected to proceed in two stages. The jury would then consider whether the accused had a duty to protect the child -- that is, to provide the necessaries of life -- and whether the accused failed in that duty. If so, the jury would be entitled to find that the accused committed an offence under s. 215(2)(a)(ii). The jury would then be required to decide whether the accused, in failing to provide the necessaries of life, showed a wanton or reckless disregard for the life or safety of the child. If so, the jury would be bound to find the accused guilty of criminal ***negligence***. If not, the jury could still find the accused guilty of failure to provide the necessaries of life, but not of criminal ***negligence***.

**14**  In this case, there is no issue regarding identity, date, or jurisdiction.

**15**  In accordance with the approach set out in *J.F.*, I propose to start my analysis of the issues raised by these four counts by considering whether Mr. Tremblay was under a legal duty to provide the necessaries of life to Martha and Kayla. The four issues I will consider in relation to the first four counts are thus:

1. Were Kayla and/or Martha under the charge of Mr. Tremblay such that he was under a legal duty to provide necessaries of life to either or both of them?
2. If so, did Mr. Tremblay fail to provide necessaries of life or act in such a way that he showed wanton or reckless disregard for the life or safety of Kayla or Martha or both of them?
3. If not, did Mr. Tremblay's actions amount to a marked departure from the expected conduct of someone in his circumstances?
4. If the answer to issue two or three is yes, did his failure to provide the necessaries of life cause the death of Kayla and/or Martha?

**Position of the Crown**

**16**  The Crown argues that Mr. Tremblay owed a duty to both girls because he was effectively the only adult at the residence and was certainly the adult in charge. The Crown relies on other decisions where courts have concluded that a child is under the charge of an adult when the child is under the influence of drugs or alcohol and, because of his or her intoxication, is unable to withdraw from that charge.

**17**  The Crown says that the duty to provide necessaries of life includes not only the provision of food and shelter but also timely medical attention. In addition, the Crown says that in these circumstances, the duty included the obligation to provide information to emergency professionals about the condition of the two girls.

**18**  In order to prove the *actus reus* for criminal ***negligence***, the Crown must establish that Mr. Tremblay's acts or omissions showed wanton or reckless disregard for the lives or safety of Kayla and/or Martha. The test against which acts or omissions are measured is the conduct of a reasonably prudent person in the circumstances. The Crown says that a reasonable person in Mr. Tremblay's circumstances would have recognized an obvious or serious risk of danger to the girls. The Crown argues that guidance as to the standard that Mr. Tremblay should have met can be found in legislation, including the *Liquor Control and Licensing Act*, [*R.S.B.C. 1996, c. 267*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5MS4-PW61-DYV0-G06J-00000-00&context=), which provides for prohibition against supplying liquor to minors, the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337*, which sets out a duty of care of occupiers towards persons in their premises, the *Child, Family and Community Service Act*, *R.S.B.C. 1996, c. 46*, which deals with children in need of protection and the *Youth Criminal Justice Act*, [*S.C. 2002, c. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JJD0-G4F1-00000-00&context=), which deals with the responsibility of members of society to take reasonable steps to respond to the needs of young persons.

**19**  The Crown says that when Mr. Tremblay's actions are examined from the time the girls arrived at his residence on the afternoon of March 1, 2010 until the police were called for Martha on the morning of March 2, 2010, it is clear that he showed wanton or reckless disregard for the safety of Kayla and Martha. The Crown says there is no reason to question the credibility of any of the Crown witnesses as none of them were seriously challenged in cross-examination. The Crown also says I should accept the hearsay evidence of Kayla and Martha which was entered through the telephone conversations with A.D. and Ms. Gambler. The Crown notes that Mr. Tremblay provided liquor and drugs to the girls, observed them consuming illegal drugs, took no steps to monitor their welfare throughout the evening of March 1, 2010, failed to contact emergency services in a timely manner and failed to provide important information to the attending emergency professionals.

**20**  In addition, the Crown says the acts and omissions of Mr. Tremblay caused the deaths of Kayla and Martha, both factually and at law. The Crown says it has proved beyond a reasonable doubt that his actions were a significant contributing cause to their deaths.

**Position of the Defence**

**21**  The defence does not take issue with the Crown's statement of the legal principles that apply to these charges. Rather, the defence stresses the importance of the presumption of innocence which applies throughout the case. Quite simply, the defence says the Crown has failed to prove the essential elements of the charges beyond a reasonable doubt.

**22**  The defence argues that some of the critical Crown evidence should be disregarded or given little weight. In particular, the defence says that the hearsay telephone statements of Kayla and Martha may have been contaminated by collusion between A.D. and Ms. Gambler because they had a number of discussions after the events of March 1. In addition, Kayla and Martha may not have been telling the truth. They were both evidently intoxicated at the time of the brief conversations.

**23**  The defence also says that Mr. Sewell's statement that Mr. Tremblay possessed powdered methadone is not credible. The defence notes that Mr. Sewell was interviewed numerous times and did not give that information to the police until September 28, 2011, more than a year and a half after the death of the two girls. The defence is critical of the interrogation of Mr. Sewell and says that his evidence was contaminated by police actions.

**24**  The defence also argues I should accept P.G.'s evidence in preference to that of Mr. Sewell. She stated that there were no drugs at Mr. Tremblay's residence as he did not keep drugs there when his daughter was at the home.

**25**  The defence also says there was insufficient evidence to establish that Mr. Tremblay's actions were a marked and substantial departure from what would be expected of a reasonable person in the circumstances. Indeed, the defence says the evidence establishes that Mr. Tremblay acted reasonably. When he realized Kayla was in distress, he decided that she should be taken to Burnaby General Hospital. He drove her part of the way there and gave her to Mr. Sewell with instructions that he should get her to the hospital. When Ms. Marquardt woke up in the early morning, he took her to Tim Hortons to get apple juice on four occasions. Finally, when he realized that Martha was in distress, he and P.G. made the decision to call 911 immediately.

**26**  In summary, the defence says that each of the three girls exhibited distress in different ways at different times, and Mr. Tremblay did the best he could with his limited skills. Accordingly, the defence says the Crown has not established that Mr. Tremblay's actions meet the lesser test of a marked departure from what would be expected of a reasonable person. Accordingly, he should be acquitted of these charges, including the two counts of failing to provide the necessaries of life.

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|  | **Issue 1:** |  | **Were Kayla and/or Martha under the charge of Mr. Tremblay such that he was under a legal duty to provide necessaries of life to either or both of them?** |  |

**27**  Most of the facts that are relevant to this issue are not contentious. Kayla and Martha began drinking before going to Mr. Tremblay's residence and by the late afternoon were clearly intoxicated. The cell phone evidence includes photos of the three girls drinking at 14:00. A brief video taken at about 16:55 shows them fooling around in a drunken state at Mr. Tremblay's home.

**28**  In a ruling, I admitted into evidence text messages exchanged between Kayla and others and Martha and others pursuant to exceptions to the hearsay rule. I conclude that the text message evidence about the girls' actions and intentions is credible. To a large extent, the text message evidence was confirmed by other evidence, including the testimony of Ms. Marquardt and A.D.

**29**  The sequence of events established by the text messages includes the following, none of which is controversial:

1. On February 28, Kayla invited Martha to join her to drink a 26-ounce bottle the next day.
2. At 11:05 on March 1, Mr. Tremblay invited Kayla to come to his place to party.
3. At noon on March 1, Martha and Kayla discussed where they would meet and whether to invite Ms. Marquardt to join them.
4. Shortly after 12:00, Kayla and Martha were at the Gazebo in Central Park and had started drinking. They were waiting for Ms. Marquardt.
5. At 14:08, Kayla told Mr. Tremblay that she was drinking. He repeated his invitation to come to his place and included Ms. Marquardt in that invitation.
6. At 14:20 in the afternoon, Kayla says she is drunk.
7. At 14:22, Kayla tells Mr. Tremblay they are on their way to his residence.
8. At 15:00, Kayla and Martha are with Mr. Tremblay. They continued to drink.
9. Just before 16:00, Martha says that Kayla and Ms. Marquardt are both drunk. At the same time, Kayla says that Ms. Marquardt is "hammered".

**30**  The cell tower evidence from Rogers and Telus shows the path the girls took starting at approximately 13:00 when they left Broadway and Victoria Drive until they reached Central Park where they stayed from 13:12 to 14:29. The evidence indicates that by 15:00, the girls arrived in the area of Mr. Tremblay's residence. The evidence of the transmission of the text messages and cell phone calls from their phones shows that the girls stayed there for the rest of the day.

**31**  I accept the evidence of A.D., Ms. Marquardt and Ms. Gambler about Mr. Tremblay's relationship with Kayla and the other girls. For a few months prior to March 1, 2010, Mr. Tremblay welcomed Kayla to his residence and, as her "street dad", gave her alcohol, food, cigarettes, a cell phone and gifts. Kayla, in turn, invited her friends, including Martha, Ms. Gambler, Ms. Marquardt and A.D. to his house. When they were at his house, Mr. Tremblay gave them alcohol and drugs, including marihuana and ecstasy. They did not have to pay for the drugs and alcohol.

**32**  I can infer from all of the evidence, including the past history of Mr. Tremblay's relationship with the girls, that he provided alcohol for them on March 1 and that he encouraged them to drink and party. P.G. also provided some confirmation of this. She stated that Ms. Marquardt broke into her room with a beer bottle in her hand and that P.G. cleared up empty beer bottles from the table once the girls were passed out.

**33**  I also find that Mr. Tremblay was present with the girls during the afternoon and was aware of their circumstances and condition. The cellular telephone records show that he was in the area of his residence from the morning of March 1 until at least 19:24. Photos taken on Kayla's and Martha's phones at 16:17 and 16:18 show Mr. Tremblay's bare back, which is identifiable by his tattoos. I conclude that he saw the girls drink, provided alcohol to them and facilitated and encouraged their actions as he had done in the past.

**34**  The evidence regarding consumption of drugs by the girls is controversial. The Crown says I should conclude that Mr. Tremblay gave Kayla and Martha a powdered drug to snort at approximately 17:00. The Crown says Mr. Tremblay told them the powdered drug was a mixture of cocaine and MDMA but that it was, in fact, methadone. There are four critical sources of evidence to support this conclusion: the telephone conversation between Kayla and A.D., which took place shortly after 17:00; the telephone conversation between Martha and Ms. Gambler in the same time period; the pathology reports which establish that methadone toxicity was a cause of death; and Mr. Sewell's statement that Mr. Tremblay possessed and sold powdered methadone.

**35**  The defence says I cannot reach that conclusion for a number of reasons. First, the hearsay evidence of the telephone calls should be disregarded because it may not be true. Both Kayla and Martha were intoxicated, and the defence says that the circumstances of the calls do not provide sufficient support for the reliability of the statements. Further, A.D. and Ms. Gambler had extensive opportunity to discuss their evidence and collude in order to make it similar and convincing. In addition, the defence says Mr. Sewell's statement is not credible as he did not tell anyone that Mr. Tremblay possessed powdered methadone until a year and a half after the incident. In addition, P.G. stated that there were no drugs at Mr. Tremblay's house on March 1 and that he never kept drugs there when his daughter was present.

**36**  The defence also says that I cannot rule out the possibility that the girls purchased the drugs themselves during the course of the day. As they made their way to Mr. Tremblay's residence, they were in an area where drugs are easily purchased.

**37**  I conclude that the hearsay evidence of the two telephone calls is compelling and credible. The content of the two calls can be described succinctly. The telephone conversation between A.D. and Kayla occurred at either 17:09 or 17:29. Kayla told A.D. that she and the other two girls just snorted a line of cocaine and MDMA that was given to them by Mr. Tremblay. She told A.D. she was sorry for doing so. She said she felt sick and asked A.D. to pick her up.

**38**  Ms. Gambler testified that she received a call from Martha around dinner time. From the cell records, I conclude that the call was made at 17:11. Martha told her that she and Kayla had just done a single line of coke and MDMA mixed together. Martha stated repeatedly that she felt very high. Ms. Gambler could hear Kayla crying in the background. The call ended when Martha said she could not talk on the phone anymore.

**39**  I also accept A.D.'s evidence about her subsequent calls with Mr. Tremblay. At approximately 18:00, he used Kayla's phone to call A.D. and told her that Kayla was sick and that she was getting up to throw up and then would pass out again. Later in the evening when A.D. returned from her workout at the gym after 20:00, they spoke again. Mr. Tremblay told her that Kayla was drunk and high. She had passed out but kept getting up to throw up. In the latter conversation, he said he could not wake her up.

**40**  I infer from the discussion between Mr. Tremblay and A.D. and the cessation of all communications to and from Kayla and Martha shortly after the phone calls between the two girls and their friends, that they consumed the drug just before the last two calls. There is no evidence to suggest the girls consumed drugs earlier in the day. Shortly after they took the drug, they became high and felt sick. Given the toxicology evidence, there is no doubt that the drug they consumed was methadone.

**41**  I also conclude that Mr. Tremblay provided the drug to the girls. There is no evidence that they purchased drugs on their way to Mr. Tremblay's house. Ms. Marquardt denied doing so. Further, there is no question Mr. Tremblay was aware that Kayla and Martha snorted a powdered drug and immediately became extremely high after which they passed out. My reasons for arriving at these conclusions include the following:

1. Kayla and Martha's statements that they consumed a powdered drug which Kayla said was provided by Mr. Tremblay were made contemporaneously with their action in doing so. They were both speaking to close friends and had no reason to lie about their activities.
2. The fact that the two statements are strikingly similar supports the credibility of each.
3. There was no reason for Kayla to fabricate her evidence that she had just consumed drugs. She had promised A.D., her girlfriend, that she would not take drugs, hence, her tears and apology during the conversation.
4. The accuracy of the recollection of Ms. Gambler and A.D. was not challenged directly in cross-examination. The indirect challenges to their credibility were without substance. I found both witnesses to be credible.
5. While Ms. Gambler and A.D. did have an opportunity to collude, there is no evidence of them doing so. The differences in their statements suggest they did not collude.
6. The differences in their statements do not detract from their credibility. Kayla said that all three girls had consumed the drug, but Martha said just she and Kayla did so. Ms. Marquardt was certainly present. Given her greater level of intoxication and the fact that she did not succumb to methadone toxicity, it is possible she did not consume the drug. However, Kayla's statement that Ms. Marquardt also consumed the drug is the kind of inaccuracy that could be expected in the circumstances. The fact that Martha did not identify Mr. Tremblay as the supplier of the drug is not a significant difference and does not make her statement inconsistent with Kayla's. Again, it is the kind of difference one would expect in casual conversations.
7. Ms. Hernandez confronted Mr. Tremblay a few days after the death of Martha. He told her that Kayla and Martha each did a half line of MDMA and something else and pointed to the table where the drugs were taken.
8. When Mr. Tremblay and P.G. returned from dropping Kayla off at Rumble Street, he asked her to clean off the table where the line of drugs had been consumed.
9. The fact that Kayla had taken drugs was confirmed by Mr. Tremblay in his telephone conversations with A.D. He said that Kayla was drunk and high and that she became sick and passed out. They also exchanged text messages in which Mr. Tremblay confirmed that Kayla was high.
10. Mr. Tremblay was the probable source of the powdered methadone. Mr. Sewell knew that Mr. Tremblay sold methadone to a limited number of customers. Every couple of weeks a customer would ask for it. He saw Mr. Tremblay with a jeweller's flap with an ounce of powdered methadone, which has a finer texture than powdered cocaine. Mr. Sewell testified that Mr. Tremblay still had some of the powdered methadone a month after the girls died.

**42**  I should comment further regarding Mr. Sewell's credibility. I accept his evidence regarding Mr. Tremblay's possession of powdered methadone. He gave a number of statements to the police, including a very lengthy interview during which he told the police about the methadone. Even though Mr. Sewell provided hours of statements to the police, he was not contradicted in cross-examination with inconsistent statements. His explanation for not telling the police sooner that Mr. Tremblay possessed powdered methadone is logical and credible: He did not know that the girls died of methadone toxicity or that methadone played any part in the events of March 1 or 2, 2010. There was no reason for him to mention methadone until he was shown the toxicology reports. Further, methadone sales formed a very small part of the drug deals he was involved with for Mr. Tremblay. Sales of cocaine and heroin accounted for the vast majority of the transactions.

**43**  P.G.'s statement that Mr. Tremblay only dealt in cocaine and that he did not keep drugs around the house does not detract from Mr. Sewell's evidence. He had been actively involved in Mr. Tremblay's drug business for several years. He was sufficiently involved with Mr. Tremblay's business that he dealt with both customers and suppliers. P.G. was not involved in the business and relied upon Mr. Tremblay to provide her with cocaine to feed her habit. Mr. Tremblay was undoubtedly careful and secretive with the storage of his drugs, both to protect himself and to prevent others, including P.G., from accessing the drugs.

**44**  Mr. Sewell's evidence regarding Mr. Tremblay's drug dealings and the supply and sale of powdered methadone was detailed and convincing. I found Mr. Sewell to be a credible witness based on the substance of his evidence as well as his manner and demeanour.

**45**  In summary, I find that Mr. Tremblay knew that Kayla and Martha were both teenagers. He had known them for several months and would have had some knowledge of their alcohol and drug experience and tolerance. On March 1, 2010, he knew they had been drinking and were intoxicated when they arrived at his residence. He encouraged them to keep partying and provided them with alcohol for that purpose. At approximately 17:00, he gave them a powdered drug and told them it was a mixture of cocaine and MDMA. In fact, it was methadone. While it is likely Mr. Tremblay knew the girls took methadone, at the very least, he knew they took a drug which immediately made them very high and sick. They passed out shortly after snorting the drug.

**46**  Having made these findings of fact, I turn to the legal analysis. To begin, I note that the circumstances relevant to this consideration are the same for both Kayla and Martha. In other words, either Mr. Tremblay owed a duty to provide the necessaries of life to both girls or he did not owe such a duty to either of them.

**47**  In *R. v. Peterson* [*(2005), 201 C.C.C. (3d) 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-FJDY-X2M3-00000-00&context=) at paras. 42-43 (Ont. C.A.), the Ontario Court of Appeal considered in different circumstances the meaning of the phrase *under the charge* as used in s. 215 of the *Code*:

1. Used in these contexts the word "charge" connotes, among other things, the duty or responsibility of taking care of a person or thing. Similarly, one of the definitions of charge in Black's Law Dictionary, 8th ed. (St. Paul, Minneapolis: West Publishing, 2004) is "to entrust with responsibilities or duties e.g. to charge the guardian with the ward's care". What the definitions have in common is the exercise of an element of control by one person and a dependency on the part of the other.

43 In assessing whether one person is in the charge of another, the relative positions of the parties and their ability to understand and appreciate their circumstances is a factor to consider.

**48**  The relevant positions of the girls and Mr. Tremblay are an important factor in determining whether they were under his charge. In this case, the fact that Kayla and Martha were teenagers and were under the influence of alcohol and, later, under the influence of an illicit drug, placed them in a position of dependency. In addition to the dependency arising from their age and intoxication, it is relevant that the girls came to Mr. Tremblay's residence by invitation so that they could engage in dangerous behaviour: the consumption of drugs and alcohol. They turned to him as an adult with a place where they could party and someone who had drugs and alcohol. By offering his premises, he facilitated and encouraged the dangerous behaviour. He exercised control over their activities and, by necessary inference from all of these circumstances, for their safety and well-being.

**49**  Pursuant to s. 215(1)(c), before someone is found to be under the charge of another, the Crown must prove that the dependent individual "is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge." Here, once Kayla and Martha passed out after reaching a point of advanced intoxication from alcohol and drugs, they were unable, by reason of their physical condition, to withdraw from the charge of Mr. Tremblay.

**50**  In *R. v. Turley*, [*2012 BCSC 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BS-00000-00&context=), the court recently considered this issue in circumstances that have some similarity to this case. The victim, a 16-year-old girl, arrived at Ms. Turley's residence having already consumed drugs and alcohol. When Ms. Turley arrived at the residence some time later, she realized that the teenager was in some distress. The accused laid down beside the teenager and monitored her condition throughout the night. Justice Stromberg-Stein noted that the defence did not seriously argue that the victim was not under the charge of Ms. Turley, and she concluded as follows at para. 151:

[151] Ms. Raymond was unable by reason of her level of intoxication to withdraw herself from Ms. Turley's charge or provide herself with necessaries of life. I agree with the Crown that Ms. Raymond was under the charge of Ms. Turley from the time Ms. Turley began to care for Ms. Raymond around 2:00 a.m. until the time the paramedics arrived shortly after 6:00 a.m. As a person in her charge, Ms. Turley owed Ms. Raymond a duty to provide her with necessaries of life.

**51**  As in *Turley*, the defence did not seriously contest that Kayla and Martha were under the charge of Mr. Tremblay. In the circumstances I have outlined above, I conclude that when Kayla and Martha arrived at his house, the girls were under his charge. By 17:00 at the latest, after they had consumed the powdered drug, both girls were, by reason of their advanced intoxication from drugs and alcohol, unable to withdraw from his charge.

**52**  Accordingly, in these circumstances, Mr. Tremblay had a duty to provide Kayla and Martha with the necessaries of life.

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| --- | --- | --- | --- | --- |
|  | **Issue 2:** |  | **Did Mr. Tremblay fail to provide necessaries of life or act in such a way that he showed wanton or reckless disregard for the life or safety of Kayla or Martha or both of them?** |  |

**53**  As explained in *J.F.*, where the Crown alleges criminal ***negligence*** arising out of a breach of the duty to provide the necessaries of life, the *actus reus* for the criminal ***negligence*** charge and the charge under s. 215 is the same. The difference between the two offences is the fault element. Given the conclusion I have reached, I propose to examine the more serious fault element of the criminal ***negligence*** charges first. In order to consider whether the Crown has proved the essential elements of Counts 1 and 2, I will proceed as follows: First, I will make findings of fact regarding the acts and omissions that are alleged to form the basis of the *actus reus* for the two criminal ***negligence*** counts; second, I will examine the appropriate standard of care for a reasonable person in the circumstances; third, I will consider the question of foreseeability and the fault requirement; and finally, I will analyze the facts in relation to the standard of care and degree of fault to determine if Mr. Tremblay's actions showed a wanton and reckless disregard for the lives or safety of Kayla or Martha or both of them.

(a) The acts and omissions that are alleged to form the basis of the *actus reus*

**54**  The Crown relies on both acts and omissions in relation to these two counts. I have already made findings of fact regarding the negligent acts which the Crown relies on to prove the *actus reus*. I will summarize those briefly.

**55**  On March 1, Mr. Tremblay invited Kayla and Martha to his house so that they could "party"; so they could drink alcohol and take drugs. He had known them for some months and understood that they were under the age of majority The girls knew from their previous association with Mr. Tremblay that he would give them free alcohol and drugs. When they arrived at his home, they were intoxicated and this would have been evident to him. He already knew from the text messages that they started drinking an hour or two before they arrived at his place. Mr. Tremblay knew that Ms. Marquardt had already blacked out as evidenced by the photograph of her passed out in the back of his Lincoln. In spite of their intoxicated state, he gave them beer to drink. By providing the additional liquor and making his home freely available to them, he encouraged and enabled their behaviour.

**56**  At approximately 17:00, he gave Kayla and Martha a line of a powdered drug. He may have believed it was a mixture of MDMA and cocaine, as he told them; however, it was methadone. At the very least, he knew it was an illegal drug and could have been powdered methadone which was in his possession.

**57**  The omissions which the Crown relies on to prove that Mr. Tremblay was criminally negligent require an examination of the events that occurred after the two girls were under his charge and he had a duty to provide them with the necessaries of life. I have already concluded that he owed that duty to them at the latest by approximately 17:30 after he provided the drugs to the girls. His actions up to approximately 23:30 on March 1 are relevant to both counts. After that, his actions must be looked at separately with regard to each of the girls.

**58**  I will set out my findings of fact covering three periods of time: (a) from 17:30 to 23:30 (relevant to both counts); (b) from 23:30 to 01:00 on March 2, 2010 (relevant to Count 1 - Kayla); and (c) from 01:00 to 09:00 on March 2 (relevant to Count 2 - Martha).

*(i)* *The first period, from 17:30 to 23:30*

**59**  Shortly after snorting the line of methadone, both Kayla and Martha passed out. Mr. Tremblay saw Kayla become sick after snorting the powdered drug. He knew she was high from the drug, drunk from the liquor, and so sick that she vomited a number of times. He told A.D. that Kayla was sick and high but that he would make sure she would be back at her group home before 22:00. Martha's condition was similar. She was drunk and high and passed out shortly after taking the illicit drug. Ms. Marquardt also passed out, although she may not have been under the influence of the drug.

**60**  During this time period, there is no evidence that Mr. Tremblay took steps to provide assistance to, obtain medical care for, or monitor the condition of the three girls. Rather, he took advantage of the fact that they were passed out. He used the opportunity to touch Ms. Marquardt and Kayla in a sexual manner and to videotape his actions. After doing that, he left the girls alone while he drove into Vancouver to make a rent payment.

**61**  I have concluded that Mr. Tremblay videotaped and sexually touched Ms. Marquardt and Kayla because of the video evidence recovered from the Vado video recorder which was seized from Mr. Tremblay's bedroom shortly after the incident. The recorder contained two brief video recordings. The shorter video depicts a hand turning down the tank top and bra of a young woman, thus exposing her breast and nipple. In addition to the breast and clothing, some of the hair of the young woman is visible. Ms. Marquardt identified herself as well as the bra and tank top shown in the video. She was wearing those clothes on March 1. She has no memory of the event. At the end of the video, it is possible to see the hand exposing the breast and, in particular, to see a distinctive crushed fingernail on the index finger of the left hand.

**62**  The second video was, according to the recorder's time and date stamp, created approximately 23 minutes later. It shows the same hand with the distinctive fingernail exposing and groping the buttocks of a woman. She is wearing a white ribbed tank top and blue thong underwear with lint balls on it. The clothing in the video matches the clothing worn by Kayla on March 1. The hand with the distinctive fingernail which is visible in the two videos matches the photograph of Mr. Tremblay's left hand which was taken after his arrest in September 2011.

**63**  The date and time stamps for the videos suggest that they were created in the early morning hours of March 1, 2010. These times suggest the videos were made more than 12 hours before the girls arrived at Mr. Tremblay's house. However, I conclude that the time and date stamp in the videos is incorrect. There are a number of reasons for that:

1. Mr. Tremblay admits that the video recorder belongs to him and that he used it. It was seized from a drawer in his bedroom.
2. The girls were not at his home or in his presence in the early morning hours of March 1, 2010.
3. There is no doubt that the girls depicted on the video are Ms. Marquardt and Kayla and that they are wearing the clothes and underwear they were wearing on the afternoon and evening of March 1.
4. I accept Mr. Leekha's evidence regarding the recorder. The date and time stamp were incorrect when he powered up the recorder to examine the contents. He also noted that the clock function of the video recorder effectively lost time whenever the battery was removed.
5. According to the data on the recorder, the two videos were deleted by someone on March 1, 2010. I infer that this was done in an effort to prevent the videos from being discovered. That attempt was unsuccessful and the data was recovered.

**64**  In light of these circumstances, I conclude that the time and date stamp on the videos was incorrect. The videos must have been created sometime after the girls passed out and before Kayla was driven to Burnaby. Mr. Tremblay left his residence between 19:30 and 20:00 that evening and did not return until after 21:30. It is likely the videos were taken before he left the residence. At that time, the girls had just passed out and Mr. Tremblay would have had some confidence they would not be awakened by his actions.

**65**  The cell tower records provide evidence of Mr. Tremblay's movements after 19:30. At some time between 19:24 and 20:09, Mr. Tremblay left his residence and drove into Vancouver. He attended at his landlord's home on East King Edward to pay his March rent. By 21:32, he had returned to the area of his home. He remained in that area until at least 00:24 on March 2.

**66**  Based on the cell phone records, while Mr. Tremblay was away from his residence and after he returned, he had a number of telephone discussions with Mr. Sewell. There are more than ten calls between the two men between 21:16 and 23:38. I infer from this evidence and from Mr. Sewell's description of the work he did for Mr. Tremblay that these were calls relating to Mr. Tremblay's drug business.

**67**  In summary, in this time period, Mr. Tremblay's activities were concerned with his personal interests. He paid rent, took videos of the comatose girls while touching them sexually, and engaged in conversations to further his drug business.

*(ii)* *The second period, from 23:30 to 01:00*

**68**  During this period of time, Mr. Tremblay became aware that Kayla was in distress. When he returned home from his trip to Vancouver, he tried to wake her up but was unable to do so. However, there was no evidence that he took steps to look after her or even monitor her condition. At approximately 22:30, P.G. awoke and saw Kayla and Martha passed out on the floor of the living room and Mr. Tremblay was not in the room.

**69**  Shortly before midnight, Mr. Tremblay woke up P.G. to tell her that one of the girls might not be breathing. P.G. checked on Kayla and could not tell if she was breathing. She said they should call 911. Mr. Tremblay stated emphatically that they should not call 911 because he did not want to get into trouble. When P.G. reiterated that they should call 911, Mr. Tremblay again refused to permit it. P.G. suggested they call Mr. Sewell instead and Mr. Tremblay agreed.

**70**  There were seven phone calls with some call duration from Mr. Tremblay's mobile phone to Mr. Sewell's phone between 23:56 on March 1 and 00:31 on March 2. Mr. Sewell described the calls. He and Mr. Kirk were driving to Burnaby to check out some heroin samples. He received the first call from Mr. Tremblay around midnight. Mr. Tremblay was very agitated and sounded frightened. He said that someone who was partying at his house would not wake up. Mr. Tremblay said she had been drinking but had passed out and he could not wake her up. Mr. Sewell said he was busy and hung up. Mr. Tremblay called back several times. He told Mr. Sewell that he had to remove the girl from his house. He was insistent. Mr. Sewell eventually relented and gave Mr. Tremblay the option of driving the girl to Rumble Street and dropping her there. Mr. Sewell told Mr. Tremblay that he was close by and that he would call 911.

**71**  Mr. Tremblay and P.G. put Kayla into the Lincoln and left for Rumble Street. Of course, in doing so, he left the two other girls passed out in the house without anyone else present.

**72**  When Mr. Sewell arrived at Rumble Street, Mr. Tremblay was already there with P.G. and Kayla. Mr. Tremblay seemed frightened. He was upset and incoherent. Kayla was unconscious in the back seat of the Lincoln. Mr. Sewell assisted in lifting her out and placing her on the lawn by the sidewalk. He called 911 as Mr. Tremblay was driving away. That call was made at 00:35.

**73**  Before leaving, Mr. Tremblay told Mr. Sewell and Mr. Kirk not to tell anyone that Kayla had been at his house. His desire to distance himself from Kayla explains why Mr. Tremblay did not flag down the police car that he and P.G. passed as they were driving towards Rumble Street and why they did not go directly to the nearby fire hall.

**74**  In summary, shortly before midnight, Mr. Tremblay realized that Kayla's condition was serious. He woke P.G., who recognized the need for immediate medical attention. Mr. Tremblay refused to permit a call to 911 because of his personal concern; he did not want to get into trouble. He attempted to have Mr. Sewell look after the situation and call for emergency services. However, it took a number of phone calls for Mr. Tremblay to convince Mr. Sewell to meet with him and take over responsibility for Kayla's care. The call to 911 was thus delayed by approximately 40 to 45 minutes as a result of the transfer of Kayla from Mr. Tremblay's residence to Rumble Street.

*(iii)* *The third period, from 01:00 to 09:00*

**75**  Mr. Tremblay's actions after he left Rumble Street suggest that he appreciated the seriousness of Kayla's situation. He tried to contact Mr. Sewell throughout the night, presumably to find out what had happened. He was unsuccessful in his numerous attempts to reach Mr. Sewell by text message or by telephone. He asked Mr. Sewell to answer his inquiries and to "please call". His outgoing calls stopped for about two hours between 04:00 and 06:10 when he texted Mr. Sewell and asked him to "stop play game answer".

**76**  While he was concerned about Kayla, he continued to take steps to hide his involvement with her. He gave Kayla's telephone to P.G. and asked her to keep it. He told P.G. to tell the other girls when they woke up that Kayla had left. He instructed P.G. to wipe down the table where the girls had snorted the methadone and to wipe down the back seat of the Lincoln where Kayla was lying when they drove to Rumble Street. He also asked her to dispose of the empty beer bottles.

**77**  When Ms. Marquardt woke up, she was sick and extremely hung over. Between 01:40 and 04:15, Mr. Tremblay drove her to get apple juice at Tim Hortons on four occasions. When he did so, he left P.G. at the residence with Martha. After the last trip to Tim Hortons, Mr. Tremblay watched television with Ms. Marquardt. Periodically, he walked over to where Martha was lying and put his hand on or near her face. He brought a mattress out to the living room and placed Martha on the mattress. He put a blanket over her. Eventually, Ms. Marquardt fell asleep, and Mr. Tremblay went into his bedroom. I presume that he slept. There is no evidence of his activities between 06:10 and 08:00.

**78**  At approximately 08:00, P.G. was outside smoking a cigarette when Mr. Tremblay told her that Martha might not be breathing. P.G. looked at Martha and then she and Mr. Tremblay woke up Ms. Marquardt. They asked her to check on Martha to see if she was all right. Ms. Marquardt thought that Martha was not breathing and that she felt very cold. Ms. Marquardt told Mr. Tremblay to call the police or someone, but he said he could not "because of the shit he had in his house". P.G. tried to call 911 and Mr. Tremblay again told her not to. However, P.G. persisted and the call was made at 08:15.

**79**  In summary, in this last period, Mr. Tremblay showed some concern for Martha after leaving Kayla at Rumble Street. However, he took no steps to obtain medical care or attention for Martha. He placed her on a mattress and checked on her from time to time. Towards the early morning, he left her alone and went to his bedroom presumably to sleep. When he finally realized she was not breathing, he again tried to prevent others from contacting emergency services.

(b) What is the appropriate standard of care?

**80**  I agree with the Crown's submissions that some guidance as to the conduct expected of an adult in these circumstances can be found in relevant legislation. Mr. Tremblay was the adult in charge of three teen-age girls whom he had invited to his home for the purpose of partying. He gave them liquor and illegal drugs. His actions were in breach of the legislative provisions and statutory duties.

**81**  The standards of Canadian society concerning the possession and use of illicit drugs are reflected in the provisions of the *Controlled Drugs and Substances Act*, [*S.C. 1996, c. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB01-JJSF-220V-00000-00&context=). Pursuant to that statute, someone in Mr. Tremblay's position has no right to possess powdered methadone, let alone to provide it to teenagers for their use.

**82**  The *Liquor Control and Licensing Act* prohibits a person from possessing liquor for the purpose of supplying it to a minor and, of course, from actually supplying liquor to a minor. This reflects society's concern that minors must be protected from the direct and indirect harmful consequences of the consumption of liquor.

**83**  The duty owed by an occupier of premises to other people using those premises is set out in s. 3 of the *Occupiers Liability Act*. Pursuant to that section, an occupier owes a duty to see that persons will be reasonably safe in using the premises. This duty extends to activities undertaken on the premises. In *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=), a case which considered social host liability, the Court noted that an occupier has a positive duty to act where he "intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls".

**84**  Numerous federal and provincial statutes reflect society's concern that children are vulnerable and that adults share the duty and responsibility to provide proper care to children. For example, the preamble of the *Youth Criminal Justice Act* states "...members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood." In *A.B. v. Bragg Communications Inc.*, [*2012 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X214-00000-00&context=) at para. 17, Abella J. recently affirmed that "[r]ecognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law." (Emphasis in original).

**85**  Of course, the fact that someone has committed a statutory breach does not necessarily mean that the conduct is negligent or criminally negligent: *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=); and *Peterson.* As noted in *Peterson* at para. 40:

The mere breach of a federal or provincial statute... does not constitute a crime. It is nevertheless proper for the trier of fact to consider legislation governing the accused in order to determine whether the accused's actions or inactions show a "marked departure" from the conduct expected...

**86**  Mr. Tremblay's apparent breaches of the statutes referred to do not inevitably lead to a conclusion that his behaviour was negligent or criminally negligent. However, the statutory provisions and principles are relevant to an examination of the standard of care. Society regards children to be vulnerable and thus in need of care and attention. The consumption of illicit drugs and alcohol by teen-aged children is unquestionably a high-risk activity which the statutory prohibitions seek to prevent. These prohibitions indicate the importance of the societal objective.

**87**  I can also conclude from the provisions that all adults are expected to share the responsibility to protect children and guide them safely into adulthood. The responsibility does not fall solely on parents or individuals placed in a position of authority. Adults, as a result of their age, experience, resources, and position of control, are held to a much higher standard of care than children who find themselves in the same place or in similar circumstances. This is particularly the case with high-risk activities such as the consumption of alcohol and illegal drugs.

(c) Foreseeability and the fault requirement

**88**  The offence of criminal ***negligence*** is established through proof of objective fault. The Crown does not have to establish that the accused actually foresaw or intended harm or injury to the victim. As Fish J. noted in *J.F.* at para. 7, the question is what the accused ought to have foreseen:

... Neither criminal ***negligence*** nor failure to provide the necessaries of life requires proof of intention or actual foresight of a prohibited consequence. Under both counts, the jury was required to determine not what the respondent knew or intended, but what he *ought to have foreseen*.

[Emphasis in original.]

**89**  Given that the standard to which an accused is held is objective, there is no need to consider individual conditions which might offer an excuse to the accused: *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=). As explained in *Creighton* at 71, the question of fault is not particularized to the accused's personal characteristics, rather, it is contextualized so that all of the relevant circumstances are considered:

This is not to say that the question of guilt is determined in a factual vacuum. While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care. As McIntyre J. pointed out in *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 answer to the question of whether the accused took reasonable care must be founded on a consideration of all the circumstances of the case. The question is what the reasonably prudent person would have done in all the circumstances.

**90**  The Crown must also prove that a reasonable person would have foreseen the risk of bodily harm. Where conduct is inherently dangerous, it is easy to conclude that the risk attached to such conduct is objectively foreseeable. *Creighton* is a good example of this. The accused in that case injected the deceased with cocaine after consuming alcohol with her. He did not check the potency or quality of the drug. Chief Justice McLachlin had no difficulty in concluding, at 74-75, that the risk of bodily harm was foreseeable:

[The trial judge] also found that he was guilty of criminal ***negligence***, using the standard which I view as correct, the standard of the reasonable person. The only remaining question, on the view I take of the law, was whether the reasonable person in all the circumstances would have foreseen the risk of bodily harm. I am satisfied that the answer to this question must be affirmative. At the very least, a person administering a dangerous drug like cocaine to another has a duty to inform himself as to the precise risk the injection entails and to refrain from administering it unless reasonably satisfied that there was no risk of harm.

**91**  In summary, the Crown does not have to prove that Mr. Tremblay actually foresaw the risk of bodily harm or that he intended such harm. The test is objective. The two closely connected questions I must consider are (1) what would a reasonable person have done in the circumstances, and (2) would a reasonable person have foreseen the risk of bodily harm?

(d) Did Mr. Tremblay's acts and omissions show a wanton and reckless disregard for the life or safety of Kayla or Martha or both of them?

**92**  In *R. v. Menezes*, [*[2002] O.J. No. 551*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-FJDY-X1B9-00000-00&context=) at para. 72 (S.C.J.) , Hill J. conveniently summarized the various judicial expressions of the definition of the term "wanton or reckless disregard":

Criminal ***negligence*** amounts to a wanton and reckless disregard for the lives and safety of others: Criminal Code, s. 219(1) . . . This is a marked and substantial departure in all of the circumstances from the standard of care of a reasonable person: Waite v. The Queen [*(1989), 48 C.C.C. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-650H-00000-00&context=) (S.C.C.) at 5 per McIntyre J.; Regina v. Barron [*(1985), 48 C.R. (3d) 334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-F900-G3RR-00000-00&context=) (Ont. C.A.) at 340 per Goodman J.A. The term wanton means "heedlessly" (Regina v. Waite [*(1996), 28 C.C.C. (3d) 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD11-JBDT-B2FK-00000-00&context=) (Ont. C.A.) at 341 per Cory J.A. (as he then was)) or "ungoverned" and "undisciplined" (as approved in Regina v. Sharp [*(1984), 12 C.C.C. (3d) 428*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-JJ6S-62PN-00000-00&context=) (Ont. C.A.) at 430 per Morden J.A.)) or an "unrestrained disregard for consequences" (Regina v. Pinske [*(1988), 6 M.V.R. (2d) 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2P6-00000-00&context=) (B.C.C.A.) at 33 per Craig J.A. (affirmed on a different basis [*[1989] 2 S.C.R. 979*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6524-00000-00&context=) at 979 per Lamer J. (as he then was)). The word "reckless" means "heedless of consequences, headlong, irresponsible": Regina v. Sharp, supra at 30.

**93**  When I examine all of the circumstances over the period of Mr. Tremblay's actions with Kayla and Martha, I have no hesitation in concluding that he showed a wanton and reckless disregard for the lives and safety of both girls.

**94**  I will explain this conclusion by focusing on the three time periods I have examined earlier.

*i.* *From 17:30 to 23:30*

**95**  During this time period, Mr. Tremblay's actions were irresponsible and undisciplined by any reasonable standard. He knew that Kayla, Martha and Ms. Marquardt were teenagers who liked to party and have access to alcohol and drugs. He also knew, given their youth and relative inexperience with alcohol and illicit drugs, that they were more vulnerable to the hazardous effects of both. In spite of that knowledge, or indeed, because of it, he offered the girls a comfortable place to drink and take drugs where they would not be seen or discovered by persons in authority. The fact that the girls were intoxicated when they arrived adds to the extent of his recklessness. He did not hesitate to give them beer and the powdered drug in spite of their condition.

**96**  The circumstances here bear remarkable similarity to the circumstances in *R. v. C.W.*, [*[2006] O.J. No. 1392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-F7ND-G4WJ-00000-00&context=) (C.A.), where the accused held a party where the victim, a 13-year-old girl, died as a result of an overdose of alcohol and drugs. The Court of Appeal upheld the conviction and agreed that in the circumstances, the accused "facilitated, encouraged, welcomed and promoted" the use of drugs and alcohol such that an intervening act defence could not succeed. The fact that the drugs were taken willingly by the victim was not a valid defence.

**97**  There is no question that Mr. Tremblay facilitated, encouraged, welcomed and promoted Kayla and Martha's high-risk behaviour. There is, however, a significant difference between the circumstances here and those in *C.W.* Unlike the offender in that case, Mr. Tremblay is an adult and so the standard to which he should be held is even higher.

**98**  The fact that Kayla and Martha were keen to partake in the drugs and alcohol offered to them does not excuse otherwise negligent actions. This issue has been considered in a number of cases where the provision or administration of drugs or alcohol has contributed to the victim's death. While all of the circumstances need to be considered, courts have consistently concluded that the fact that drugs or alcohol were consumed voluntarily does not provide a defence: see *C.W.*; *Turley*; and *R. v. Jordan* [*(1991), 4 B.C.A.C. 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X37K-00000-00&context=) (C.A.). In part, this is because the fact that a victim is high or intoxicated may be the circumstance which places him or her under the charge of someone else. However, in the case of a teen-aged child, the fact that he or she wants access to drugs or alcohol is one of the factors that a reasonable person would take into account in the circumstances. The facilitation of high-risk behaviour by teenagers is obviously reckless and irresponsible.

**99**  After the girls passed out, they fell under Mr. Tremblay's charge. His actions in this time period show a callous disregard for their well-being. A reasonable person would have realized that the girls were at some risk. Mr. Tremblay was aware that Kayla threw up repeatedly before she finally passed out and that she and Martha were very high as well as drunk. Instead of monitoring their condition, he took advantage of the fact that they were comatose. He sexually touched and videotaped Kayla and Ms. Marquardt. His actions were ungoverned and undisciplined in the extreme. Although his actions did not directly contribute to their physical harm, they expose his personal motives for the partying and show his complete disregard for the well-being of the girls.

**100**  Mr. Tremblay's disregard for the condition of the three girls in his home is also demonstrated by his willingness to leave them unattended while he drove into Vancouver to pay his rent. A reasonable person would not have left the teenagers alone, unattended and passed out on the floor of his house after they had consumed quantities of alcohol and the powdered drug. His actions at this stage of the evening continued to show wanton and reckless disregard for their situation. His focus on his personal well-being continued during the balance of this time period as he carried on his business as a drug dealer, communicating with Mr. Sewell and others rather than attending to the girls under his charge.

*ii.* *From 23:30 to 01:00*

**101**  Shortly after snorting the line of methadone, the girls became extremely ill. Mr. Tremblay should have recognized their need for medical attention early in the evening. However, as time passed and the condition of the girls did not improve, the risk to their health and safety increased. Once Kayla's condition started to deteriorate, and Mr. Tremblay finally recognized that, the need for immediate medical attention was obvious. When he awoke P.G. to look at Kayla, she recognized the need to call 911 and sought to do so. Mr. Tremblay did not permit it. Once again, he placed his personal interests not to be found with drugs and intoxicated teen-age girls in his house ahead of the interests of Kayla and Martha. His refusal to call 911 at that time and the decision to contact Mr. Sewell and drive Kayla to Rumble Street delayed the call to 911 at a critical time.

**102**  By midnight, the risk to Kayla was evident and well known to Mr. Tremblay. It was objectively plain and obvious that she was having difficulty breathing. As someone who dealt with illicit drugs and was familiar with many drug users, he would have been aware, subjectively, of the risk of death from an overdose. In spite of the obvious hazard and his knowledge of the risk, he delayed the call for medical attention so that he could take Kayla out of his house and deposit her on a roadside in Burnaby. His failure to take urgent action to obtain medical assistance was irresponsible in the extreme. His disregard for her safety and well-being was, unquestionably, wanton and reckless.

*From 01:00 to 09:00*

**103**  After returning to his residence, Ms. Marquardt woke up. While this would have given Mr. Tremblay some comfort, he knew that Kayla had been left in a precarious state on the sidewalk at Rumble Street. He showed some concern for Ms. Marquardt's safety when he obtained apple juice in order to rehydrate her. His concern over what happened to Kayla likely prompted Mr. Tremblay to pay closer attention to Martha, which he did so long as he remained up with Ms. Marquardt. However, he did not take steps to obtain medical attention and eventually he went to his room and stopped monitoring her condition.

**104**  The circumstances that should objectively have been considered by Mr. Tremblay include:

1. Martha had consumed a similar quantity of alcohol to Kayla.
2. She had taken half of the same drug that Mr. Tremblay gave to Kayla.
3. Martha passed out at the same time as Kayla.
4. Shortly after midnight, Kayla was left at Rumble Street in an extremely precarious medical condition.
5. Mr. Tremblay did not know what happened to Kayla. He must have been concerned when he could not contact Mr. Sewell.
6. After Mr. Tremblay returned to his residence, Ms. Marquardt was recovering but Martha was not.

**105**  In these circumstances, a reasonable person would have taken immediate steps to have Martha assessed by someone with medical training. A reasonable person would have provided information to the trained medical professional about the drugs and alcohol consumed by Martha and the length of time that she had been passed out. This could have been accomplished easily by calling 911 or driving her to a hospital. Mr. Tremblay did neither. Indeed, he eventually went to his room presumably to sleep. He did not even continue to monitor her condition. When he woke up at 08:00 and discovered that Martha was not breathing, he woke P.G. and Ms. Marquardt. They were the ones who decided to call 911 over his protests.

**106**  His action in this period of time showed wanton and reckless disregard for Martha's life and safety. While he knew of the potential risk of an overdose of drugs or alcohol before March 1, the experience with Kayla would have made that risk patently obvious to any reasonable person. He knew that the drug and alcohol consumed by the girls had dangerously depressed Kayla's breathing. He knew that Martha was in a similar situation to Kayla and thus suffered a similar risk. He did nothing but wait silently for her condition to improve. His refusal to take any steps to obtain medical attention after he returned to his residence and could not revive Martha was reckless and irresponsible measured against any reasonable standard. It was a marked and substantial departure from the standard of care expected of a reasonable person.

**107**  As the court found in *R. v. R.P.*, [*[2004] O.J. No. 5109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JF75-M0WK-00000-00&context=) (S.C.J.) at para. 46, a person charged with the care of another cannot, in emergent circumstances, fulfil their duty by silently waiting for improvement:

The accused's course of action of silently waiting and watching for improvement, in the circumstances of which he was aware, amounted to an unreasonable gamble with the child's health and a breach of the duty prescribed by s. 215 of the Code. This conclusion is sustainable on the criminal standard of proof without resort to the statutory burden upon an accused to provide a lawful excuse for the otherwise criminal neglect.

**108**  In summary here, I conclude that Mr. Tremblay also acted in a way that amounted to an unreasonable gamble with Martha's life.

**109**  Mr. Tremblay's acts and omissions showed a wanton and reckless disregard for the life and safety of both Kayla and Martha.

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|  | **Issue 3:** |  | **Did Mr. Tremblay's actions amount to a marked departure from the expected conduct of someone in his circumstances?** |  |

**110**  As I have concluded that the Crown has proved beyond a reasonable doubt that Mr. Tremblay's actions were a marked and substantial departure from the conduct expected of someone in his circumstances, I need not consider the test for the *mens rea* element required for Counts 3 and 4 in the indictment. Mr. Tremblay's acts and omissions showed a marked and substantial departure from the standard of care of a reasonable person and so the Crown has also established the lesser degree of culpability required for those two counts.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Issue 4:** |  | **Did Mr. Tremblay's failure to provide the necessaries of life cause the death of Kayla and/or Martha?** |  |

**111**  In *R. v. Nette*, [*2001 SCC 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49H-00000-00&context=) at para. 44, the Court explained the two-part test for causation in order to find an accused responsible for a death:

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.

**112**  The second part of the test, legal causation, is concerned with whether the accused should be held responsible in law for the death, based on concepts of moral responsibility. As such, it is not a mechanical or mathematical exercise: *Nette* at para. 83.

**113**  In *Nette*, the Court confirmed the test that was established for legal causation in *R. v. Smithers*, [*[1978] 1 S.C.R. 506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24XG-00000-00&context=). The test is: "not a trivial cause" or "at least a contributing cause of death, outside the *de minimis* range". The Court also suggested an analogous wording for the test: were the actions of the accused a "significant contributing cause" to the death?

**114**  Legal causation is concerned with whether the wrongdoer is legally responsible to answer for the consequences of his or her factual contribution to a death because it was intentionally or recklessly produced or because a reasonable person would have foreseen the likely result of those actions: *R. v. Hughes*, [*2011 BCCA 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1SM-00000-00&context=) at paras. 66-67.

**115**  In order to prove factual causation, the Crown relies on the evidence of Dr. Purssell, a medical doctor with a speciality in emergency medicine and a subspecialty in medical toxicology. He was qualified to give opinion evidence with respect to the nature and effects of drugs on the body, including alcohol and methadone, as well as the efficacy of medical intervention. He was not seriously challenged in cross-examination, and I accept his evidence, which I will summarize.

**116**  Methadone is an opiate and falls within Schedule I of the *Controlled Drugs and Substances Act*. It is a sedative that comes in a powdered form. There is no way of determining the quality or potency of the powdered drug simply by looking at it. It causes profound depression of a variety of bodily functions, including the respiratory system, the circulatory system, and the central nervous system. The depression is progressive and continues to worsen over time. The degree of depression is connected to the level of the methadone in the blood. It has the opposite effect to that of stimulants, such as MDMA or cocaine.

**117**  The toxic level of methadone overlaps with the therapeutic level. How a person will react to a particular dosage depends on various factors and, in particular, their tolerance. Tolerance is established after daily use for a period of approximately two weeks. The higher the tolerance, the more diminished are the effects of a dosage of the drug.

**118**  The levels of methadone found in Kayla and Martha at autopsy, .32 and .43 respectively, were well within the range of the reported levels of those who die from the drug. Indeed, they are higher than the average for fatal levels. I note that Kayla and Martha did not have a tolerance for methadone. There was no suggestion that either had used it before.

**119**  Death is often caused by respiratory depression. If a person stops breathing and there is no medical intervention, they will sustain a cardiac arrest. After a person's heart has stopped, something such as CPR must be done to try to re-establish the circulation and breathing. Something must then be done to re-establish arrhythmic contraction of the person's heart either by defibrillation, medication, or both. This must all be done very quickly. If there is no medical intervention, death will occur in a short period of time.

**120**  I note that alcohol is also a sedative and has similar progressive effects to methadone. The combination of methadone and alcohol will increase the depressive effects upon the respiratory, circulatory and central nervous systems.

**121**  There are several medical interventions that can reverse the progressive, depressive and sedative effects of methadone and alcohol when administered prior to the person's breathing having ceased. First responders and hospitals can all support someone's breathing either by a mask device, intubation or ventilation by a machine. Naloxone or Narcan is a specific drug that reverses the depressive and sedative effects of methadone. In Dr. Purssell's experience, those interventions are extremely effective. Indeed, in 30 years of experience, he has never seen a circumstance where they have not worked where a patient has the treatments administered while he or she is still breathing.

**122**  There is no question that the symptoms exhibited by Kayla and Martha over the course of the evening are consistent with progressive depression of vital systems caused by overdoses of alcohol and methadone. They felt sick after consuming the methadone and alcohol. Kayla vomited and passed out. Martha felt very high and passed out. They then appeared to be sleeping. As the evening wore on, their level of breathing became shallower.

**123**  I accept the evidence given by P.G. regarding Kayla's condition as she and Mr. Tremblay drove to Rumble Street. While they had some concern that she was not breathing, when she was picked up to get into the car, she gasped. When P.G. touched her in the car, Kayla appeared to be breathing. Mr. Kirk also believed that Kayla was breathing when she was removed from the car at Rumble Street. In other words, it is likely she stopped breathing shortly after her arrival at Rumble Street.

**124**  I accept Dr. Purssell's opinion that if medical intervention had occurred while Kayla, an otherwise healthy 16-year-old, was breathing, there is more than a reasonable probability she would have survived. This is the case even if her heart had just stopped beating.

**125**  Mr. Tremblay checked on Martha's condition until he went to his room around 06:00 on March 2. He told one of the first responders that he heard Martha cough at 05:30. I conclude that Martha continued to breathe at least until 06:00. However, at 08:00 when Ms. Marquardt checked on Martha's body, she was already cold. I conclude that she stopped breathing and her heart stopped sometime after Mr. Tremblay went to his room.

**126**  I also accept Dr. Purssell's opinion that if medical intervention had occurred while Martha, an otherwise healthy 17-year-old, was breathing, there is more than a reasonable probability she would have survived.

**127**  The defence did not advance any real argument on the issue of causation. The only serious question is whether medical intervention could have saved the two girls at the time when Mr. Tremblay breached the duty he owed.

**128**  A similar issue arose in *R. v. Collins*, [*2006 BCSC 1531*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1V7-00000-00&context=), where the court held that the accused's failure to obtain medical attention for the deceased was a marked departure from the standard expected of a reasonable person. However, the court could not conclude on the medical evidence before it that the failure made any difference to the victim's outcome.

**129**  The Crown does not have to prove beyond a reasonable doubt that medical attention would have saved the lives of Kayla and Martha. Rather, it is sufficient to establish that the absence of appropriate medical treatment was a significant contributing cause of death, in other words, that "the lack of treatment played more than a minor, trivial, or *de minimis* role" in the victim's death: *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 para. 58.

**130**  The situation here is quite different from the circumstances in *Collins*. Here, Mr. Tremblay was or should have been acutely aware of all of the circumstances leading up to the condition in which Kayla and Martha were found towards the end of the day on March 1, 2010. Given those circumstances, his obligation to obtain medical attention for the girls arose at a time when there was a reasonable probability that medical attention would have made a difference.

**131**  In Kayla's case, given Mr. Tremblay's actions earlier in the evening and his knowledge of her condition, he should have sought immediate medical attention for her by midnight at the very latest, when her condition dramatically deteriorated. If 911 had been called at that time, there is more than a reasonable possibility she would not have died; there is a likelihood she would have survived.

**132**  The situation with Martha is equally clear. At the very latest, when Mr. Tremblay saw what happened to Kayla and returned to his house, he ought to have obtained medical care for Martha. If he had done so, there is a substantial likelihood she would not have died.

**133**  In summary, Mr. Tremblay's failure to fulfil his duty to provide the necessaries of life to both Kayla and Martha throughout the evening of March 1 and the morning hours of March 2, 2010, was a substantial contributing cause to their deaths; a cause beyond the *de minimis* range. In addition, his actions in delaying medical assistance to Kayla when he believed that she had stopped breathing were a substantial contributing cause to her death beyond a *de minimis* range.

**134**  Based on all of the evidence, I conclude that the Crown has proved both factual and legal causation. With regard to the latter, there is no question that Mr. Tremblay's negligent acts and omissions are sufficient to support the conclusion that he bears the necessary moral responsibility.

**135**  Accordingly, I find Mr. Tremblay guilty of criminal ***negligence*** causing the deaths of Kayla and Martha.

**Summary and Conclusions regarding Counts 1 to 4**

**136**  I have concluded that the Crown has proved beyond a reasonable doubt all of the essential elements of the two counts of criminal ***negligence*** causing death. I also find that the Crown has proved beyond a reasonable doubt all of the essential elements of the two counts of failing to provide the necessaries of life.

**137**  Given these conclusions, I need to consider the application of the principle in *R. v.* *Kienapple*, [*[1975] 1 S.C.R. 729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0BK-00000-00&context=), to these circumstances. That principle is succinctly stated by Laskin J. at 751:

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions...

**138**  In order for the principle to apply, there must be a factual and legal nexus between the two charges. Where there is a charge of criminal ***negligence*** and a charge of failing to provide the necessaries of life, both are based on the same *actus reus*. There is no question that the *Kienapple* principle is applicable. The proper approach in these circumstances is described in *J.F.* at para. 13:

That criminal ***negligence*** is a more serious offence, signifying more blameworthy conduct, has been recognized by the courts as well. This is reflected in cases where the accused has been found guilty of both offences: Applying the rule against multiple convictions in accordance with *Kienapple v. The Queen*, [*[1975] 1 S.C.R. 729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0BK-00000-00&context=), and *R. v. Provo*, [*[1989] 2 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6513-00000-00&context=), courts have systematically recorded a conviction of criminal ***negligence***, as the more serious of the two offences, and entered a stay on the charge of failure to provide the necessaries of life...

**139**  In accordance with these principles and, in particular, the decision in *Provo*, I find Mr. Tremblay guilty of Counts 1 and 2 and must enter a conditional stay on Counts 3 and 4 pending final disposition of the case, including all appeals.

**Counts 5 and 6**

**140**  Mr. Tremblay is charged with two counts of attempting to obstruct the course of justice, contrary to s. 139(2) of the *Criminal Code*. Count 5 relates to Mr. Tremblay's interactions with Ms. Marquardt, and Count 6 relates to Mr. Tremblay's interactions with P.G.

**Facts**

**141**  There was little controversy regarding the evidence in support of these charges. I will briefly summarize my findings of fact based primarily on the evidence of Ms. Marquardt and P.G.

**142**  On the morning of March 2, 2010, Ms. Marquardt woke up to P.G. telling her to check on Martha. She found that Martha was very cold and did not appear to be breathing. Ms. Marquardt asked Mr. Tremblay to call the police, but he stated he could not because of the "shit" in his house. P.G. insisted on calling the police in spite of Mr. Tremblay's emphatic statement.

**143**  After the police were called, P.G. went into her bedroom. Ms. Marquardt joined her when the paramedics arrived. Mr. Tremblay then came into the bedroom and told them they had to stick to the same story. He told them to tell the police that Kayla was never at his residence that night. Additionally, Mr. Tremblay told them to tell the police that he did not know Martha, Kayla or Ms. Marquardt. Rather, they were friends of P.G.'s daughter. This was not true. Ms. Marquardt did not know P.G. and had never met her daughter. There is no evidence that Kayla or Martha knew P.G.'s daughter. P.G. did not know the girls and does not believe that the three girls knew her daughter.

**144**  P.G., Ms. Marquardt and Mr. Tremblay were escorted to the police detachment to provide statements. After the interview, Mr. Tremblay asked P.G. what she told the police. She confirmed that she stuck to his story and stated that Kayla had not been at his house that night.

**145**  P.G. had been staying with Mr. Tremblay but could not return to the house because of the police search. Mr. Tremblay made arrangements for P.G. to stay with a friend of his, Robert Smith, for a few days. On the last evening at that home, Mr. Tremblay informed her that Kayla had passed away. He wanted to speak with P.G. privately in the bathroom. Mr. Tremblay told her to tell the police that she had given the drugs to the girls because "she would only get two years." P.G. was very upset at his suggestion. She had not given any drugs to Kayla, Martha or Ms. Marquardt.

**146**  The next morning she went to the police station and told them what happened. She also gave the police Kayla's cell phone which Mr. Tremblay had asked her to conceal from the other girls.

**Legal Framework**

**147**  Section 139(2) of the *Criminal Code* states:

1. Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

**148**  Under s. 139(2), the Crown must prove two things: (1) that Mr. Tremblay's statements to Ms. Marquardt and P.G. had a tendency to obstruct, pervert or defeat the course of justice; and (2) that Mr. Tremblay specifically intended his statements to obstruct, pervert or defeat the course of justice.

**149**  The term "course of justice" includes the investigatory stage. In *R. v. Wijesinha*, [*[1995] 3 S.C.R. 422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3JG-00000-00&context=) at para. 27, the Court stated:

... Investigation is necessary to determine if a crime or wrong has been committed. It is the essential first step in any judicial or quasi?judicial proceeding which may result in a prosecution. In the ordinary course of events, one who perverts the course of an investigation also perverts the course of justice.

**150**  The term "wilfully" means the offence cannot be made out on a basis of accidental or unknowing conduct. A simple error will not be enough: *R. v. Beaudry*, [*[2007] 1 S.C.R. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18C-00000-00&context=) at para. 52. The accused must have specific intent to obstruct justice.

**151**  The attempt to obstruct justice does not need to be successful. The fact the desired result did not materialize is not relevant to the charge. There only needs to be evidence of conduct that has the propensity to defeat the course of justice and that it was intended.

**Discussion**

**152**  I accept Ms. Marquardt and P.G.'s evidence that on March 2, 2010, Mr. Tremblay came into the room and counselled them to lie to the police. After that he checked with P.G. to see if she lied to the police as he suggested.

**153**  I also accept P.G.'s evidence that sometime after March 2, 2010, Mr. Tremblay told her to accept responsibility for giving Kayla and Martha drugs. At the time this conversation took place, Mr. Tremblay knew that both Kayla and Martha had passed away. P.G.'s evidence is supported by the testimony of Mr. Smith, who stated that Mr. Tremblay came to his residence and asked to speak to P.G. privately.

**154**  I can infer from all of the evidence that Mr. Tremblay was trying to distance himself from Martha, Kayla and Ms. Marquardt to escape any finding of responsibility. Mr. Tremblay was worried about becoming the target of a police investigation. He did not want the police in his residence because of the presence of incriminating evidence such as the Vado recorder or drugs. He wanted to hide any information that would personally tie him to Kayla and Martha.

**155**  Counselling a witness to lie to police constitutes an obstruction of justice. Misinformation can compromise the police investigation and risk injustice. Although it is not necessary for the attempt to be successful, it is noteworthy that P.G. admitted to acting on Mr. Tremblay's instructions. When interviewed by police on March 2, 2010, she stated that the girls were friends with her daughter and refrained from mentioning that Kayla was at the residence that night. The fact that Mr. Tremblay's instructions were acted upon actually undermined the police investigation and thus had a tendency to obstruct justice.

**156**  Accordingly, I conclude that the Crown has proved the first element of the charge for both Count 5 and Count 6.

**157**  The second element, whether he specifically intended his statements to obstruct the course of justice, requires a careful examination of Mr. Tremblay's dealings with Ms. Marquardt and P.G. There is, of course, a significant difference between his involvements with the two witnesses after his initial statement to them in the bedroom on March 2.

**158**  Mr. Tremblay followed up with P.G. after the police interview by asking what she said, in order to be sure that she had followed his instructions. After learning she had done so, he later tried to get her to add another lie: to say that she provided drugs to the girls. Of course, he also asked her to hide the cell phone.

**159**  I infer from these actions that Mr. Tremblay was intent on misleading the police investigation and hoped he could accomplish this through P.G. There is no other conclusion to reach on the evidence. I find that the Crown has proved beyond a reasonable doubt that Mr. Tremblay specifically intended his statements to P.G. to obstruct, pervert, or defeat the course of justice.

**160**  Accordingly, I find Mr. Tremblay guilty of Count 6.

**161**  I am not able to arrive at the same conclusion with regard to Count 5. Mr. Tremblay did not check with Ms. Marquardt after the police interview to see what she told them. He did not have any further interaction with her after the initial discussion. There were no subsequent dealings between them from which I could infer that Mr. Tremblay had the requisite intent in relation to Ms. Marquardt. Accordingly, it is possible his statements on the morning of March 2 were not directed at Ms. Marquardt; rather, they were directed at P.G. P.G. was an adult and thus would have had much more credibility with the police. P.G. had much more knowledge about Mr. Tremblay's activities generally. Further, Ms. Marquardt was extremely intoxicated throughout the relevant time period which would cause Mr. Tremblay to believe that the police would give her statements little credit.

**162**  In these circumstances, I am unable to conclude beyond a reasonable doubt that Mr. Tremblay specifically intended to dissuade Ms. Marquardt from providing full and accurate information about the circumstances.

**163**  Accordingly, I find Mr. Tremblay not guilty of Count 5.

**164**  That concludes my reasons for judgment. I find Mr. Tremblay guilty of Counts 1 and 2. While the Crown has proved all elements of Counts 3 and 4, I have ordered a conditional stay of those two counts pending final determination of the charges. I find Mr. Tremblay guilty of Count 6 and not guilty of Count 5.

G.B. BUTLER J.

**End of Document**

[***McGavin v. Talbot, [2017] B.C.J. No. 2439***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R4H-S261-F7G6-62X6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

D.M. Masuhara J.

Heard: October 31, November 2, 2017.

Judgment: November 30, 2017.

Dockets: 151931, 160954

Registry: Victoria

**[2017] B.C.J. No. 2439** | 2017 BCSC 2194

Between Brian McGavin, Plaintiff, and Michael Talbot, Defendant And between Brian McGavin, Plaintiff, and Morgan Wohlers and Renee Wohlers, Defendants

(59 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Back and spine — Neck — Whiplash — Soft tissue — Head injuries — Concussion — Leg injuries — Knee — Ankle — Action for damages for personal injuries sustained in two motor vehicle accidents allowed in part — In first accident, 55-year-old plaintiff sustained mild traumatic brain injury, road rash and lumbar strain that resolved, and cervical spine strain that persisted — Second accident exacerbated plaintiff's neck pain and caused soft tissue injuries, which resolved — Plaintiff awarded $65,000 non-pecuniary damages for first accident and $7,000 for second — Plaintiff was unemployed at time of first accident with sporadic work history, and employed and continued working after second — Plaintiff awarded $9,000 income loss — Plaintiff awarded $900 future care and $6,636 special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Employment status — Cost of future care — Special damages — Past loss of income — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action for damages for personal injuries sustained in two motor vehicle accidents allowed in part — In first accident, 55-year-old plaintiff sustained mild traumatic brain injury, road rash and lumbar strain that resolved, and cervical spine strain that persisted — Second accident exacerbated plaintiff's neck pain and caused soft tissue injuries, which resolved — Plaintiff awarded $65,000 non-pecuniary damages for first accident and $7,000 for second — Plaintiff was unemployed at time of first accident with sporadic work history, and employed and continued working after second — Plaintiff awarded $9,000 income loss — Plaintiff awarded $900 future care and $6,636 special damages.**

**Tort law — *Negligence* — Motor vehicles — Cyclists — Liability of driver — Rules of the road — Action for damages for personal injuries sustained in two motor vehicle accidents allowed in part — Liability was contested in first accident, in which plaintiff was cycling and alleged he was struck by defendant's vehicle and thrown over handlebars — Plaintiff entered narrow part of road ahead of defendant — There was no room for defendant to move to centre as he passed plaintiff — Defendant passed when it was unsafe to do so, and was liable for accident.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Cyclists — Meeting, overtaking and passing — Narrow roadway — Liability — Civil actions — *Negligence* — Action for damages for personal injuries sustained in two motor vehicle accidents allowed in part — Liability was contested in first accident, in which plaintiff was cycling and alleged he was struck by defendant's vehicle and thrown over handlebars — Plaintiff entered narrow part of road ahead of defendant — There was no room for defendant to move to centre as he passed plaintiff — Defendant passed when it was unsafe to do so, and was liable for accident.**

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| Action for damages for personal injuries sustained in two motor vehicle accidents. Liability was contested for the first accident. The 55-year-old plaintiff was cycling and the bike lane ended as the road approached a bridge. The plaintiff testified he was wearing a bright red vest with reflective strips. The plaintiff testified the defendant's pickup truck passed him and he was thrown over his handlebars and landed in the middle of the road. The motorist driving behind the defendant testified the plaintiff's rear wheel went straight up as the plaintiff was positioned at the rear of the defendant's truck, and he saw a piece of red fleece in the rear light of the truck, and the plaintiff's tire rim was bent as though it struck something. It was acknowledged that the roadway became narrow at that point, and there would have been little room between the plaintiff and defendant. The defence disputed the plaintiff was struck and asserted he lost control of his bicycle. Liability was not contested for the second accident, in which the other defendant read-ended the plaintiff's vehicle. The medical report adduced by the plaintiff stated he sustained a mild traumatic brain injury, road rash and a lumbar spine strain in the first accident, which all resolved, and a cervical spine strain with some persisting symptoms. The plaintiff was unemployed at the time. The plaintiff was employed full-time by the second accident, in which his neck strain was aggravated and he sustained soft tissue injuries and tension headaches from which he recovered. The plaintiff was able to continue working. The plaintiff sought $60,000 to $75,000 non-pecuniary damages from the first accident and $20,000 from the second, $12,000 for loss of earnings, $1,800 for future care and special damages.  HELD: Action allowed in part.  The witness evidence from the first accident established that vehicles were moving slowly and travelling close to each other. There would have been no chance for the defendant to move to the centre as he passed the plaintiff. The defendant's passenger's evidence was significant in that she saw the plaintiff ahead, and then they passed, and heard a sound of metal hitting the ground and the plaintiff had fallen. The plaintiff had merged onto the roadway at the end of the bike lane ahead of the defendant, so was in the dominant position, and the defendant passed when it was not safe to do so. The plaintiff was awarded $65,000 non-pecuniary damages for the first accident and $7,000 for the second. The plaintiff was looking for work at the time of the first accident and had to take eight months off his job search. The plaintiff's work history was sporadic, so taking into account contingencies, he was awarded $9.000 loss of income. Future rehabilitation treatments were supported, but not in the amount claimed given the plaintiff's recovery. $900 was awarded for future care. The plaintiff was awarded $6,636 special damages. The total award was $88,536. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, R.S.B.C. 1996, s. 144, s. 157(1), s. 183(1), s. 318

Supreme Court Civil Rules, Rule 15-1, Rule 15-1(15)

**Counsel**

Counsel for Plaintiff: R.P. Helme, Q.C., T. Higginbotham.

Counsel for Defendants: S.W. Farquhar.

**Reasons for Judgment**

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| **D.M. MASUHARA J.** |

**Introduction**

**1**  These Reasons deal with a claim for damages arising from two separate accidents involving the plaintiff. In the first, Mr. McGavin was a cyclist riding along Interurban Road in Victoria, B.C. on August 24, 2013 and alleges that a 2008 Chevrolet Silverado pickup driven and owned by the defendant Mr. Talbot struck the bicycle causing him to fall and suffer injuries. In the second, a van owned by Ms. Wohlers and operated by the defendant Mr. Wohlers rear-ended a van driven by Mr. McGavin on September 25, 2015 near Highway 1 and Tillicum Road, Victoria, B.C.

**2**  Liability and damages are contested regarding the first accident.

**3**  Liability is not contested in the second accident.

**4**  The trial was brought under Rule 15-1.

**5**  The witnesses called in the plaintiff's case were:

1. Mr. McGavin, the plaintiff; and
2. Ms. Cutt, a witness at the first accident.

**6**  The witnesses called in the defence case were:

1. Mr. Talbot, a defendant;
2. Ms. Talbot, a defendant;
3. Mr. Burghardt, a witness at the first accident; and
4. Mr. Hull, an ICBC estimator of the damage to the vehicle the plaintiff was driving in the second accident.

**7**  I will first deal with liability in the first accident.

**Liability for the Incident on August 24, 2013**

**8**  At about 11:30 a.m. on the day in question, the plaintiff was wearing a bright red fleece vest, a bicycle helmet and reflective strips on his left ankle and wrist. His bicycle was equipped with both front and rear facing lights, both of which were "on".

**9**  The plaintiff was an experienced cyclist as cycling was his primary mode of transportation. He had been cycling in the bicycle lane on Interurban Road. At around the McKenzie Bridge overpass, under which the Interurban passes, the bicycle lane ends. There is a sign indicating this, but Mr. McGavin did not see this sign. He only noticed the end of the bike lane when he got close to the merge point between the vehicle lane and the bike lane. In cross examination it was revealed Mr. McGavin was virtually blind in his right eye at the time of the incident. More recently, he has had surgery to replace his eye with an acrylic eye. As a result he has no vision on his right side.

**10**  At some point the defendant's pickup went by the plaintiff. The plaintiff was flung forward over his handlebars, and landed in the middle of the northbound lane he was riding in.

**11**  Mr. Burghardt is the owner of a truck rental and delivery company, who was driving behind both the defendant's pickup and the plaintiff and observed, as the plaintiff and pickup neared the Colquitz River bridge, the rear tire of the plaintiff's bike go straight up and the plaintiff fly forward over his handle bars and land in the middle of the northbound lane. He observed that the plaintiff was at the right rear of the truck.

**12**  Mr. Burghardt stopped and called 911. He then went over to offer assistance. He saw that the pickup had stopped ahead. He noticed that the front tire rim of the plaintiff's bicycle was been bent inward in a way that looked like it had struck something. He went to the pickup and spoke to Ms. Talbot who was by the pickup and noticed a piece of red fleece stuck by the rear light of the pickup. As noted Mr. McGavin was wearing a red fleece vest.

**13**  Ms. Cutt, a nurse, driving in the opposite noticed the plaintiff cyclist in her peripheral vision and then saw the plaintiff "tumble" off his bike. She parked her car and then went over to where the plaintiff was to offer assistance. Her observation was that Mr. McGavin appeared to be in shock and that he had significant road rash on his abdomen.

**14**  The versions of the plaintiff and defendant do not differ, except for whether the pickup struck the plaintiff's bike handle as asserted by the plaintiff or whether the plaintiff simply lost control of his bicycle on his own and struck the curb.

**15**  It is acknowledged that the roadway becomes quite narrow past the overpass towards the Colquitz Bridge.

**16**  Mr. McGavin provided the following uncontested measurements, which he took after the first accident:

1. at the accident site the distance from the inside of the center line to the curb is 133.67 inches;
2. that the width of the pickup from the outside edge of the side mirrors was 101 inches; and
3. the width of the his bicycle's handlebars was 25.5 inches. It is fair to say that there was little room between the bicycle and pickup at the time of passing.

**17**  I accept the evidence of Ms. Cutt that the traffic at the time was moving relatively slowly and vehicles were driving closely behind each other in her lane. I find that this was the condition when Mr. Talbot overtook and passed Mr. McGavin who at all times was riding on the right side of the lane.

**18**  I find there was no chance for Mr. Talbot to have pulled over across the center line into the oncoming lane to provide sufficient room to pass Mr. McGavin.

**19**  I find the testimony of Ms. Talbot significant as to her recall that she saw the cyclist ahead of the pickup and that as the pickup passed the bicycle she heard a noise like metal hitting the ground. She then saw that the cyclist had fallen.

**20**  I find that Mr. McGavin had merged on the roadway at the end of the bike lane. Mr. McGavin estimates he was riding at about 20-25 kmph which I accept. I also find based on the testimony of Ms. Talbot, that Mr. McGavin was ahead of the Mr. Talbot's pickup when the bike lane ended. In my view, Mr. McGavin had the dominant position on the roadway beyond the end of the bike lane, and Mr. Talbot passed Mr. McGavin when there was not a safe distance between his pickup and Mr. McGavin to do so. Mr. Talbot did not pass at a safe distance.

**21**  I find the passing occurred before the X in the lane and before the start of guard rails for the Colquitz Bridge (Exhibit 1, Tab 4) and that the rear of the pickup driven by Mr. Talbot struck or clipped the handle bar of the bicycle ridden by the plaintiff causing the plaintiff to fall at about the start of the guard rails by the Colquitz Bridge.

**22**  As a result, it is my determination that Mr. Talbot is entirely at fault for Mr. McGavin's fall.

**23**  My finding here is made on the bases that:

1. A cyclist has the same rights and duties of a driver of a vehicle pursuant to s. 183(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, s. 318;
2. A driver of a vehicle overtaking another vehicle must cause its vehicle to pass to the left of the other vehicle at a safe distance and must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle pursuant to s. 157(1); and
3. A driver of a vehicle must drive with due care and attention and must have reasonable consideration for other drivers pursuant to s. 144.

**24**  I now turn to the matter of damages.

**Medical Evidence**

**25**  The only medical evidence adduced at trial was the report dated April 11, 2017 obtained by the plaintiff from Dr. Graboski, a specialist in physical medicine and rehabilitation. Dr. Graboski's report states that the plaintiff suffered the following injuries (including resolution) as a result of the first accident:

1. Mild traumatic brain injury with physical signs of headache. He had some subjective vision complaints but when reviewed by an ophthalmologist, results were normal. He experienced a variety of emotional symptoms, including decreased motivation and energy, some bike-related anxiety, and a sense of disconnection along with decreased short-term memory. He has made a good recovery.
2. "Road rash" on the left thigh, leg and abdomen - Resolved.
3. Musculoligamentous strain of the lumbar spine - Resolved.
4. Musculoligamentous strain of the cervical spine --some persisting symptoms.

**26**  In regard to the second accident, Dr. Graboski's report states the plaintiff suffered the following injuries:

1. Exacerbation of neck pain which occurred from bike accident.
2. Soft tissue injury to the right knee - Resolved.
3. Soft tissue injury to the right ankle - Resolved.
4. Soft tissue injury to the right shoulder - Resolved.
5. Tension headache - Resolved.

**27**  Dr. Graboski opined that the injuries were caused by the accidents as follows:

The patient has no history of neck or soft tissue injuries. I believe, therefore, that the bike/motor vehicle collision was directly causal to the injuries noted. The patient does have a major concussion history, however, reporting at least five past concussions. These most likely made him more susceptible to the neurological sequelae he suffered and likely prolonged a number of his symptoms.

In terms of the second motor vehicle collision, I do not have any medical records and was forced to rely entirely on the patient's history. Based on this information, I feel it is most likely that the injuries sustained in the second accident were caused by the motor vehicle collision itself. I can think of no pre-accident factors that might have rendered the patient more susceptible to injury, beyond mild pre-existing neck pain. The accident exacerbated this pain for a time.

**28**  Following the report, Dr. Graboski was provided the clinical records of the medical clinic and the chiropractic clinic he attended after the second accident. She opined that after her review of the documents, her report did not require change.

**Damages**

**29**  Mr. McGavin was born in October 1958. At the time of the first accident he was just about 55 years old. At the time of the second accident he was 57 years old. At the time of trial he was 59 years old.

**30**  He was unemployed at the time of the first accident.

**31**  Prior to that he had worked primarily as an employment placement specialist from 1988 to 2012. He was unable to look for work after the first accident until May 2014. He found a full-time courier job in March 2015.

**32**  Mr. McGavin's income from 2011 to 2017 (September 23) was as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** 2011 2012 2013 2014 2015 2016 2017 |  | **Income** $19,101 $11,637 $3,229 (Social assistance) $7,355 (Social assistance) $18,828 $22,556 $20,719 |  |

**33**  The plaintiff testified that as a result of the first incident, he suffered significant injuries to his head, shoulders, neck and back, and road rash down the left side of his body. He testified that his injuries from the first incident were largely resolved before the second event on September 25, 2015.

**34**  Mr. McGavin testified that following the first accident he felt confused and fatigued, struggled with his balance and was impulsive in conversation.

**35**  He says that following the first accident he stopped various activities such as: reading, writing, puzzles, housework, gardening and other yard work. He says he became socially withdrawn, did not see friends or attempt to date as often as he did prior to the first accident.

**36**  In regard to the second accident, as mentioned liability is admitted but damages are disputed.

**37**  Briefly, Mr. McGavin was driving his brother's Chevrolet G20 cargo van northbound on the Trans-Canada highway. He was stopped in traffic just short of the Tillicum Road intersection when the defendant's pickup collided with the rear of the plaintiff's van. It is fair to say that it was a low speed collision.

**38**  The plaintiff described being thrown forward into his seatbelt then back into his seat. At trial the plaintiff said the impact pushed his car forward a foot. However, in his examination for discovery he stated that it was about an inch. The plaintiff testified that he and the defendant exited their vehicles and that the licence plate from the defendant's vehicle was lying on the ground. The plaintiff also observed damage to the defendant's vehicle grille. The plaintiff described damage to his vehicle including a bent welded plate and bumper at the rear of the vehicle. The impact rendered the rear doors inoperable.

**39**  The plaintiff testified that from the accident he suffered stiffness and pain in his neck and shoulder. He also had significant pain in his right knee. Despite the pain he continued to work as a courier over the next few months. His right knee pain lasted for about two to three weeks. His shoulder and neck pain lasted several months though he had flareups from time to time thereafter. His headaches lasted about four to five months. His neck pain was exacerbated from the first accident.

**40**  The plaintiff testified that he received chiropractic treatment regularly after the accident.

**General Damages**

**41**  The determination of non-pecuniary damages is an individualized process. Guidance is obtained from past cases involving similar injuries in similar circumstances. A non-exhaustive listing of considerations is found in the well-known case of *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=).

**42**  The plaintiff submits that the appropriate range for damages under this head is $60,000 to $75,000 for the first accident. Following the defence submission under this head where the amount of $65,000 was put forth as appropriate, in the case of the defendant being found liable, Ms. Helme accepted that figure. Given this common position and my finding of liability, general damages in the amount of $65,000 are awarded.

**43**  In respect to the second accident, the plaintiff submits that an appropriate amount is $20,000 under this head.

**44**  In support, the plaintiff refers to the following cases: *Woods v. Chahal*, [*2008 BCSC 1555*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2V3-00000-00&context=) and *Sourisseau v. Peters*, [*2012 BCSC 1163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S284-00000-00&context=).

**45**  The defence submitted that an appropriate amount under this head is $5,000.

**46**  In support, the defence refers to the following cases: *Brar v. Kaur*, [*2010 BCSC 1220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2174-00000-00&context=); *Barrows v. Wong*, [*2006 BCPC 407*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3NB-00000-00&context=); and *Gibson v. Saran*, [*2003 BCSC 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S200-00000-00&context=).

**47**  In my view, the cases submitted by the plaintiff reflect a level of injury that is greater than those suffered by Mr. McGavin. The range in my view is closer to those cases referred to by the defence. My assessment is that an award of $7,000 is reasonable for the second accident.

**Past Loss of Income Earning Opportunity**

**48**  The plaintiff submits that $12,000 is a reasonable award under this head. The plaintiff had been unemployed and looking for work for about eight months at the time of the first accident. He was unable to continue his job search for about eight months immediately following the accident.

**49**  The plaintiff submits that over the fifty-two months the plaintiff worked or was looking for work from 2011 to 2016 he had earnings of approximately $71,161 (excluding social assistance payments) and this equals to approximately $1,368 of monthly income. As a result the loss of past income should be assessed at $12,000.

**50**  The defence submits that an appropriate award under this head would be $6,000. This results from the observation that Mr. McGavin had sporadic income since returning to work in 2015 and that taking into account the income earned in 2011 and 2012, the expected annual income would be about $12,000 and the loss for the period would be about $6,000 net.

**51**  In my view, a reasonable assessment taking into consideration the real and substantial possibilities and contingencies is an award of $9,000.

**Cost of Future Care**

**52**  The plaintiff submits that an award of $1,800 is appropriate. This would cover 30 visits at $60 per visit for chiropractic therapy, a visit with a kinesiologist, and intramuscular stimulation therapy.

**53**  The defence submits that the plaintiff says he is not in need of additional care and as a result, no award under this head is warranted.

**54**  I find that the future care claim is supported by the medical evidence. However, the extent of the sessions are excessive given Mr. McGavin's recovery. In my view, an award of $900 is appropriate.

**Special Damages**

**55**  The plaintiff has provided a listing of out-of-pocket medical and other expenses incurred as a result of the first accident which totals $5,741.82 and claims this amount. The defendant does not take issue that this amount has been incurred as special damages. As a result of my finding of liability, this amount is awarded under this head.

**56**  In respect to the second accident, the amount of $895 is claimed by the plaintiff under this head. The defence does not take issue with this amount. As a result, this amount is awarded under this head.

**57**  The total for special damages is $6,636.82.

**Conclusion**

**58**  Reviewing the amounts awarded above in totality, I find that the total is fair and reasonable. As a result, the amounts awarded are:

**Heading** **Amount** General Damages (First Accident): $65,000.00 General Damages (Second Accident): $7,000.00 Loss of Past Income Earning Opportunity: $9,000.00 Cost of Future Care: $900.00 Special Damages: $6,636.82 **TOTAL:** $88,536.82

**59**  Unless further submissions are to be made, costs are awarded to the plaintiff in the manner set out under Rule 15-1(15).

D.M. MASUHARA J.

**End of Document**

[***Aberdeen v. Langley (Township), [2007] B.C.J. No. 1515***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Groves J.

Heard: October 10 - 13, 18 - 20, 23 - 27 and 30 - 31;

November 1 - 3, 6 - 10, 14 - 17 and 20; and December

7 - 8, 2006; and January 15 - 17 and 22, 2007.

Judgment: July 6, 2007.

Vancouver Registry No. M024554

**[2007] B.C.J. No. 1515** | 2007 BCSC 993 | 35 M.P.L.R. (4th) 233 | 158 A.C.W.S. (3d) 412 | 2007 CarswellBC 1615

Between James Aberdeen, Plaintiff, and Township of Langley, Joseph Zanatta, Ann Cassels and Ann Cassels d.b.a. Nathan Creek Nursey, Defendants

(243 paras.)

**Case Summary**

**Damages — General damages — For personal injuries — Calculation -- life expectancy — Cost of future care — Non-pecuniary damages, including pain and suffering — The plaintiff was awarded $5,647,773 in total damages for injuries suffered in a bicycle accident — The defendant driver, who had veered over the line and caused the plaintiff to swerve off the road was held 25 per cent liable, while the defendant township was 75 per cent liable for failure to repair an inadequate guardrail.**

**Damages — Physical injuries — Body injuries — Back — Paralysis — The plaintiff was awarded $5,647,773 in total damages for injuries suffered in a bicycle accident — The defendant driver, who had veered over the line and caused the plaintiff to swerve off the road was held 25 per cent liable, while the defendant township was 75 per cent liable for failure to repair an inadequate guardrail.**

**Municipal law — Actions by or against municipalities — Types of actions against municipalities — Highway repair — The plaintiff was awarded $5,647,773 in total damages for injuries suffered in a bicycle accident — The defendant driver, who had veered over the line and caused the plaintiff to swerve off the road was held 25 per cent liable, while the defendant township was 75 per cent liable for failure to repair an inadequate guardrail.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Motor vehicles — Liability of driver — The plaintiff was awarded $5,647,773 in total damages for injuries suffered in a bicycle accident — The defendant driver, who had veered over the line and caused the plaintiff to swerve off the road was held 25 per cent liable, while the defendant township was 75 per cent liable for failure to repair an inadequate guardrail.**

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| The plaintiff sued for damages for injuries sustained in an accident whereby he alleged his bicycle was driven off the road by the defendant Zanatta in a cube van owned by the defendant Cassels, which he claimed had crossed the yellow line on a tight curve -- He also alleged ***negligence*** against the defendant township for having created a gap in a roadside barrier, through which he was propelled, falling down a rocky embankment -- The plaintiff, a former triathlete and "Ironman" suffered a spinal cord injury resulting in his becoming a paraplegic, and sustaining a mild traumatic brain injury -- The defendants alleged the plaintiff was contributorily negligent for biking over the speed limit, and due to the presumption that if a driver left the road he was negligent -- HELD: The defendant driver was 25 per cent liable while the township was 75 per cent liable; the plaintiff was awarded $5,647,773 in total damages -- The court found on the balance of probabilities that the defendant Zanatta had negligently crossed the yellow line; his testimony was ripe with inconsistencies -- The plaintiff had rationally anticipated the vehicle coming into his lane, and swerved sufficiently wide around the corner, encountering gravel before he could brake, and was directed along the guard rail before being propelled through the gap -- The township was liable in ***negligence*** also, having breached its duty of care to the plaintiff, a reasonably foreseeable user of the road operating a bicycle on a dedicated bicycle route -- The gap in the guard rail was something that with a relatively modest cost could have been avoided -- The allegation of contributory ***negligence*** failed, as there was no evidence of excessive speed on the part of the plaintiff, and there was evidence he was exercising caution as he cycled on the street -- Any inference to be drawn from his leaving the roadway was insufficient to establish ***negligence*** on a balance of probabilities -- Zanatta's ***negligence*** was a momentary lapse in attention while he was driving, which constituted a moderate departure from the expected standard of care -- Meanwhile, the township had knowingly created a serious risk when it decided not to replace the entirety of the existing guard rail in 1999, or to take measures to ensure cyclists or cars would not risk injury due to the existence of a gap between the two guard rails -- The damages awarded consisted of $311,000 in non-pecuniary loss, $153,249 in past wage loss, $502,381 in future wage loss, $4,151,504 in cost of future care, $388,639 in cost of care/ home replacement, $96,000 for an in-trust claim, and $45,000 in special damages -- The plaintiff's life expectancy was set at 25.2 years (low due to the increased risk due to his injuries), and he was found to need care for 18 hours per day -- Non-pecuniary loss was assessed at the upper limit -- Special damages were agreed. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=), s. 4

**Counsel**

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| **GROVES J.** |

**1.**

**Introduction**

**1**  On the morning of June 29, 2002, the plaintiff James Aberdeen ("Aberdeen"), an accomplished triathlete and Ironman competitor, aged 50, began preparations for a lengthy cycle ride as part of his ongoing Ironman training. He was set to meet up with a friend, Mike McGee ("McGee"), for this ride. Over the course of the day Aberdeen and McGee travelled throughout areas of the Lower Mainland familiar to them. Towards the end of their ride, they were cycling in the Township of Langley on a road maintained by Langley, being 272nd Street. Aberdeen was aware that around the 6000 block of 272nd Street, the road became steep and windy and potentially a challenge. Prior to encountering the downward winding slope of 272nd Street, Aberdeen conversed with McGee and it was agreed that Aberdeen would take the lead.

**2**  What happened in the steep and windy portion of the 6400 block of 272nd Street is one of the significant issues before the court. It is Aberdeen's evidence that a cube van negligently driven by Joseph Zanatta ("Zanatta") and owned by Anne Cassels ("Cassels") (collectively the "Zanatta Defendants"), crossed over the yellow centerline of the road, causing Aberdeen to take evasive action, and swing wide around a curve. He then encountered some gravel on the roadside, and without time to brake, he was propelled against a metal guard rail.

**3**  Aberdeen also alleges ***negligence*** on behalf of the Township of Langley ("Langley") based on the fact that Langley constructed a roadside barrier on 272nd Street in July 1999 and in doing so, created a gap between the metal barrier initially encountered by Aberdeen and a cement no-post barrier which continued on the downward slope of 272nd Street once the metal guard rail ended. Aberdeen was directed along the metal guard rail, through the gap, and over a bank.

**4**  The entire incident took a matter of seconds. The consequences however are tragic and life-altering for Aberdeen. There is no dispute that as a result of the accident, Aberdeen suffered spinal cord injury in his neck at the C-6/C-7 level. He suffered what is called an incomplete ASIA B spinal cord injury. He has almost no sensation from the chest down and virtually no use of his body from the chest down. Aberdeen does not have use of his abdominal muscles to hold himself up. Of the three groups of muscles used to breathe, the intercostal, abdominal, and diaphragm muscles, Aberdeen has use of only his diaphragm muscles. Aberdeen does have use of his arms. Given the high level of his spinal cord injury, he has been described as a quadriplegic masquerading as a paraplegic. Although he has almost no sensation from the chest down, Aberdeen falls into the minority of spinal injured persons who suffer relentless and chronic neurogenic or neuropathic pain.

**5**  There is some dispute as to whether or not Aberdeen has suffered a debilitating mild traumatic brain injury as a result of the accident. There is little doubt he suffered head trauma. The question is really whether or not he has recovered sufficiently from the brain trauma so as to not affect his ongoing cognitive ability or whether there are residual effects of the brain injury which affect his ability to function.

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| **2.** | **Liability** |  |

1. **Plaintiff's Evidence**

**6**  Aberdeen gave evidence about what happened at the accident. He recalled that he was towards the end of a lengthy cycle ride, which he referred to as slow long distance training, on the date of the accident. Prior to descending the hill on 272nd Street, he had a conversation, while riding with McGee, about the danger posed by the hill and the need for caution. It was agreed Aberdeen would lead and they would approach the hill single file. McGee testified that he followed Aberdeen about 10-15 metres behind, at a speed under the posted regulatory speed limit.

**7**  Both McGee and Aberdeen testified to what was identified as the Zanatta's vehicle, being a large cube van, beginning to come into the lane occupied by Aberdeen and McGee. Aberdeen testified to the necessity of taking evasive action. He testified that the cube van began to cross over the yellow line around a very tight curve. His evasive action was to swing wide to the right hand side of the lane in which he was travelling. Because of the need to swing wide to avoid the perceived danger of the cube van, the curvature of the road, a small amount of gravel on the road, and the shortness of time, he could not effectively apply his brakes on the pavement. Aberdeen was within the gravel almost immediately and within a split second up against the metal guard rail.

**8**  McGee confirms Aberdeen's testimony as to what happened in the accident. McGee was able to confirm that he saw Aberdeen against the guard rail and then saw him disappear down the bank, eventually ending up on the rocky terrain below, having essentially been propelled down the embankment. He was found by McGee seriously injured and in a state of semi-consciousness.

**9**  The evidence of McGee, and indirectly of Aberdeen, was challenged by he defendants in regards to a statement given by McGee to Constable Carlson ("Carlson") immediately after the accident. In that statement, McGee does not mention the cube van. When cross examined on this point, McGee emphasized that the cube van was over the centre line but he did not know how far - the best that he could say was that he saw out of the corner of his eye. To challenge the suggestion of recent concoction, the evidence of Ron Rose, a friend of the plaintiff and McGee, was read in. This evidence is that Ron Rose saw McGee at the hospital on the date of the accident and McGee advised Rose that as he and Aberdeen were going down the hill a vehicle coming up the hill was coming wide on the corner, and that in reaction to this, Aberdeen swung wide, got into the gravel, went along the guard rail and down the bank.

**10**  Additionally, and significantly, there is the evidence of the ambulance attendant Keith Parks ("Parks"). Parks was the Airvac ambulance attendant who arrived by helicopter near the accident scene on the 29th of June 2002. He described speaking to Aberdeen through the process of getting him into the Airvac ambulance and off to the hospital. Parks indicated that Aberdeen advised him that a vehicle was coming into his lane and that he went into the gravel to avoid an accident.

**11**  In regards to the guard rail, the evidence is clear that the metal guard rail which Aberdeen encountered was a long established guard rail. The evidence is also clear that the defendant Langley installed a cement no-post barrier along part of the road in question during a reconstruction of the road in July of 1999, which replaced an earlier metal guard rail. The new cement no-post barrier and the remaining metal guard rail do not connect. There is a gap of anywhere between 12"-18" between where the cement no-post barrier stops and the metal guard rail begins, parallel to the driven roadway. This distance or gap, it is suggested by McGee, is what Aberdeen was propelled through, down a steep bank. The guard rails were intended to prevent vehicle access to this steep bank.

**12**  In regards to the guard rail configuration, Jim Liseman ("Liseman"), an expert in highway safety engineering, testified on behalf of the plaintiff. Liseman described the guard rail in question, the cement no-post and metal guard rail configuration with a gap between the two, as a serious problem. He described the configuration as being particularly dangerous in light of what guard rails are generally supposed to do, which is to move the traffic along the road in a safe fashion, in a guided way, with the potential to slow the vehicle down. The problem in this configuration, according to Liseman, is that the guard rail did its job, in that the metal guard rail moved Aberdeen along its surface avoiding the hazard, the cliff, on the other side. However, rather than keeping Aberdeen on the road, as clearly would have been the intention of a guard rail, the existence of the gap propelled Aberdeen down the gap and into the gulley, projecting him into the hazard the guard rails were intended to prevent.

1. **Zanatta Defendant's Evidence**

**13**  The evidence of the Zanatta Defendants in regards to the circumstances of the accident consisted of Zanatta, Cassels, and Bradley Williams ("Williams"), the son-in-law of Cassels. Cassels testified that she followed Zanatta up to 272nd Street, from property she owned at the base of the hill on the date in question. She testified that the cube van driven by Zanatta was loaded full of nursery items for a flea market in Cloverdale the next day. She described the cube van as incapable of going a fast speed. She described the Zanatta van as coming to a stop close to the inside fog line of the road, prior to the curve in the hill. This testimony suggests that the Zanatta vehicle could not have crossed the centre line.

**14**  Zanatta testified in a similar fashion, that he was driving approximately 20 kmph. He described a bike flying through the air and disappearing over the edge of the road. His evidence was that he did not come close to crossing the centre line of the road, that he simply came upon the accident scene. During his examination, Zanatta was confronted with a number of contradictory statements made by him since the accident. Zanatta gave contradictory evidence as to which cyclist came down the hill first, suggesting at discovery that it was in fact the second cyclist that went over the bank. In response to this inconsistency, Zanatta confessed that it was after reading transcripts and hearing from others that he changed his evidence as to who was first down the hill. Additionally, Zanatta gave contradictory evidence as to the speeds he was travelling. At discovery he indicated that it was between 3-5 kmph and at trial it was 20 kmph, although in fairness he explained this discrepancy as simple lack of knowledge as to what an effective speed was.

**15**  Both Zanatta and Cassels were also challenged significantly about any conversation with Carlson, who took the statement from McGee. Zanatta said that he approached Carlson. Carlson does not recall being approached. Carlson testified that his practice was to ask anyone in the surrounding area about their knowledge of the accident. Cassels and Zanatta were also questioned about their leaving the scene of the accident and not identifying themselves to the police attending there, indicating that they had witnessed the accident.

**16**  As noted, Williams also testified on behalf of the defendant as to the circumstances of the accident. Williams testified that McGee said to Aberdeen, as he laid on the rocks at the base of the hills, words to the effect: "don't worry about it, you were going too fast, you missed the corner." Williams was aware that Cassels and Zanatta were at the scene of the accident but admitted not telling Carlson or other police officers about Zanatta and Cassels. He also did not tell the police officer about the alleged conversation between McGee and Aberdeen.

1. **Langley's Evidence**

**17**  The defendant Langley called a number of its employees and former employees in regards to two issues, the issue of the guard rail installation and alignment and the issue of gravel on the roadway.

**18**  In regards to their roadway gravel, it was the evidence of Terry Veer ("Veer") at an examination for discovery that the gravel along the roadway through which Aberdeen travelled appeared from the photographs presented at the discovery to be the remainders of winter sand, placed on the road by Langley as part of ice-related winter road maintenance. At trial, Veer resiled from that testimony, indicating that upon reflection and discussion with those better in the know, the gravel along the roadway appears to be too large to constitute the winter sand used for de-icing purposes. Veer's explanation at trial for the existence of the gravel appears to be normal gravel accumulation on the roadway.

**19**  In regards to the gap in the guard rails, the various witnesses for Langley confirmed that the gap was in fact created by the crew of Langley during their reconstruction in 1999 of 272nd Street. The evidence for Langley also confirms that since the accident, the cement no-post barrier has been extended so that it forms a complete barrier in the affected area and there is no reliance on the metal guard rail.

**20**  The reconstruction of 272nd Street in 1999 was undertaken because a leaking culvert had permitted water to leak into the road-base, causing it to become unstable such that portions of the bank had broken away. It was decided not to use more standard concrete lock block retaining wall because an engineering report stated that underlying soils in the area were too unstable to withstand extreme weight. A portion of the existing metal guard rail was removed to permit the bank stabilization project to proceed and, because of the method used to stabilize the bank, it was not possible to sink posts a sufficient distance into the ground to permit the metal guardrail to be replaced. Therefore, the cement no-post barrier was chosen instead. The decision was made not to extend the no-post barrier further because of concerns about the excess weight of the barriers on the bank when a detailed geotechnical report had not been prepared for the portions of the hillside extending beyond the project area. Additionally, due to space constraints, it was not possible to align the new barrier with the existing metal guardrail. These decisions were made by the project supervisor, his supervisor, and the construction foreman.

**21**  The witnesses for Langley also confirmed that the installation of a complete cement guard rail would have been a relatively nominal cost to Langley. They did not dispute the suggestion of approximately $1500 for such a cost in 1999 and Veer confirmed that for that modest amount of money for road safety or repair considerations, money is regularly available within the budget.

**22**  Much was made in cross examination of some potential evidence in Langley's control going missing. Part of the guard rail against which Aberdeen came into contact was removed and is missing. The sign which indicated that 272nd Street was a designated cycle route has gone missing and has not been replaced. The road maintenance records of the traffic sweeper for the area were destroyed in about 2005 or early 2006. Nothing in my view turns on these concerns.

1. **Contributory *Negligence***

**23**  The defendants allege that the plaintiff was contributorily negligent in this case. They rely on the belief that Aberdeen was travelling above the advisory speed limit of 30 kmph, and on the presumption that a driver is negligent if his or her vehicle leaves the road (see *e.g.* ***Redlack v. Vekved*** [*(1996), 82 B.C.A.C. 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S10D-00000-00&context=) at paragraph 17), to establish that the plaintiff was negligent in this case.

**24**  In this case, there is some evidence to suggest that the plaintiff was travelling above the posted advisory speed. Specifically, McGee's evidence was that he was going 40 kmph coming into the curve, and that the plaintiff would have been travelling at approximately the same speed. In his original statement to Constable Carlson, he estimated their speed as being 30 miles per hour (which converts to 48 kmph). However, all of these speeds are estimates only, as neither Aberdeen nor McGee could recall looking at their speed at the relevant time.

**25**  This evidence falls short of establishing that the plaintiff was travelling above the posted speed limit of 50 kmph at the time of the accident. The defendants agreed that the plaintiff could not receive a ticket for travelling above the advisory speed limit only, although he could receive a ticket for travelling above the posted maximum speed.

1. **Conclusions on Liability - Zanatta Defendants**

**26**  Having considered all of the evidence on the issue of the liability of Zanatta and the Zanatta Defendants for Zanatta's driving on the 29th of June 2002, I have concluded that Zanatta crossed the yellow centre line of 272nd Street and in doing so, created a hazard which caused Aberdeen to take the evasive action he did, which resulted in the accident and Aberdeen's injuries. Zanatta as a driver on the road had a duty of care to others on the road, and this included a duty not to permit his vehicle to stray into the path of oncoming traffic so as to present a hazard to others. Zanatta breached that duty of care to Aberdeen, a user of the road, and as a result of that breach Aberdeen suffered injuries.

**27**  I preferred the evidence of the plaintiff Aberdeen and McGee over that of the Zanatta Defendants and Williams. Despite the difficulties with McGee's evidence in terms of his statement to Carlson, I accept that his failure to advise Carlson about the Zanatta vehicle crossing the road was due to the stress of this circumstances and his overwhelming concern for his friend Aberdeen. After leaving the police officer's vehicle, McGee rode his bike home and attended at the hospital to see about Aberdeen's condition. Once there he encountered Aberdeen's friend, Ron Rose. Ron Rose's evidence is that McGee at that point advised of the van being the initiator of the accident. Additionally, Aberdeen in potentially a slight coma, and in circumstances at the date of trial he could not recall, advised the ambulance attendant Parks, according to the evidence of Parks, that a vehicle coming into his lane was the source of the accident and that he went into the gravel to avoid the accident.

**28**  Zanatta's testimony is ripe with inconsistencies and has clearly changed over time as a result of external influences. No realistic explanation is provided as to why Zanatta and Cassels, who say they simply witnessed the accident, did not stay to advise authority. They did not. Despite the significance of this accident and the immediate and apparent serious harm to Aberdeen, Zanatta and Cassels did not remain at the scene of the accident long enough to give their names to the police in attendance. Williams, who was notified of the accident by Cassels' return to the nursery, did not give the names of Cassels and Zanatta to the RCMP investigator. Cassels and Zanatta both noted in their testimony that when they returned home, an RCMP police officer was present in their driveway. Zanatta says that he approached the RCMP officer but the RCMP officer denies such an approach.

**29**  Additionally, both Zanatta and Cassels struggled with their evidence. They at times seemed confused, and unable to recall details. In contrast, Aberdeen was clear and direct. McGee, despite considerable pointed cross examinations, was a straightforward believable witness.

**30**  I have concluded, after considering all of the evidence, that the balance of probabilities lies on this point in the plaintiff's favour. I have concluded that the Zanatta vehicle in approaching the sharp curve began to cross over into the traffic lane for oncoming traffic. The effect of this was to cause Aberdeen, who was approaching a tight corner, to swerve away from a vehicle he anticipated, rationally, would be coming into his lane. In doing so, he swerved sufficiently wide around the corner and, before he could brake, encountered gravel, the gravel lessening the effect of any braking. He encountered the metal guard rail and was directed along it. The metal guard rail, as Liseman noted, did what it was supposed to do-it propelled Aberdeen along. Unfortunately, due to the configuration of the guard rails, Aberdeen was propelled through the gap and down the cliff that the guard rail placement was in theory designed to barricade from those using the road.

1. **Conclusions on Liability - Langley**

**31**  Langley concedes that they operate and maintain 272nd Street. Langley concedes that in 1999, after reconstruction of the road, the guard rail configuration that existed at the time of the accident was put in place by the employees of Langley. This guard rail configuration resulted in the removal of what was a continuous metal guard rail prior to the reconstruction of the road, and the replacement in the place of the metal guard rail removed, of a cement no-post barrier. The cement no-post barrier did not connect with the metal guard rail barrier. The configuration of the two guard rails put in place by the employees of Langley created a gap. It is through this gap that I have found Aberdeen was propelled and as a result, Aberdeen was injured.

**32**  Langley also concedes that 272nd Street was a road which Langley had dedicated as a designated bicycle route, although it says that the road was not accorded any special treatment by reason of this designation.

**33**  Langley submitted with respect to the duty of care owed by a municipality to users of the road that the appropriate standard of care is as stated in ***Fafard v. City of Quebec*** (1918), 55 S.C.R. 615, [*39 D.L.R. 717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGV1-DYFH-X52P-00000-00&context=) at 717:

A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

**34**  This same passage was cited by Owen-Flood J. in the trial decision in ***Ryan v. Victoria (City)*** [*(1994), 21 M.P.L.R. (2d) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M2FH-00000-00&context=) (B.C.S.C.).

**35**  Langley submits that the standard of care for a municipality in respect of liability will often be tempered by the availability of resources for any given activity, and that its barrier configuration represented an acceptable compromise among budgetary and environmental constraints. Langley also emphasized that 272nd Street is a relatively low volume road. However, Langley does not go so far as to argue that its decision in relation to the barrier configuration was a policy decision, and thereby immune from tort liability. Langley simply seems to be contending that the standard of care expected of it in these circumstances should be relatively low, given the context. Langley further argues that the barriers were constructed to protect cars, not bicycles, that to the extent that a hazard was present, it was adequately marked, and that there had been no complaints or accidents due to the barrier configuration, prior to Aberdeen's accident.

**36**  The plaintiff, whose submissions on this issue are adopted by the Zanatta Defendants, counters that Langley had a duty to design and maintain its roadways such that they were reasonably safe for the purpose of travel, relying on the formulation of the duty of care of a municipality set out by Scarth J. in ***Rimmer (Guardian ad litem of) v. Langley (Township)***[*(2006), 21 M.P.L.R. (4th) 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22D-00000-00&context=), [*2006 BCSC 703*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22D-00000-00&context=) at paragraph 192:

The duty of care imposed upon the Township was to make the roadway reasonably safe for the purposes of travel: ***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=). This duty of care ordinarily extends to reasonable maintenance and includes the duty to take reasonable steps to prevent injury to users of the roads by reason of hazardous conditions: ***Just v. British Columbia***, [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=); ***Just v. British Columbia***, [*[1991] B.C.J. No. 3328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X309-00000-00&context=) (S.C.).

The plaintiff submits that Langley was negligent both in creating the gap, and in failing to recognize it during its inspections between July 1999 and June 2002. The plaintiff cites the case of ***English v. Chilliwack (District Municipality)*** [*(1985), 62 B.C.L.R. 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21FJ-00000-00&context=) (S.C.), in which the municipality was held 100% liable for injuries caused to a cyclist by reason of its inappropriate repair of a sewer grate that it had installed such that it protruded above the road surface. Spencer J. held that it was reasonably foreseeable that if the repair to the sewer grate failed, it would present a hazard to cyclists, and that this was an operational decision rather than a policy decision-the district, having embarked upon an activity, did it carelessly.

**37**  The plaintiff points to the evidence of two expert witnesses to the effect that gaps such as the one created and left unrepaired on 272nd Street are considered to be unsafe, and should have been remedied.

**38**  I have concluded that Langley owes a duty of care to those who travel on its roads to ensure that the roadways are reasonably safe for the purposes of travel. I have concluded that Langley breached its duty of care to Aberdeen, a reasonably foreseeable user of the road operating a bicycle on a dedicated bicycle route. As a result of the breach of the duty of care, Aberdeen was injured. I note that the guard rail configuration was a hazard put in place by Langley. It is something that with a relatively modest cost, approximately $1500 expended in July 1999, could have been avoided. Funds would have been available to eliminate this hazard, had it been properly identified as such. Even balancing environmental and financial constraints, Langley should not have left what two witnesses immediately described as an unsafe barrier configuration when the cost to remedy the situation was so low.

**39**  In my view, Langley cannot rely on the line of cases which limit a municipal government's liability for ***negligence*** when they have a policy in place to regularly monitor their roads or facilities they maintain to check for hazards. Those lines of cases, for the most part, deal with hazards created by others or by weather or by wear and tear. Those cases do not apply in a circumstance where a municipality has actually created the hazard as is the case here. Further, Langley has not directly sought to argue that its decision as to how to place the concrete no-post barrier was a policy decision that should be exempt from tortious liability.

**40**  As a result, I have concluded that Langley is liable to Aberdeen for the injuries he suffered.

**41**  The presence of gravel on the roadway was not proven on the evidence to have materially contributed to Aberdeen's accident. While Aberdeen may have skidded slightly on the gravel, the outcome of the accident would probably not have been any different had the roadway been free of gravel.

1. **Conclusions on Liability - Contributory *Negligence***

**42**  I have also concluded that the suggestion of contributory ***negligence*** against Aberdeen must fail. There is no evidence that Aberdeen was driving above the posted speed limit. There is limited evidence that he may have been driving his bicycle above the advisory speed sign but of note that is simply an advisory speed. Additionally, I accept the evidence of Aberdeen that he was a well experienced cyclist. His discussion with McGee prior to entering the downward slope of 272nd Street suggests that he was cautious in his approach, choosing to discuss the concerns of the roadway with McGee and the two of them deciding cautiously to approach the hill single file. There is simply no evidence to suggest that Aberdeen was in any way not conscious of the difficulties that 272nd Street imposed for cyclists. The evidence of both he and McGee was that they were tapping their brakes as they proceeded downhill, an appropriate means of maintaining both control and caution.

**43**  The defendants argue for contributory ***negligence*** based on what they view as two circumstances. First, it is their belief that Aberdeen was travelling too fast while driving his bicycle on 272nd Street. Secondly, they rely on a presumption of ***negligence*** raised by the fact that Aberdeen left the road.

**44**  In regards to the first issue, there is a paucity of evidence as to the speed at which Aberdeen was travelling on 272nd Street. There is no evidence to suggest that Aberdeen was driving over the posted speed limit. There is a limited amount of evidence to suggest that he may have been driving over the advisory speed.

**45**  The Supreme Court of Canada established 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=) that breach of a statute is neither ***negligence*** *per se* nor *prima facie* evidence of ***negligence***. Rather, breach of a statutory provision is simply evidence of ***negligence***.

**46**  The Court in ***Saskatchewan Wheat Pool*** concluded that the statutory formulation of a duty may afford a specific and useful standard of reasonable conduct. However, the Court also concluded that the concept of fault inherent in ***negligence*** law, rather than the breach of a statute *per se*, should govern the imposition of civil liability. Thus, where a defendant has taken all reasonable care, breach of a regulatory provision will not of itself suffice to hold the defendant liable.

**47**  In the case at bar, the evidence is that Aberdeen was travelling within the posted speed limit. While Aberdeen may have been travelling in excess of the advisory speed, he could not have received a ticket or fine for doing so. On its own, the possibility that the plaintiff was travelling above the posted advisory speed fails to establish that he was contributorily negligent.

**48**  There is however evidence that Aberdeen was exercising caution as he drove his bicycle on 272nd Street. Aberdeen and McGee both testified to a conversation they had immediately prior to the accident, as they cycled beside each other, about the steepness and the danger associated with the descent on 272nd Street. Aberdeen exercised caution by agreeing with McGee to travel single file down the hill. Both Aberdeen and McGee testified to a circumstance of pumping brakes as a means of controlling speed and exercising caution as they descended the hill on 272nd Street.

**49**  Based on the evidence of Aberdeen and McGee, and based on the lack of any evidence to suggest significant speed, I have concluded that the argument in regards to contributory ***negligence*** as it relates to speed must fail.

**50**  The second aspect of contributory ***negligence*** is the suggestion of a presumption of ***negligence*** arising based on Aberdeen leaving the travelled roadway.

**51**  While a number of cases have concluded that the fact a vehicle goes off the road raises a *prima facie* case of ***negligence***, which the driver must then rebut, the strength of the inference of ***negligence*** to be drawn depends heavily on the facts of each particular case. The appropriate treatment of this presumption was examined by the Supreme Court of Canada 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=). The impact of that decision is well-stated by Romilly J. in ***Steen v. British Columbia (Ministry of Transportation and Highways)*** [*(1999), 64 B.C.L.R. (3d) 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1F1-00000-00&context=) at paragraph 46-47 (S.C.):

The plaintiff suggests that the presumption that a driver whose vehicle leaves the road is *prima facie* negligent may no longer be applicable since the decision in ***Fontaine v. British Columbia***, [*[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=), which ousted the principle of *res ipsa loquitur*. The court in that case stated at paras. 20-21:

It has been held on numerous occasions that evidence of a vehicle leaving the roadway gives rise to an inference of ***negligence***. Whether that will be so in any given case, however, can only be determined after considering the relevant circumstances of the particular case.

Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone.

And at para. 27:

It would appear that the law would be better served if the maxim [*res ipsa loquitur*] 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*. (Emphasis added)

This suggests that the inference remains even though the concept of *res ipsa loquitur* should no longer be utilized by the courts. The circumstantial evidence may still be sufficient for the Court to draw the conclusion that the driver was negligent. However, the trial judge must weigh this evidence along with direct evidence, which may negate that inference and suggest a reason other than ***negligence*** for the accident.

**52**  The Court in ***Fontaine*** also clarified that whether an inference of ***negligence*** can be drawn from circumstantial evidence is highly dependent on the facts of each case (at paragraph 20 and 35), and that the strength of the explanation the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff (at paragraph 24).

**53**  In this case, there is direct evidence that the cause of Aberdeen leaving the roadway was his observation of Zanatta's van crossing the centre line. I accept that as a fact under the circumstances, Aberdeen took the only action that he could in response to this real and perceived threat: he veered his bicycle away from the oncoming vehicle and onto the side of the roadway, where he hit gravel and then went off the road. In these circumstances, where there is a clear reason for why the plaintiff deviated from a normal course of travel, I conclude that any inference of ***negligence*** to be drawn against the plaintiff by reason of his leaving the roadway is not sufficient to establish his ***negligence*** on a balance of probabilities. He was as such not contributorily negligent.

1. **Apportionment of Liability**

**54**  The parties are essentially in agreement with respect to the law on the apportionment of liability as discussed below. In particular, they agree that the apportionment of liability pursuant to the ***Negligence Act***, *R.S.B.C. 1996, c. 333* should be made based on a consideration of the degree to which each party is at fault, and not the degree to which each party's fault caused the plaintiff's loss (as detailed by Lambert J.A. in ***Cempel v. Harrison Hot Springs*** [*(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=), [*100 B.C.A.C. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=)).

**55**  Before an apportionment of liability can be considered, it must be established that each relevant act or omission was a legal cause of the plaintiff's loss (see *e.g.* ***Heller v. Martens*** [*(2002), 213 D.L.R. (4th) 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), [*2002 ABCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=) at paragraph 31; ***Vigoren v. Nystuen*** [*(2006), 266 D.L.R. (4th) 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FJM6-642G-00000-00&context=), [*2006 SKCA 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FJM6-642G-00000-00&context=) at paragraph 89). In this case, as explained above, the ***negligence*** of both Langley and Zanatta caused the plaintiff's loss.

**56**  The relevant provisions of the ***Negligence Act***, *R.S.B.C. 1996, c. 333*, provide as follows:

**Apportionment of liability for damages**

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| --- | --- | --- | --- | --- |
| 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.

**Liability and right of contribution**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4 | (1) |  | If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault. |  |

1. Except as provided in section 5 if 2 or more persons are found at fault
2. they are jointly and severally liable to the person suffering the damage or loss, and
3. as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

**57**  The significance of the difference between these sections is that where the plaintiff is contributorily negligent, under section 1 he will be able to recover from each defendant only to the extent that particular defendant was found to be at fault. In contrast, pursuant to section 4 of the ***Negligence Act***, where the plaintiff is not contributorily negligent the defendants will be jointly and severally liable, such that the plaintiff may recover the entire amount of his loss from one defendant, leaving that defendant to claim contribution from the second defendant in the amount the second defendant was found to be at fault. The parties' submissions and authorities focus primarily on section 1 of the ***Negligence Act***. However, the same principles with respect to the apportionment of damages on the basis of fault apply to section 4: see *e.g.* ***Cragg v. Tone***, [*[2006] B.C.J. No. 1555*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G34N-00000-00&context=), [*2006 BCSC 1020*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G34N-00000-00&context=) at paragraph 178-179 (applying the reasoning in ***Cempel***, *supra*, to section 4 of the ***Negligence Act***); Cheifetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981) at 232.

**58**  The B.C. Court of Appeal established in ***Ottosen v. Kasper*** [*(1986), 37 C.C.L.T. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3FP-00000-00&context=) (B.C.C.A.) that the apportionment of fault under section 1 of the ***Negligence Act*** should be based on the weight of fault that should be attributed to each of the parties, not on the weight of causation. Lambert J.A. based this conclusion on the wording of the ***Negligence Act***, which speaks of "fault," and equated fault with blameworthiness. This approach to apportionment was subsequently confirmed in ***Cempel***, *supra*, as follows at paragraph 19:

... 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.

**59**  The relative blameworthiness approach is therefore quite clearly established as the appropriate approach to apportionment of damages in British Columbia.

**60**  Although assessing the relative blameworthiness of the parties is the correct approach, there is some difficulty in quantifying that concept. In this regard, the words of Lambert J.A. in ***Cempel***, *supra*, at paragraph 24 are instructive:

In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

**61**  Finch J.A. (as he then was) expanded upon the concept of relative fault in ***Alberta Wheat Pool v. Northwest Pile Driving Ltd.*** [*(2000), 80 B.C.L.R. (3d) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at paragraph 46 as follows:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**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***, *supra*, at paragraph 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***, *supra*, at paragraph 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.

**64**  These factors were applied, for example, in ***Cempel***, *supra*, a case where the plaintiff had climbed over a fence onto the defendant's private property to access a hot spring pool, and suffered severe burns as a consequence. In that case, the defendant had created a serious hazard with the pool of hot water, bore sole responsibility for maintaining the fence around the hot pool to prevent access, failed to post signs warning of that hazard, and knew that young persons often went to the pool at night.

**65**  However, the fact that the fault results from an active versus a passive act of a party should not impact on the assessment of the degree of relative fault. Lambert J.A. observed in ***Cempel***, *supra*, at paragraph 23:

... I do not think that the fact that the fault on the part of the plaintiff was an active fault, whereas the fault on the part of the defendant was a passive fault, at least at the time of the incident itself, should form any basis in this case for attributing more of the fault to the plaintiff than to the defendant.

Liability was apportioned 60% to the defendant and 40% to the plaintiff, reversing the trial judge's apportionment of 25% and 75%, respectively.]

**66**  Another important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care. For example, in ***Alberta Wheat Pool***, *supra*, the plaintiff's grain loading facility was destroyed by a fire caused by molten slag from the defendant's welding activities. The defendant was negligent in not thoroughly wetting the area in which welding was taking place. The plaintiff was contributorily negligent in having a fire protection system which did not meet recommended standards. On the issue of apportionment, Finch J.A. for a majority of the Court of Appeal found that both parties exhibited a substantial or significant departure from the standard of reasonable care expected of each. He noted at paragraph 55 that "[w]hile the fault of the two is different in kind, I do not see how one can justify a conclusion that their faults differ in degree." Thus, liability was apportioned equally pursuant to s. 1(2) of the ***Negligence Act***. McEachern C.J.B.C. in dissent found the owner's fault to be higher: the owner's failure was considered and deliberate, while the contractor's fault was accidental and unexpected. The contractor had failed to water sufficiently, but it did not fail to water at all.

**67**  Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

**68**  The plaintiff argues that there is a large divide between the relative fault of the Zanatta Defendants and Langley. In particular, he argues that Zanatta's ***negligence*** arises from a momentary lapse in attention, and did not represent an extreme departure from the standard of care imposed on motorists. In contrast, the plaintiff argues that Langley's departure from the standard of care imposed on municipalities was extreme: Langley created the gap, failed to take action to remedy the gap for three years, and vehicles would have been redirected by the metal barrier and then speared by the no-post barrier. Cyclists were at risk of being redirected by the barrier and directed through the gap into the ravine. The plaintiff submits that ***negligence*** should be apportioned 10-20% to Zanatta and 80-90% to Langley.

**69**  The Zanatta Defendants deny that the van crossed the centre line, and submit that the relative fault of the Zanatta Defendants is negligible as compared with that of Langley and the plaintiff in light of the relative degrees of risk of harm and the seriousness of the effects associated with their respective actions and omissions. The Zanatta Defendants argue that the plaintiff's injuries would have been much less severe had he collided with a properly constructed barrier. The van never came in contact with the plaintiff, and the error, if it did occur, was at worst a "momentary or minor lapse of care in conduct" representing a minimal departure from the required standard of care, which should attract no damages. In this respect, the Zanatta Defendants rely on the case of ***Ford v. Henderson*** [*(2005), 138 A.C.W.S. (3d) 1075*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P7-00000-00&context=), [*2005 BCSC 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P7-00000-00&context=) at paragraph 72-76.

**70**  ***Ford v. Henderson*** involved a plaintiff who had been a passenger in the defendant driver's car. The defendant negligently accelerated when leaving a parking lot, losing control of the car and causing it to hit a hydro pole. The plaintiff had not been wearing his seatbelt, although he was trying to fasten it at the time of the accident. Wedge J. held that this was "closer to a minor lapse of care," and therefore she would have assessed the plaintiff's contributory ***negligence*** at 10% at most, had she found contributory ***negligence*** on the facts.

**71**  Langley submits with respect to Zanatta's fault that his negligent driving initiated the chain of events, and that most driving ***negligence*** arises from a momentary lapse of attention, but often results in serious consequences. With respect to the plaintiff, Langley submits that the plaintiff was travelling over the advisory speed and approached a blind corner with reckless disregard for his own safety, which deprived him of an opportunity to react in a safe, appropriate and timely manner. Langley submits that, while the barrier configuration was not optimal, it represented a reasonable repair of a problem within difficult geographical and topographical conditions, the barriers were erected not for bicycles but for motor vehicles, there was no accident history at the site, and to the extent a hazard was present, it was marked. Further, Langley submits that the current barrier configuration would not necessarily have prevented serious injury to a cyclist. Therefore, Langley submits that the plaintiff and Zanatta Defendants should be held solely liable for the plaintiff's injuries. Alternatively, Langley submits that if it is found liable, 20% of the responsibility should be apportioned to it, with the remainder jointly divided between the plaintiff and the Zanatta defendants. Langley relies on several cases involving the apportionment of liability where municipalities have been found negligent, but have been held liable for a relatively low proportion of the damages.

**72**  In ***Balan v. Newfoundland*** [*(1994), 128 Nfld. & P.E.I.R. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F1H1-22B7-00000-00&context=) (Nfld. S.C.T.D.), the plaintiff had pulled out into a slush-covered passing lane when he lost control of his car. As a result, the car rolled down a steep embankment, just missing a guardrail. Expert evidence established that the guardrail should have been 17 metres longer than it was, and the Court held that the operational decision of the Crown employee to install the guardrail as he did was negligent. Liability was apportioned 80% to the plaintiff for his negligent driving and 20% to the Crown. However, the discussion in that case (at paragraph 143-154) suggests that the Court used a causation analysis, rather than considering relative degrees of fault, in determining the apportionment issue (Orsborn J. considered that the plaintiff's ***negligence*** was the effective cause of the accident, while construction of an appropriate guard rail would have reduced, but not eliminated, the plaintiff's loss).

**73**  In ***Danco v. Thunder Bay (City)*** [*(2000), 13 M.P.L.R. (3d) 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-FC1F-M26J-00000-00&context=) (Ont. S.C.J.), aff'd [*(2001), 21 M.P.L.R. (3d) 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-JFSV-G36C-00000-00&context=) (Ont. C.A.), the plaintiff was held 70% liable for his own injuries and the defendant municipality and railway company were held jointly liable for 30% of his damages. That case involved injuries sustained by the plaintiff, an experienced cyclist, in crossing the defendant's railway tracks. The defendant railway company had not ensured that its tracks complied with the relevant regulations, and both the municipality and the railway company had failed to post adequate warnings of the danger. However, the plaintiff was held to be primarily at fault, as he admittedly knew that he should have crossed perpendicular to the railway tracks, and gave no reason for failing to do so.

**74**  In ***Bissell v. Rochester***, [*[1930] 3 D.L.R. 825*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JXNB-63CP-00000-00&context=), [*65 O.L.R. 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JXNB-63CP-00000-00&context=) (S.C.), a municipality was held 50% liable where the highway was in a significant state of disrepair at a sharp curve which was not marked, and there was no guard rail to prevent cars from going into a ditch. The plaintiff was held to be contributorily negligent, because he was driving at an excessive rate of speed and should have seen the curve in time to avoid an accident. However, in that case, Wright J. held that he could not determine the respective degrees of fault, and therefore liability was apportioned equally.

**75**  As the cases are highly fact-specific, I do not find the authorities relied on by Langley to represent more than a guide to the appropriate level of liability of the municipalities on the particular facts of those cases. Each case requires a careful assessment of the relative degree of fault of the parties, as outlined in ***Cempel***, *supra*, and the other authorities I have reviewed above.

**76**  In the result, I have concluded that liability should be apportioned 75% to Langley and 25% to the Zanatta defendants for the reasons that follow. This involves a careful consideration of the nature and extent of each defendant's departure from the standard of care expected in all of the circumstances.

**77**  In relation to Zanatta's ***negligence***, his crossing the centre line was a momentary lapse in his attention while driving. As Langley observes, many serious traffic accidents are caused by momentary lapses in attention. A fairly serious risk was created by the presence of a large cube van within the lane normally occupied by oncoming traffic on a steep hill with a sharp curve, and this risk could have been completely avoided had Zanatta exercised proper care while driving. However, Zanatta did not actually strike the plaintiff, and his fault was due to inattention, rather than being an intentional act. Therefore, I conclude that Zanatta's conduct represented a moderate departure from the standard of care expected in the circumstances.

**78**  In contrast, I have concluded that Langley's departure from the standard of care was considerably greater than Zanatta's: while Langley did not intentionally create a hazard, it knowingly created a serious risk when it decided not to replace the entirety of the existing guard rail in 1999, or to take measures to ensure that cyclists or cars would not risk injury due to the existence of a gap between the two guard rails. Langley knew that 272nd Street was frequently used by cyclists, and in fact was a designated bicycle route. Langley had over three years to take action to avoid the risk of injury due to the barrier configuration. The cost was not prohibitively high, and money could have been allocated from the existing budget to remedy the situation. The gravity of risk created by Langley's decision was high, both for cyclists and for cars that might have been redirected by the metal barrier into a collision with the no-post barrier. The expert witnesses of both the plaintiff and the Zanatta defendants thought that this gap was obviously "unsafe" and "constituted a violation of basic traffic safety practices." The departure from the standard of care expected of a municipality in these circumstances was considerably higher than Zanatta's departure from the relevant standard of care. Accordingly, I would apportion liability for the plaintiff's injuries 25% to the Zanatta defendants and 75% to Langley.

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| **3.** | **Damages** |  |

**79**  Although the three parties to this litigation (Aberdeen, Zanatta Defendants, and Langley) took very different positions on the issue of liability for the accident, the Zanatta Defendants and Langley presented a combined case on the issue of damages. Like liability, however, the issue of damages was significantly contentious between the parties.

**80**  A significant legal issue was raised in regards to the approach to be taken in an analysis of damages and the personal injury case. Below is an analysis of the appropriate principles to be applied in assessment of damages in a personal injury case.

1. **Principles**

**81**  Counsel for the plaintiff placed significant emphasis on the decision of the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd.***, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=). I agree this was an appropriate starting point. Counsel for the plaintiff says the decision in ***Andrews*** can be read to emphasize that the plaintiff is to be fully compensated for his loss-his compensation is not to be limited by a concern for what it will cost the defendants.

**82**  The defendants counter that future care costs must meet the test of "medical justification" set out by McLachlin J. (as she then was) in ***Milina v. Bartsch*** [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.). The defendants agree that "medical justification" is not limited to "medical necessity," and that items that will enhance the plaintiff's well-being should be awarded. The parties disagree, however, with respect to the characterization of the plaintiff's injuries used by the experts, and whether certain items which "would be nice" for the plaintiff meet the medical justification test.

**83**  Because most of the divergence between the figures put forward for the cost of future care centres around differences in opinion as to what is required to make full compensation to the plaintiff, this analysis will go to significant effort to attempt to clarify what is meant by "full" compensation, as that term is used by the Supreme Court of Canada in ***Andrews***. This overview is important because the idea of "full" compensation is not sufficiently precise to assist in determining whether an expense for future care should be allowed, and this was the standard of compensation propounded by counsel for the plaintiff.

**84**  The heart of the legal problem resolved by ***Andrews*** was the distinction between "fair and reasonable" versus "full" compensation for catastrophic personal injury cases, as derived from old English authorities. In short, and as ***Andrews*** affirmed, the English authorities actually do support the idea of "full compensation" for pecuniary losses, including the cost of future care, although many cases repeatedly state that full compensation should not be given, only compensation that is fair and reasonable as between the plaintiff and the defendant. A close reading of these cases shows that some cases clearly intended that "fair and reasonable" compensation was to be applied for non-pecuniary damages, while other cases (arguably mistakenly) applied these same principles to limit pecuniary damages. ***Andrews*** clearly stated that full compensation was to be made for pecuniary injury, and plaintiffs were not to make do with a lesser standard of care in order to save defendants money. This is exactly the error made by the B.C. and Alberta Courts of Appeal in ***Thornton v. Prince George School District No. 57***, [*[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 ***Andrews***, *supra*, where rulings granting the plaintiffs home care were overturned in favour of institutional care because the former would be unduly expensive for the defendants. The Supreme Court of Canada rejected this position.

**85**  While the notion of making full compensation for pecuniary losses is clearly the goal, neither the English cases nor ***Andrews*** fully resolve the issue of what standard of future care is required to provide "full" compensation. Additionally, ***Andrews*** retained the requirement that compensation must be fair and reasonable, and stated that fairness to the defendant was to be achieved by ensuring claims were "legitimate and justifiable."

**86**  The issue was subsequently clarified by McLachlin J.'s often-cited judgment in ***Milina v. Bartsch*** [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=). There, she clarified that (1) there must be medical justification for claims for the cost of future care, and (2) the claims must be reasonable. This is the test which has been repeatedly applied by subsequent courts in determining which expenses to allow for future care. Thus, although judges are to make "full" compensation for the cost of future care, in the sense of awarding what the medical evidence indicates is the appropriate standard of care, such claims must still be reasonable and justifiable.

**87**  In the English authorities and in the lower court decisions leading up to the ***Andrews*** trilogy, there is a tension in the law relating to compensation for catastrophic personal injuries. Many judges urged that the courts should not attempt to give "perfect" compensation up to the full extent of the pecuniary injury sustained, but rather must give compensation that is "fair and reasonable," considering both the plaintiff's and the defendant's perspectives. As will be seen from the following review of the English authorities, concerns with respect to fairness or reasonableness to the defendant often relate to poorly-articulated concerns directed to the impossibility of making full compensation for non-pecuniary losses or accounting for negative contingencies. Unfortunately, later cases picked up on these statements that the courts should not attempt perfect compensation in order to deny plaintiffs the entire sum of their pecuniary losses. For example, the full extent of the plaintiff's loss of future income was not awarded in ***Fletcher v. Autocar & Transporters, Ltd.***, discussed below, as the majority of the court considered this would have been unfair to the defendant: the plaintiff could not himself use the funds, and would not have saved any of it had he continued working without the accident.

**88**  The fundamental principle in tort compensation is contained in an often-quoted statement of Lord Blackburn in ***Livingstone v. Rawyards Coal Company*** (1880), 5 App. Cas. 25 at 39:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation ...

**89**  That case dealt not with personal injury, but with a claim for damages arising from the unauthorized taking of coal. Of note, Lord Blackburn also stated at 41:

... It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

**90**  Straightforward though these guidelines appear, courts were slow to apply them in the context of damages for personal injury. Given the significant difficulties (or impossibility) of valuing damages for non-pecuniary losses and the difficulty of calculating precisely what position the plaintiff would have been in but for the defendant's ***negligence***, courts resorted to the idea of "fair and reasonable" compensation for catastrophic personal injuries.

**91**  The root of fair and reasonable compensation, rather than *restitutio in integrum*, as a goal of damage awards for catastrophic personal injuries stems largely from reliance by courts on a *dictum* of Brett J. in ***Rowley v. London and North Western Railway Company*** (1873), L.R. 8 Exch. 221 at 231. That case involved a claim brought under the *Fatal Accidents Act* by the mother, widow and child of the deceased. The deceased had been employed as a lawyer, and had been under a covenant to pay his mother an annuity of [pounds]200 during their joint lives. The Court held that the judge erred in directing the jury that they could take into consideration evidence of an accountant as to the average lifespan of a person the mother's age and the cost of purchasing an annuity for that lifespan. The judge should have noted that the annuity was for the joint lives of the mother and son, and that it was only secured by the personal covenant of her son. Honyman J. added that the judge also erred in not directing the jury to take into consideration the state of health of the annuitant, or point out the fact that the son's personal covenant to pay would be rendered meaningless by his ill-health or the loss of his business. In short, the court appeared to be concerned that negative contingencies had not been addressed by the judge's charge to the jury.

**92**  Brett J. went much further, dissenting in holding that evidence as to the average lifespan and cost of an annuity was not properly before the jury. He stated at 231:

To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation*." I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust ... I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law.

[Italics in original; underlining added.]

**93**  The remainder of Brett J.'s judgment underscores some of his rationales for taking this position. He notes that, disregarding the failure to point out that the annuity was dependent on both lives and the many contingencies that might have rendered the son unable to pay the annuity, the judge's direction left it open to the jury to award "the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the action is brought" (at 229-230). He felt this could ruin poor defendants. By "fully calculated equivalent of the pecuniary loss sustained," I suggest he may have been referring to an award that did not take into consideration negative contingencies.

**94**  Brett J. also quoted from the judgment of Parke J. in ***Armsworth v. South Eastern Railway Co.*** (1847), 11 Jur. 758 (at 230). Below is the original quotation from ***Armsworth*** at 760; the italicized portions were omitted by Brett J. when quoting this passage. This same passage was also quoted in ***Blake v. Midland Railway Company*** (1852), 18 Q.B. 93, 118 E.R. 35, which is another case often cited for the proposition that damages should be fair and reasonable (decided in the context of a claim under the *Fatal Accidents Act*).

... *you cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent; and* it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. *Here you must estimate the damage by the same principle as if only a wound had been inflicted*. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life; *and in the present case* you are not to consider the value of his existence as if you were bargaining with an annuity office; *for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter*. *I therefore* advise you to take a reasonable view of the case, and give what you consider fair compensation.

[Italics added.]

**95**  The original passage from ***Armsworth*** appears to relate to concerns about the potentially unlimited value of human life, and how it would be unfair to inflict that full value on defendants. It also alludes to the difficulty involved in evaluating all of the contingencies which might have befallen the plaintiff in the absence of the accident. The dissenting statements of Brett J. in ***Rowley*** were subsequently relied on by courts in asserting that damages should not be perfect, only fair and reasonable.

**96**  Some clarification as to the meaning of Brett J.'s *dictum* was provided in ***Phillips v. London & South Western Railway Company*** (1879), 5 Q.B.C. 78 (C.A.), a judgment in which Brett L.J. concurred. In that case, the plaintiff, a doctor who was seriously injured by the defendant's ***negligence***, sought a new trial on the basis that the damages awarded were so small the jury must have omitted relevant considerations. The plaintiff argued that the rule set out by Brett L.J. in ***Rowley*** was being disputed, and that the proper rule was that a jury must not attempt to give a man full compensation for bodily injury, for which there would be no limit, but that full compensation should be made for pecuniary loss. James L.J. agreed in his discussions with counsel that the trial judge, Field J., had meant to say that full compensation must be made for pecuniary loss, but damages for suffering cannot proceed on the principle of making full compensation (at 84). James L.J. agreed that the proper direction to the jury in ***Rowley*** would have been (at 84):

[t]o tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

**97**  Thus, the principle, even in 1879, appeared to be that full compensation was to be made for pecuniary loss, although the amount awarded should be reduced based on a consideration of negative contingencies. In contrast, with respect to damages for pain and suffering, full compensation was not possible, and such damages were not to be awarded on the principle of making full compensation. Despite this clarification and the apparent distinction between pecuniary and non-pecuniary damages, both ***Rowley*** and ***Phillips v. London & South Western Railway Company*** continued to be cited for the proposition that courts should not attempt to award perfect compensation. Some of these cases clearly dealt with non-pecuniary damages. However, other cases applied this principle to reduce pecuniary damages.

**98**  Another case which was often cited for the proposition that a court must not attempt to give perfect compensation, but must give fair compensation, is ***H. West & Son v. Shephard***, [1963] 2 All E.R. 625 (H.L.). In that case, an award of general damages of [pounds]17,500 to a 41-year old woman rendered permanently disabled but with some limited mental capacity remaining was upheld (Lord Reid and Lord Devlin dissenting). [pounds]2,500 of this award was attributable to the fact that the woman might have some awareness of her plight. The case deals mainly with the issue of the appropriate quantum of non-pecuniary damages, for which moderation and reasonableness are urged. However, all of the speeches delivered seem to indicate that compensation for pecuniary losses is to be made in full. For example, Lord Reid stated (at 628):

On the other hand, no one doubts that damages must be awarded irrespective of the man's mental condition or the extent of his suffering where there is financial loss. That will cover the cost of treatment or alleviation of his condition just as much as it covers the cost of repairing or renewing his property. And it will cover loss of earning power ...

**99**  Lord Morris of Borth-y-Gest, in a judgment read and concurred in by Lord Tucker, stated (at 631):

... A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation ...

**100**  Lord Devlin (dissenting) stated at 636 that the injury:

... may bring with it three consequences. First, it may result in loss of earnings and they can be calculated. Secondly, it may put the victim to expense in that he has to pay others for doing what he formerly did for himself; and that also can be calculated. Thirdly, it produces loss of enjoyment, loss of amenities as it is sometimes called ... This is incalculable and at large.

**101**  This passage still supports the notion of full compensation for pecuniary losses. However, Lord Devlin went on to quote from and approve the jury direction given by Field J. in ***Phillips v. London and South Western Railway Company*** (1879), 5 Q.B.D. 78 at 79 (at 637):

"... it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters and are to decide; but I mean that it would operate unjustly, and in saying so I am using the language of the great Baron Parke (in ***Blake v. Midland Railway Company*** (1852), 18 Q.B. 93) whose opinion was quoted with approval in ***Rowley's*** case ((1873), L.R. 8 Exch. 221 at 231). Perfect compensation is hardly possible, and would be unjust."

**102**  As explained above, the Court of Appeal in ***Phillips*** made clear that the trial judge's charge to the jury had meant that full compensation should be made for pecuniary loss, but that full compensation could not and should not be made for the bodily injury. Lord Devlin continued at 638 in relation to what would be fair compensation in such a case:

What is meant by compensation that is fair and yet not full? ... [it will be a sum] that will enable him to say that he has done whatever money can do. He has ex hypothesi already provided for all the expenses to which the plaintiff has been put and he has replaced all the income which she has lost. What more should he do ...?

I think that he would say in an extreme case like this that he would provide such a sum as would ensure that for the rest of her life the plaintiff would not within reason want for anything that money could buy. That would not be perfect; it would not be full; but it would be as much as money could fairly do ...

**103**  This passage still supports the idea of full compensation for pecuniary loss, even where the plaintiff has only a limited awareness of his plight. It recognizes the impossibility of restoring the plaintiff to her original position (which would arguably be full compensation as the term is used by Lord Devlin), and instead places a premium on ensuring that the plaintiff will be properly looked after for the rest of her life (which would arguably be fair compensation). Thus, all of the judgments in ***H. West & Son v. Shephard*** still support the notion of full compensation for the pecuniary loss.

**104**  Another case, ***Warren v. King***, [1963] 3 All E.R. 521 (C.A.), emphasized the importance of ensuring fairness as between the plaintiff and the defendant. That case dealt with a misdirection resulting in a jury award the court considered excessive; however, the speeches in that case still appear to confirm the principle of full compensation for pecuniary losses. Sellers L.J., while citing the comments of Lord Morris of Borth-y-Gest and Lord Devlin in ***H. West & Son v. Shephard*** that awards must be reasonable and must be assessed with moderation, stated (at 526-527):

Since that day, it has been the practice to assess under the Fatal Accidents Acts ... the actual financial loss as accurately as possible, but I do not understand that, at common law, Lord Devlin was of the opinion that something less than full damages should be given ... Damages must not be assessed on the basis that everything in life would go most favourably for a plaintiff ... Damages for personal injuries should always be reasonable, because they have no solid and certain basis of assessment.

**105**  This passage makes clear that full damages should be given, but taking into account negative contingencies. Harman L.J., after quoting extensively from the reasons of Brett J. in ***Rowley***, stated (at 528-529):

... the first element in assessing such compensation is not to add up items such as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances? This will involve, first, an estimate of the infant plaintiff's expectation of life, and next an estimate of the cost of such help as she needs ... It is perfectly possible to have an estimate first of expectation of life, and next of what would be the cost of an annuity over that period ...

**106**  Pearson L.J. delivered a judgment along similar lines, noting at 531:

It should have been said that, as it was impossible to give a sum of money truly equivalent to the health and amenities of life of which the infant plaintiff had been deprived, the jury should not attempt to do that, but should give a reasonable and moderate sum, fair and adequate for the infant plaintiff, but also fair and not oppressive to the defendants.

**107**  Again, this passage appears to be primarily directed at placing a limit on non-pecuniary damages. Thus, the judgments in ***Warren v. King*** similarly support the notion that full compensation should be made for pecuniary losses (taking into account contingencies), while only fair and reasonable compensation should be given for non-pecuniary losses.

**108**  A case which perhaps best illustrates the effect of awarding "fair and reasonable" compensation on pecuniary damages is ***Fletcher v. Autocar & Transporters, Ltd.***, [1968] 1 All E.R. 726 (C.A.). In that case, Lord Denning, M.R. criticised the trial judge for totalling up damages under four headings and awarding the entire figure, even though the trial judge recognized that it was a daunting figure. He stated at 733:

... I think that his conclusion was erroneous. In the first place, I think that he has attempted to give a perfect compensation in money, whereas the law says that he should not make that attempt. It is an impossible task. He should give a fair compensation. That was settled ninety years ago by the case of ***Phillips v. London & South Western Ry. Co.*** (1879), 4 Q.B.D. 406, 5 Q.B.D. 78 ...

...

... In order to give him fair compensation, I should have thought that he should be given a sum which would ensure that he would not, within reason, want for anything that money could buy; and that his wife should be able to live for the rest of her life in the comfort that he would have provided for her; and that any savings that he would have made if uninjured would be available for his family.

**109**  Denning L.J. went on to note that a man who saved nothing should not receive his entire loss of income for the remainder of his life, but agreed that the plaintiff should receive compensation for expenses such as the cost of extra help in the house while he remained there, for his future earnings to the extent they would have been used to support his wife, including any savings he would have made, and for pain and suffering and loss of amenities. Allowances were made for contingencies and the fact that compensation was to be paid as a lump sum. Diplock L.J. gave a judgment that was substantially similar. While casting into doubt the appropriateness of full compensation for loss of future earnings, neither of these judgments supports the idea that anything less than the full cost of future care should be awarded. In this case, that included help around the house while the plaintiff's wife cared for him, and the cost of care in a private institution when she would no longer be able to care for him.

**110**  Salmon L.J. dissented in ***Fletcher***, holding that each head of loss should be calculated and added together to arrive at the true amount of the total financial loss. He would have upheld the result reached by the trial judge. At 750, he noted that he accepted the *dicta* to the effect that the court should award fair and reasonable compensation, and that such comments were particularly applicable to damages for pain and suffering and loss of amenities. However, he put these comments into their original context, noting that modern defendants tended to be insured, whereas defendants were often uninsured at the time that ***Rowley*** and ***Phillips v. London & South Western Railway Company*** were decided. Therefore, he suggested that compensation should be "realistic," while not being extravagant. He also noted that, in relation to pecuniary loss, it was difficult to appreciate the difference between "the full amount of perfect compensation" and "fair and reasonable compensation."

**111**  In sum, while the English courts may have disagreed on how damages should be calculated and to what degree they should be limited out of a concern for fairness to the defendant, none of the personal injury cases appear to take issue with the concept of providing to the plaintiff the entire anticipated cost of future care, taking into account appropriate contingencies. Indeed, in some of these cases, the cost of a home attendant to care for the plaintiff or the cost of care in a private institution were awarded, without apparent discussion of whether a cheaper alternative should be used.

**112**  The trial judge in ***Andrews*** reviewed the old English authorities in reaching the same conclusion, affirmed by the Supreme Court of Canada, that full compensation should be made for pecuniary loss, while fair and reasonable compensation should be awarded for non-pecuniary loss. ***Andrews*** clearly stated that full compensation is to be made for pecuniary losses without regard to the financial position of the defendants, which in that case meant home care for the plaintiff despite its very high cost compared with institutionalization. In contrast, awards for non-pecuniary losses may be limited by broader social concerns.

**113**  Dickson J. also clarified that a claim for the cost of future care is a pecuniary claim (at paragraph 25), and that full compensation for the cost of future care is to be provided:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury ... Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

**114**  However, the judgment of Dickson J. (as he then was) still retains the qualification that compensation must be moderate and fair to both parties. While stating that there is no duty to mitigate, in the sense of accepting less than a real loss, he emphasized that "there is a duty to be reasonable," and that there cannot be "complete" or "perfect" compensation (at paragraph 26). Later, he clarified that fairness to the defendant was to be achieved by ensuring that the claims against him are "legitimate and justifiable" (at paragraph 33).

**115**  The judgment in ***Andrews*** was subsequently interpreted by McLachlin J. in ***Milina v. Bartsch***, *supra*. She noted at paragraph 192-195 and 201:

The plaintiff submits that the consideration which must govern the award of damages for cost of future care is the "functional" consideration, which he interprets as requiring the award of "the cost of such items as may be used by the plaintiff in substitution for the pleasures of life taken from him by his injury." It is on this basis, he submits, that the cost of a house was awarded in ***Thornton***, *supra*. The question is not what will provide the plaintiff with adequate housing, but what will mitigate the misery of quadriplegia. To the extent that money can, within the bounds of reason, serve to increase the plaintiff's sense of happiness and well being, it may properly be awarded under the head of cost of future care, it is submitted.

The defendants' approach is quite different. The defendants submit that there must be medical justification or vindication of the award for cost of future care. To the extent that money can be used to sustain or improve the mental or physical health of the plaintiff, it should be awarded under the head of cost of future care. But in so far as it serves only as solace by providing substitute pleasures, it falls under the head of non-pecuniary loss, not cost of future care, the defendants submit.

The distinction is important, because damages for non-pecuniary loss, unlike damages for cost of future care, are limited by the so called "$100,000 limit".

The authorities support the defendants' position on this issue ...

...

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.

**116**  She concluded at paragraph 199 that for costs for future care: (1) there must be a medical justification for such claims; and (2) the claims must be reasonable. She also noted that Dickson J. stated in ***Andrews*** that (at 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.

**117**  Thus, in ***Andrews***, the notion of full compensation in relation to damages for the cost of future care meant the cost of home care for the plaintiff, rather than institutionalization. What these judgments seem to indicate is that claims must be reasonable, but compensation is full in the sense that the plaintiff should not make do with less than what is medically justified to provide him with optimal care in order to save the defendant money, which was the route taken by the Alberta Court of Appeal.

**118**  In this case, as in ***Milina***, the plaintiff appears to be urging a functional approach to replacing what has been lost to make full compensation, while the defendant is urging a medical justification approach to urge that awards not be made for certain items that the plaintiff is unlikely to use (based on ***Izony v. Weidlich***, [*[2006] B.C.J. No. 1986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=), [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=)) or that are experimental. I do not think that the principles of making full compensation set out in ***Andrews*** provide the complete answer to this problem.

**119**  ***Andrews*** clarified the law by making clear that "fair and reasonable" compensation should not be used to reduce pecuniary compensation, nor to make the plaintiff make do with care at a level lower than that indicated by the medical evidence simply because that would be cheaper for the defendants. However, Dickson J. made clear in ***Andrews*** that the Court had been forced by counsel to choose between 24-hour home care and institutionalization - an unacceptable alternative. He did not address how choices are to be made between acceptable alternatives to make full compensation.

**120**  Thus, I think the solution is to consider "full" compensation espoused in ***Andrews*** in the context of the more pragmatic and widely-followed test set out in ***Milina***, namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable. In this sense, the inquiry is more directed to the fact-based determination of whether each individual item is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. The difference is in many respects semantic, but the former question maintains the focus on the pecuniary loss aspect of the cost of future care, and helps to prevent the Court from extending the award to fulfill the non-pecuniary goal of providing solace for what has been lost. Even in ***Andrews***, Dickson J. recognized that *restitutio in integrum* was not possible (at paragraph 25). If the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. That said, the analysis of what is "medically justified" is not as narrow as what is "medically necessary," and all of the parties agree with this proposition.

1. **The Plaintiffs' Circumstances as it relates to Damage Claims:**

**121**  The parties agree that Aberdeen sustained a spinal cord injury and a mild traumatic brain injury as a result of the accident. The parties disagree on whether Aberdeen continues to experience cognitive and emotional problems attributable to the brain injury or whether such problems that he still experiences are attributable to pain and or depression. The parties also disagree on the amount of future care Aberdeen will require to optimize his mental and physical well being.

**122**  Noted below is a summary of the evidence I accept as to the circumstances of the plaintiff and from which the appropriate compensation for losses is to be drawn, keeping in mind that ultimately the test of whether or not an item of cost of care is medically justified is the test that must be met.

1. **Dr. Hugh Anton, Physiatrist**

**123**  Dr. Anton was qualified as an expert in physical medicine and rehabilitation. He has had a long time association with GF Strong Rehabilitation Centre in Vancouver where he has in the past been Chief of Staff.

**124**  Dr. Anton examined Aberdeen on the 23rd of May 2006. He described Aberdeen's injuries as injuries to the C-6/C-7 and T1 vertebrae at the base of the neck as well as bone and ligaments damage. He cited compression and damage to the spinal cord. He described Aberdeen as having no function in his trunk and abdominal areas and incomplete function of his breathing muscles. Additionally Dr. Anton described Aberdeen as suffering a mild traumatic brain injury.

**125**  Dr. Anton gave useful information to the Court as to the typical nature of problems suffered by persons with Aberdeen's level of disability. Primary concerns centred around pressure sore problems, urinary tract infections, and bowel function problems. Dr. Anton noted that to date, Aberdeen has not had specific pressure sore problems or bowel function problems common to most people in his condition. Until recently, urinary tract infections had been a concern.

**126**  Dr. Anton commented on the chronic pain, described as neuropathic pain from which Aberdeen suffers. He notes that despite specific and multiple investigations, the source of this pain has yet to be determined although it is clearly related to his injury and clearly a significant factor for Aberdeen. His opinion concludes with the following:

Given Mr. Aberdeen's medical problems since the accident, I think his biggest specific risk factor for early mortality is his neurogenic bladder. If further urologic treatment can reduce his risk for complications, then his risk for early mortality will be less. At this time I think his risk for early mortality will probably be slightly increased, but in the best case it is possible he will live as long or longer as similar individuals without spinal cord injury.

1. **Dr. Izabella Schultz, Neuropsychologist**

**127**  Dr. Schultz is a clinical psychologist and neuropsychologist. Dr. Schultz conducted an assessment of Aberdeen. She described Aberdeen as stoic but someone at high risk for suicide, meeting a number of the traditional suicide factors for persons of his age and suffering from his level of pain. She described his pain as neuropathic pain which she described as pain resulting from nerves being cut off or severed and sending misguided signals to the brain as a result.

**128**  Dr. Schultz commented on Aberdeen's athletic activities prior to his accident and how these were at his core or what defined him.

**129**  In regards to the disputed diagnosis of consequences of a mild traumatic brain injury, Dr. Schultz commented on the lack of consciousness after the accident or better put, a period of disrupted consciousness after the accident. She cites a potential lack of oxygen during this time as having contributed to the difficulties associated with a closed head injury.

**130**  She described Aberdeen as suffering from a chronic pain disorder in the groin area and having a limited success on treatment. She further describes him as requiring extensive support services to become more independent. Despite the cross examination of Dr. Schultz and her opinions, I found her evidence compelling. Despite the extensive cross examination, she was not seriously challenged in her opinion about the level of chronic pain suffered by Aberdeen as a result of the accident and the risk that chronic pain imposes on Aberdeen's mood behaviour and his possible potential for suicide.

**131**  As for the mild traumatic brain injury, Dr. Schultz's testing identified neuropsychological and psychological problems which she divided into cognitive and emotional categories. She identified numerous cognitive difficulties and impairments in the areas of attention and concentration, processing speed and accuracy, language auditory perception, and in executive functions. To quote from her report:

Overall, Mr. Aberdeen presents with mild to moderately severe cognitive difficulties and impairments in processing speed and accuracy, particularly in speech sounds processing; in selected nonverbal intellectual abilities; in general memory including immediate visual memory, single trial auditory learning and delayed auditory memory; and in executive functions: higher order concept formation, learning from feedback, rule generalization and selective integrative functions of the brain.

**132**  Dr. Schultz makes the following observations of the impact of Aberdeen's neuropsychological and psychological impairment on his function:

It has now been almost four years since the accident. From a neuropsychological perspective, those cognitive functions that have been adversely affected by Mr. Aberdeen's mild traumatic brain injury, are not expected to further recover in any significant way. Most of the recovery occurs in the first two years after the injury.

From a psychological perspective, however, Mr. Aberdeen's

emotional status cannot be considered stable at this

time. It fluctuates with pain intensity, escalation of

depression and with suicidal ideation during

Mr. Aberdeen's recurrent bladder infections.

Mr. Aberdeen's chronic pain is currently poorly

controlled and unstable.

There are several scenarios with respect to Mr. Aberdeen's prognosis for his emotional distress:

1. Optimistic scenario: assuming that effective pain management is medically achieved for Mr. Aberdeen's severe neurogenic pain, his depression will lessen and suicidal ideations will likely subside, particularly if Mr. Aberdeen is assisted with development of new personal, social and recreational goals through occupational therapy and psychological counselling. Under this scenario, Mr. Aberdeen is likely to be left with mild depressive tendency and emotional vulnerability that will become activated under stress.
2. Pessimistic scenario: assuming that no effective pain management is identified for Mr. Aberdeen (as it is currently the case), or his pain worsens, Mr. Aberdeen's depression is likely to deepen, with onset of Major Depressive Disorder and high-risk, active suicidality.

There is also middle-of-the-way scenario, where partial pain relief may be obtained thus leading to some improvement in emotional status.

It is also important to note that severe levels of pain, fatigue and emotional distress do tend to have an impact on cognitive functioning. Therefore, in times of pain, emotional aggravation and when tired (afternoon and evening), Mr. Aberdeen's cognitive functioning is expected to further decline, below the levels identified in current assessment.

1. **Dr. Raymond Ancill, Psychiatrist**

**133**  Dr. Ancill was qualified as an expert in psychiatry. Dr. Ancill testified as to his examination of Aberdeen prior to his report of June 1, 2006. Dr. Ancill's assessment concluded that Aberdeen continued to suffer from the effects of a mild traumatic brain injury.

**134**  Dr. Ancill is of the opinion that Aberdeen suffered a mild traumatic brain injury as a result of the accident. He has developed a persistent post-concussion syndrome, a personality change and pain disorder. It is his opinion that Aberdeen continues to suffer from a number of cognitive, neuropsychiatric, functional, and emotional deficits as a result of the injuries sustained in the accident. He sets out his opinion at page 29 of his report:

1. It is my opinion that the persistent complaints and functional impairments suffered by Mr Jim Aberdeen are a direct result of the motor vehicle accident in which he was involved in June of 2002.

...

1. It is also my opinion that among his other injuries, Mr Aberdeen suffered a concussive injury in the accident, and developed a post concussion syndrome - now persistent type.
2. It is my opinion that Mr Aberdeen sustained a traumatic brain injury in the accident and I would estimate the severity of his brain injury as mild. However, Mr Aberdeen has indictors of a poorer outcome - he was aged 50 when injured, psychiatric symptoms have emerged and he still has dizzy episodes.
3. It is my opinion that Mr Aberdeen suffers from a Personality Change Due to General Medical Condition (Mild TBI) - Aggressive Type, and that this is a direct consequence of his brain injury.

...

1. It is also my opinion that this man suffers from a Pain disorder with psychological factors associated with a general medical condition and this relates to his headaches and other chronic pain complaints. Chronic pain will also exacerbate the persistent problems from the MTBI.
2. Further, it is my opinion that Mr. Aberdeen continues to suffer from a number of cognitive, neuropsychiatric, functional and emotional deficits that derive from this cluster of post-MVA syndromes. Given the complexities of his post-MVA problems, it is not possible to specifically attribute each symptom to a specific diagnosis and that many of his complaints have contributions from more than one etiology.
3. It is my opinion that Mr Aberdeen will continue to have disruption of his life and given his obvious physical injuries, he is not able return to being a bus driver and it is unlikely that he will be able to sustain any form of competitive employment.

**(d) Ms. Barbara Baptiste**

**135**  Ms. Baptiste was qualified as an expert in rehabilitation science and life care planning. Rehabilitation science is the systematic study of physical and psychosocial dimensions of disability, impairment and handicap over the lifespan of an individual. Life care planning is a highly specialized area of study, and it focuses on the comprehensive needs of an individual following either a traumatic injury or chronic health condition, and the specialization is with regard to service needs, devices and associated costs. Ms. Baptiste presented a detailed cost of future care report.

**136**  Ms. Baptiste appeared particularly qualified to provide such evidence. She has worked with people who have suffered catastrophic injuries since 1975. Her evidence was that she had directly conducted approximately 800 assessments of persons requiring care plans. She has a Masters degree in Rehabilitation Science from the University of Toronto.

**137**  In completing the cost of future care report, Ms. Baptiste followed a systematic approach to the formulation of a life care plan, which is set out in her report as follows:

Mr. Jim Aberdeen has specific care needs as a result of his involvement in the motor vehicle collision on June 29, 2002. This document provides a comprehensive examination of the data available to me, in order to determine his future extraordinary needs and the associated costs. The objective is to ensure that Mr. Aberdeen is able to maintain a quality of life which resembles, as closely as possible, that which he would have led but for the injuries he sustained in the aforementioned collision.

Recommendations adhere to the concepts of reasonableness and quality of life, and take into consideration the expected natural course of the impairment as Mr. Aberdeen ages. Goods and services are also recommended to prevent future complications. This document addresses reasonable and optimal predicted needs, and not necessarily realized access or use.

**138**  Baptiste testified that approximately 100 hours was required to complete the analysis and write her report. She explained her approach in some detail, setting a systematic approach to costing including contacting a number of sources for all potential cost of items.

**139**  Like Dr. Schultz, Ms. Baptiste was cross examined at length by counsel for the defendants. The part of her opinion to which the defence takes the strongest objection is the personal support worker at page 19 of her report, which reads as follows:

Personal Support Worker (also known as Attendant Care/Home Health Aide): Mr. Aberdeen will require significant supports, which will include a range of personal care services, i.e. assistance with bowel and bladder routines, bathing, skin-care, complex meal preparation, and generally looking after his health. He will require driving assistance for longer distances, and possibly, local driving from time-to-time. He will require assistance getting equipment in and out of his car and with some transfers. He will require assistance with laundry, shopping, and errands. At times of illness or complications, he may require a second worker; however, this has been considered in providing the nursing services. In order to ensure his optimal function and safety, 24-hour care is recommended. From time-to-time, there will be hours in the day when Mr. Aberdeen could be left alone, and may prefer this; however, he will require assistance with most aspects of community access and household management, and therefore access to such care, especially with ageing, is critical. Sub-section 8 - Living Arrangements, provides a recommended scenario for accommodating this caregiver. The PSW will require (by law and personal need) breaks throughout the day and this enables Mr. Aberdeen time to himself. This provider would be supervised through a Case Manager and/or a Nursing Care Supervisor through the organization for which they work. Mr. Aberdeen's children currently provide almost all of these services, with some assistance from other friends; however, this is not a long-term solution, as they will need to move on with their own lives. His daughter, Jenny, had an injury from an automobile collision prior to her father's injury, and her capacity to manage is already compromised. In addition to assistive support with aspects of ambulation, bathing and other aspects of personal hygiene (some details provided below), this person is also a personal companion to ensure that social isolation and marginalization are prevented. This person is considered a valued motivator for Mr. Aberdeen in accessing the community, and ensures that other family members can move forward with their lives and personal plans.

**140**  As noted earlier, counsel for the defendants cross examined Ms. Baptiste at length. Despite this, Ms. Baptiste was an impressive witness. She seems to give competent answers and appeared eminently qualified for the task assigned to her. Her credentials were particularly impressive. She appeared professional and focused on addressing what she in her experience believed would be the ongoing medical needs of Aberdeen. She did not appear to be an advocate.

**141**  Ms. Baptiste explained fully and frankly her view as to why it was medically necessary for Aberdeen to have attendant home care, needs related to care and safety. In doing so, she fully recognized that Aberdeen was an independent-minded individual before the accident but also recognized, fairly, that since the accident he has relied primarily on members of his family and his former wife to provide him with the care he needs.

**142**  I have concluded that there is much merit in the report of Ms. Baptiste. She appeared to draw a balance between providing care necessary for a quality lifestyle as opposed to complete pampering. She was attuned to his immediate needs and through her experience was able to grasp effectively what his long term needs will likely be.

1. **Dr. James Schmidt, Neuropsychologist**

**143**  Dr. Schmidt was qualified as a clinical psychologist and neuropsychologist.

**144**  Dr. Schmidt testified that Aberdeen demonstrated neuropsychological deficits in areas of cognitive and executive functioning. However, he was of the opinion that the positive findings were likely a result of such factors as pain and the emotional reaction to his spinal cord injury, rather than a result of long term consequences of a mild traumatic brain injury.

**145**  After hearing the testimony of Dr. Schmidt, there was some residual concern as to the basis of Dr. Schmidt's opinion. It appeared that Dr. Schmidt assumed that the records from GF Strong Hospital of Aberdeen did not reflect any concern regarding cognitive or emotional problems, yet those records on entries of December 3, 2002, and February 13, 2003, make such a notation.

**146**  Dr. Schmidt was of the opinion that suicidal thoughts were normal following a spinal cord injury but that they would go away, usually within the first year as the injured person adjusted to the spinal cord injury. This concern as an ongoing concern was clearly featured in the report of Dr. Schultz. Dr. Schmidt makes no reference to any suicidal thoughts in his report.

**147**  Dr. Schmidt agreed that there is not much likelihood of any improvement regardless of whether the cognitive and emotional changes are attributable to brain injury or to psychological problems arising from the pain and adjustment to the spinal cord injury.

**148**  Additionally, Dr. Schmidt confirmed that Aberdeen had acknowledged to him changes in areas of executive functioning since the accident and that Aberdeen demonstrated problems with processing speed and impulsivity in the testing, particularly on the second day of testing. Dr. Schmidt agreed that Aberdeen was a stoic type of person who would not easily talk about his problems.

1. **Dr. Peter Rees, Neurologist**

**149**  Dr. Rees was qualified as an expert neurologist. Dr. Rees conducted a 1 1/2-hour independent medical examination of Aberdeen including the physical exam. He conceded, as did all other experts, that Aberdeen was a stoic individual.

**150**  Though somewhat quick to dismiss the mild traumatic brain injury suffered by Aberdeen as a cause of the cognitive deficits, Dr. Rees did concede that cognitive deficits could be due to a mild traumatic brain injury, pain, depression, or a combination of all three.

**151**  Dr. Rees was clearly not a proponent of, or perhaps a believer in, the long term consequences of mild traumatic brain injuries. He suggested that newer literature was of the view that only a small percentage of those who suffered from a mild traumatic brain injury end up having long term consequences of it.

1. **Dr. N.K. Reebye, Physiatrist**

**152**  Dr. Reebye was qualified as a physiatrist, qualified to give opinion evidence in the area of physical medicine and rehabilitation. Dr. Reebye agrees the neuropathic pain Aberdeen experiences every day will not go away. Unfortunately when asked what he as a physiatrist could do to help Aberdeen, he was unable to offer anything of assistance except the possibility of further medication in an attempt to ease the level of Aberdeen's pain.

**153**  Dr. Reebye was asked to review the report of Ms. Baptiste and provide his comments. He was very critical of it. That being said, I agreed with counsel for the plaintiff in their submissions that Dr. Reebye does not have the expertise to comment on specifics of the future care that Aberdeen will need during the remainder of his life. I further agree that it appears that Dr. Reebye's frame of reference is a "medical necessity" model, rather than a "medically justified" model.

**154**  Dr. Reebye did not appreciate that since Aberdeen's discharge from GF Strong his daughter had been living with him and looking after him. In his report dated November 13, 2006 Dr. Reebye was asked to comment on the care needs of Aberdeen. He stated:

Based on my interview and assessment of Mr. James Aberdeen on March 14, 2005, he was independent in activities of self care and daily living and should be able to continue doing so in the foreseeable future.

As he ages and becomes generally weaker (beyond 65 years or so) he may require help for transfers and some activities of daily living. At that time, home care help for two to four hours a day will be sufficient.

Mr. Aberdeen does not require and will not require 24 hour home care support services for his deficits arising from his spinal cord injuries.

**155**  Dr. Reebye diagnosed a traumatic brain injury but he testified that he was not in a position to assess whether or not Aberdeen had any residual sequelae from the brain injury.

1. **Mr. Richard Carlin**

**156**  Mr. Carlin is an expert in vocational rehabilitation. He agreed that the combination of a brain injury and spinal cord injury would make rehabilitation more difficult. His initial view was that Aberdeen could get back to work on an almost full-time basis.

**157**  While Mr. Carlin did not feel qualified providing an opinion regarding the likelihood that cognitive problems were contributing to Aberdeen's inability to return to work, he did feel that pain may be the major reason.

**158**  Mr. Carlin did not initially have an appreciation of the nature of Aberdeen's lack of abdominal and intercostal musculature. He did not review the video of Aberdeen getting out of his massage bed into a chair. Mr. Carlin did agree that under his definition of competitive employability, Aberdeen would have to compete for a job with non-disabled persons. He also agreed that it was unlikely that he would meet that test and would have to rely on a sympathetic employer.

**159**  Mr. Carlin agreed that the comprehension score at the 3rd percentile meant that Aberdeen was worse than 97 percent of the population he was compared to.

**160**  Mr. Carlin agreed that if Aberdeen was not competitively employable it would still be important for his identity and his self image to get back into the community in a volunteer capacity. This would be the best way to enhance his self worth and maximize his mental and physical well being. He modified his opinion at trial, saying Aberdeen had potential to enter the work force, as opposed to his earlier conclusions that he had "excellent potential".

1. **Dr. Terrance Anderson, Epidemiologist**

**161**  Dr. Anderson was called by the defence to provide an opinion that Aberdeen's spinal cord injury reduces his life expectancy. But Dr. Anderson agrees that his evidence is based on averages and the best he can do for an individual is make an educated guess. Dr. Anderson wrote an article "The Underestimation of Life Expectancy in Elder Patients, the Example of Paraplegia" because both experts in a case underestimated the life expectancy of an elderly paraplegic with the result that she received half of the future care that she required.

**162**  Dr. Anderson utilized the Canada Life Tables but could not provide a satisfactory explanation for not using the BC Life Tables which produce a slightly higher life expectancy. He said he was told by someone years ago to use the Canada tables but could not remember who or exactly why, maybe something to do with medical legal opinions.

**163**  Dr. Anderson agreed that the average BC male of Aberdeen's age at the date of trial would live 27.07 years based on the BC life tables.

**164**  Dr. Anderson confirms that the whole area of predicting life expectancy of a particular individual is just an "educated guess". For example he agrees that a healthy BC male of 54 years of age would in all probability live longer than the average 27.07 years. Accordingly, Aberdeen, given his healthy life style and absence of any illnesses in his history, would likely have lived longer that than the average BC male.

**165**  Dr. Anderson agrees that the fact that Aberdeen's mother died last year at 92 years of age and the fact that his aunt is still alive at 94 years of age is a positive factor in determining how long Aberdeen will survive.

**166**  Dr. Anderson agrees that optimizing the care that a spinal cord injured person receives will, on average, extend the life expectancy.

**167**  Prior to the Accident the positive factors in Aberdeen's history would suggest that he would be far above the average BC or Canadian male in terms of life expectancy. These positive factors still exist following the Accident and with optimal care to minimize the risks associated with the spinal cord injury, there is no reason to expect that his life expectancy would be any different than before the Accident.

1. **Kathy Norton, Occupational Therapist**

**168**  Ms. Kathy Norton was qualified as an occupational therapist and as a cost of future care specialist. It should be noted that this was Ms. Norton's first cost of future care report since expanding her traditional occupational therapist training into the area of report writing and providing opinion evidence for court.

**169**  It is fair to say that Ms. Norton was reluctantly qualified as an expert. No doubt due to her limited experience in this area her evidence at times was weak and not convincing. She seemed strident in her views and unable to see any weaknesses in her report.

**170**  One could not help but be left with the impression that her approach to cost of future care was simply to look at what minimal standards Aberdeen has been existing on since the accident, and to price out those minimal needs for the future. There appears to be no detailed analysis of what medically justified expenses might be.

1. **Family and Friends**

**171**  A number of Aberdeen's family and friends testified as to Aberdeen's circumstances after the accident.

**172**  Gary Baker is a long time friend of Aberdeen. He has observed Aberdeen since the accident to be sad, to be subject to infections, and spasms which he cannot control. He further testified as to Aberdeen feeling better about his situation since he has been able to use a machine which allows him to stand up.

**173**  Phyllis DeFord has been a friend of Jim Aberdeen for 30 years. She and her husband visited Aberdeen while he was in the hospital as she described as almost every day. She described the difficulty Aberdeen experiences when he falls off his chair. She described one incident where Aberdeen fell on her and she could not get out from under him when he fell. She described Aberdeen as having a limited ability to read as he cannot concentrate due to pain.

**174**  Alferda Simpkins is the sister of Phyllis DeFord and also a long-time friend of Aberdeen. She described Aberdeen as now being very different from his former self, being withdrawn and in constant pain and as a result reluctant to leave the home. Aberdeen prior to the accident was very social, positive and active. She also describes Aberdeen as being forgetful. She has travelled with Aberdeen in her car. She described the difficulty he has in getting into a vehicle. She described the difficulty of his falling out of his chair. She described Aberdeen as having bowel and bladder accidents and how she had assisted him in cleaning up.

**175**  Jenny Aberdeen is the 28-year-old daughter of Aberdeen. She has lived with her father since the accident. She described her father since the accident as being tough to manage. Her father currently resides in a slightly renovated home, the family dining room being redesigned to act as Aberdeen's bedroom. She describes circumstances as getting more difficult for him due to his lack of concentration and describes her having to repeat things to him. She describes circumstances of him falling out of his chair and needing "two men" to get him back into it. In regards to ongoing bowel and bladder problems, she describes how there is often bleeding associated with that. She describes Aberdeen as being rarely by himself and although he attempts outside activities, they are limited because of his constant state of pain.

**176**  Ryan Aberdeen is the 27-year-old son of Aberdeen. He describes the pre-accident circumstances with his father as being exceptionally close, with him and his father actively involved in similar activities. He describes his father Aberdeen as a great guy, his best friend. Ryan Aberdeen has resided with his father since the accident and he and his sister Jenny have been the primary persons responsible for Aberdeen's care. Aberdeen has not been left alone overnight in the absence of Ryan, Jenny, or another caregiver.

**177**  Gayle Aberdeen is the former wife of Aberdeen. Despite their breakup in 1998, they have remained friends. After the accident she attended GF Strong and visited Aberdeen there and has visited regularly in the home. She has assisted him along with Jenny in doing things that he needs done around the home including laundry, housekeeping, driving him to various appointments, getting groceries, assisting in meal preparation and cleaning up afterwards. Though Aberdeen on his good days is able to wheel around, exercise, and be active, she describes his personality as one putting on a strong front but facing considerable difficulties. She has helped Aberdeen with his skin routine, ensuring that his skin is properly cared for. She has assisted him with eliminations, and has assisted in cleaning up after accidents, and has assisted him through advice on bowel and bladder matters. She described the circumstances of Aberdeen falling when she was present and how she could not get him off the floor and he could not get himself off the floor. Ryan Aberdeen had to be called for assistance. She describes her daughter Jenny as being exhausted from assisting her dad as best she can.

1. **Conclusions relating to damages**

**178**  In order to determine the appropriate benchmark for an analysis of the damages, particularly cost for future care, a determination must be made as to the life expectancy of Aberdeen.

**179**  A first issue in life expectancy is, when considering life tables, whether or not it is appropriate to use BC Life Tables or Canada Life Tables. Generally speaking, BC Life Tables are slightly higher in terms of life expectancy. I can see no logical reason not to follow BC Life Tables for a plaintiff from British Columbia.

**180**  BC Life Table based on the years 2000-2002, the most recent table, would indicate from the valuation date, being the 10th of October 2006, that someone of Aberdeen's age would have a life expectancy of 26.5 years. The previous BC Life Table, based on data collected from 1995 to 1997 would have produced a life expectancy of 25.2 years. Dr. T.W. Anderson provided evidence on behalf of the defendants. His report's final conclusion was that Aberdeen's life expectancy should be calculated at 20.5 years. Dr. Anderson's report was based on the use of the Canada Tables, not the BC Tables. Additionally, the report of Dr. Anderson underemphasized, and in fact did not consider, a number of the personal traits of Aberdeen. Aberdeen is a stoic individual who both before the injury and after has been driven to maintain as high a standard of personal health as is possible. His daily routine involves considerable exercise, despite his considerable disability. Additionally, the report did not consider the family history of Aberdeen and the evidence before me suggests a number of relatives surviving into their 80s and 90s.

**181**  Considering all of the evidence, I have concluded that the realistic life expectancy for Aberdeen is 25.2 years. This is a slight reduction from the most current BC Life Expectancy Table and reflects the negative contingencies of Aberdeen's injuries and the effect that it may have on his health.

**182**  I have concluded that it is not only a medical justification, it is a medical necessity for Aberdeen to have a substantial amount of personal care assistance. Aberdeen is able to exist on his own for a few hours a day. An acceptable level of safety would see Aberdeen on his own for three hours in the morning and three hours in the afternoon. As such, I have concluded that Aberdeen requires 18 hours a day of personal care assistance to meet his medical and physical needs and to ensure his safety. My reasons for such conclusion will be more thoroughly canvassed under the costs of future care section.

**183**  Additionally, I have concluded that Aberdeen continues to suffer from the residual effects of a mild traumatic brain injury. This is clear not only from the evidence before me, which I accept, from Dr. Izabella Schultz and Dr. Raymond Ancill, but also from the observations of Aberdeen himself while he testified. To some degree, not a lot turns on this conclusion, in that the defendants appeared to be arguing that Aberdeen does not suffer from the residual effects of a mild traumatic brain injury but rather his apparent inability to concentrate and his other cognitive difficulties likely relate to the pain he is experiencing. Either way, be it pain from physical injuries or be it the residual effects of a mild traumatic brain injury, these limitations are related to the accident.

|  |  |  |
| --- | --- | --- |
| **4.** | **Losses** |  |

1. **Non-pecuniary Loss**

**184**  Aberdeen sustained catastrophic injuries in the Accident. The effects of those injuries are permanent and impact every aspect of his life. The B.C. Court of Appeal has made it clear that in cases of "severe personal injuries" there is no basis for making fine distinctions between different types of severe injuries. Any case with devastating injuries qualifies for the upper limit of non-pecuniary damages, notwithstanding that there may be even more severe cases receiving the same damages.

**185**  In ***Spehar (Guardian ad litem of) v. Beazley***, [*[2002] B.C.J. No. 1718*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=), [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=), aff'd, [*[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=), [*2004 BCCA 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-00000-00&context=), leave to appeal to S.C.C. denied, [*[2004] S.C.C.A. No. 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B3HT-00000-00&context=), the plaintiff sustained a severe brain injury but did not sustain any significant physical injuries. The trial judge awarded the maximum non-pecuniary damages. In affirming the award, the Court of Appeal said at paragraph 14-15:

The trial judge took no time thereafter in adopting the submissions made on behalf of Ms. Spehar that her injuries "should attract the upper limit of non-pecuniary damages" of $280,000. The trial judge referred to ***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=), [*129 D.L.R. (3d) 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=), [*34 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) wherein the court, in refining the reasoning in the "trilogy" (***Andrews v. Grand and 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=); ***Thornton v. School District 57 (Prince George)***, [*[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=)), noted that the injuries suffered by the plaintiffs in the trilogy were not identical, but each received an award at the upper limit. The trial judge also noted this Court's comments in ***Blackstock v. Patterson*** [*(1982), 35 B.C.L.R. 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G14B-00000-00&context=) at 237-38, [*[1982] 4 W.W.R. 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G14B-00000-00&context=) (C.A.):

Once it was determined that the plaintiffs suffered severe personal injuries the court concluded as a matter of policy that the limit for non-pecuniary damages should be fixed at $100,000. This conclusion ... was based on the premise that in the case of all "severely injured plaintiffs", in order to avoid extravagant claims, an upper limit of $100,000 should be imposed. It follows, that even if the respondent's injuries could be said to be different from or not quite as severe as those suffered by the plaintiff in the trilogy cases, her injuries were found by the trial judge to be "devastating", and, therefore, fell within the $100,000 category fixed in ***Lindal*** and the trilogy cases.

In the case at bar the appellants draw a distinction between the injuries suffered by Ms. Spehar and the injuries suffered by the plaintiffs in the trilogy. They also cite cases in this jurisdiction wherein trial judges have awarded less than the judicial cap for extremely serious injuries. On the former, I point to the above quotation from ***Blackstock*** as an answer. On the latter, lesser awards in other cases do not dilute the principle enunciated in ***Blackstock***.

**186**  The current inflationary adjusted upper limit for catastrophic claims is $311,000.

**187**  Counsel for the plaintiff urged me to consider the language of Dickson J. as he then was in the ***Andrews*** case. In that case, Dickson J. opines that in "most" cases of catastrophic loss $100,000 was the rough upper limit. Counsel for the plaintiff urged me to consider the fact that not only has Aberdeen suffered a catastrophic loss due to his injuries, he suffers even more than the plaintiff did in ***Andrews*** in that he has the ongoing additional difficulty of chronic neuropathic pain. In fact, the suggestion is that in a number of strictly chronic pain cases, absent the significant physical difficulty of a spinal cord injury, an award close to the rough upper limit for pain and suffering has been granted.

**188**  There is some strong attraction to this argument put forward by the plaintiff. However, I am bound by the reasoning of Madam Justice Rowles in the recent Court of Appeal decision in ***Lee v. Dawson*** [*(2006), 51 B.C.L.R. (4th) 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1MJ-00000-00&context=), [*2006 BCCA 159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1MJ-00000-00&context=) (see paragraph 90), leave to appeal to S.C.C. refused, [*[2006] S.C.C.A. No. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SG1-JWBS-64YT-00000-00&context=). In light of ***Lee v. Dawson***, in British Columbia, it is not possible to consider an award above the rough upper limit. I assess non-pecuniary loss at $311,000.

1. **Past Wage Loss**

**189**  At the time of the Accident in 2002, Aberdeen was 50 years old. He was working as a full-time transit operator with Coast Mountain Bus Company.

**190**  Mr. Robert Carson of the firm Associated Economic Consultants Ltd. provided a report dated July 17, 2006 detailing Aberdeen's estimated past without accident income from 2002 to 2006. Based on the figures set out in Mr. Carson's report, Aberdeen's past wage loss is $255,415.00 which is reduced to $153,249.00 after a 40% reduction pursuant to ***Hudniuk v. Warkentin***.

**191**  In response to the report of Robert Carson, Mr. Marc Szekely provided a report for past wage loss. The report of Mr. Szekely was however, based on a reduced annual salary for Aberdeen. In determining a yearly income, Mr. Szekely included in the average the actual income earned by Aberdeen in 2001, a year in which there was a strike. His calculation was as such based on a principle that there would lost work time every 4 1/2 years due to a strike. Interestingly, if that was the case, in the 4 1/2 years since the accident, that evidence could have been provided to the court and it was not. Based on that calculation difficulty, if not error, I prefer the report of Robert Carson. I would assess Aberdeen's wage loss at $153,249 after taking into account the ***Hudniuk v. Warkentin*** factors ([*(2003), 9 B.C.L.R. (4th) 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=), [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=)).

1. **Future Wage Loss**

**192**  I accept that there is considerable difficulty, verging on impossibility, of Aberdeen ever being employed. His daily routines require him to spend a number of hours in the morning for preparation for his day, exercise, and the like, all of which make him ever achieving work dependent on an incredibly flexible employer who is prepared to recognize that at potentially regular intervals, it would be impossible for Aberdeen to attend and do his job.

**193**  Additionally, I conclude that Aberdeen continues to suffer from the effects of the mild traumatic brain injury. This would make any training and retention a considerable difficulty. I do not accept on the evidence that Aberdeen can be employed. I accept that he is competitively unemployable.

**194**  For the same reasons as noted above, I prefer the evidence of Mr. Robert Carson in regards to the loss of future income over that of Mr. Marc Szekely.

**195**  Aberdeen is not competitively employable. While there is hope that he will re-engage into the community with the appropriate assistance as contemplated by Ms. Baptiste, the best that can be hoped for is that he will find some volunteer work that will provide him with some enjoyment and sense of accomplishment.

**196**  Mr. Carson estimates the present value of Aberdeen's future without injury loss of income at $502,381.00 inclusive of future loss of pension benefits to age 63 as a bus driver. Based on the evidence before me, I consider it highly probable that Aberdeen would have worked until age 63. I also consider highly probable that after age 63 Aberdeen would have continued part-time work. However, considering other potential negative contingencies, no amount is provided for this future positive contingency.

**197**  I determine the loss of future wages including pension benefits to be $502,381.

1. **Cost of Future Care**

**198**  As noted earlier in the discussion around damages generally in these Reasons, I have concluded that full compensation as espoused in ***Andrews*** and ***Milina*** requires that there should be medical justification for a cost of future care expense and the expense must be reasonable. As I noted, the inquiry is more directed to the fact-based determination of whether each individual item claimed for a cost of future care expense is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. I have rejected any suggestion that medical necessity is the test; rather it is one of medical justification.

**199**  The Court in this case is faced with two very different approaches to the cost of future care. These two distinct approaches are found in the report of Barbara Baptiste of Rehabilitation Management Inc. and Kathy Norton of Progressive Rehabilitation Orien Health.

**200**  I have a number of significant concerns with the report of Kathy Norton and the evidence of Kathy Norton. Though seemingly well-meaning, Ms. Norton's approach to the preparation of a cost of future care report appears to be naive and minimalistic. In her testimony, Ms. Norton appeared to be of the view that the plaintiff would, with minimal assistance be in a much more active or advanced position in terms of assisting in his own care, than appears at present. There is a suggestion in her evidence that Aberdeen could learn to get himself off the floor and back into his chair in the event he was to fall.

**201**  This is inconsistent with the entire medical evidence and inconsistent with Aberdeen's experience to date as noted by him in his evidence as well as those who testified who had to assist him in getting off the floor as a result of a fall in the past.

**202**  Additionally, Ms. Norton appears to be of the view that Aberdeen would be able to learn to get himself into his car and dismantle his own chair, something that he from all other evidence appears incapable of doing.

**203**  There is no evidence at all to suggest that Aberdeen is not doing the best he can in his circumstances, and in fact Aberdeen is regularly exercising and appears to be diligent in his efforts to obtain as much physical strength as possible with his considerable disability. It is hopelessly naive, in my view, for one to base the cost of future care report on a patient being able to do physical activities which he clearly cannot do.

**204**  Additionally, some of the costing in Ms. Norton's report would, frankly, be comical if it was not for the significant consequences of one's reliance on it would be. For example, it is not disputed by any party that Aberdeen's current home is inadequate for his needs. I will deal with this issue in more detail later on in this section on costs of future care. The plaintiff and the defendants collectively have provided the court with evidence of what they feel is the cost of replacement housing for Aberdeen is. Both agreed that some component of moving costs is necessitated by the need to find alternative accommodations.

**205**  Ms. Norton's allocation for moving expenses in her cost of future care report is $500.

**206**  It is hard to imagine how even an able-bodied individual could pack, move, and unpack a household for $500. On this point, despite extensive cross examination, Ms. Norton could not bring herself to resile from her report, her assessment of quite frankly, a preposterously low estimated cost.

**207**  This was Ms. Norton's first cost of future care report. Under cross examination, she admitted to not having consulted any textbooks on the preparation of a cost of future care report.

**208**  I find her report to be based on hopelessly naive assumptions about Aberdeen's abilities and I find her summary of costs woefully inadequate.

**209**  In contrast, I find the report of Ms. Baptiste to be well thought out, and much more reflective of the tests in law, which is what costs are medically justified for this plaintiff in light of the injury caused to him by the ***negligence*** of the defendants. There are however a number of items from Ms. Baptiste which, in meeting the medical justification test, must be "backed out" of her costing estimate.

**210**  I accept the recommendations of her report dated the 29th of June 2006, less the items to be backed out from it.

**211**  Having considered the medical evidence and the evidence of the friends and family of Aberdeen who witnessed his circumstances, there are a number of conclusions that can be drawn as it relates to damages. One particularly contentious claim was the plaintiff's request for the provision of a 24-hour personal support care worker.

**212**  Despite Aberdeen's almost heroic efforts of maintaining a quality lifestyle and being stoic in the face of considerable adversity, I have concluded that Aberdeen is a person very much in need of personal support care assistance. Aberdeen has relied on this support assistance, provided voluntarily by friends and family since the accident. Aberdeen has attempted through regular physical exercise and considerable discipline to try to improve his circumstances. He is, four-and-a-half years post-accident, still in a circumstance where he is unable to care for himself without considerable support.

**213**  Though able to drive, having obtained a license, Aberdeen cannot get in and out of a traditional vehicle on his own. Though able to provide himself with minimal food preparation, he cannot shop for groceries, and he cannot provide himself on his own with complex meals important for balanced nutrition.

**214**  Due to his physical limitations, he cannot clean up after himself if he has a bowel or bladder accident. These are unfortunately relatively common occurrences.

**215**  In terms of maintaining a home, he cannot maintain a home and the level of cleanliness necessary for someone subject to infections and illnesses as a result of his limited physical ability.

**216**  Additionally, and of a great concern, is the injury on one occasion that Aberdeen caused himself in attempting to sterilize catheters. He accidentally burned himself significantly with hot water and was only sensitive to this once sores and scars developed as a result of the burn.

**217**  The costing of the claim for future care in the Barbara Baptiste report is found in the report of Robert Carson of Associated Economic Consultants Ltd. dated July 14, 2006. Based on the determination of Aberdeen's life expectancy at 25.2 years from the assessment date in October 2006, I accept the costs set out in the report of Robert Carson.

**218**  The total of that report is (CDN) $5,021,538, $259,966 in GST and PST, and (US)$57,085. Noted below in these Reasons as Table 1 are the expenses which I would back out from this costing report.

**Table 1: Cost of Future Care Items from Report of Barbara Baptiste, as costed in Report of Robert Carson (July 14, 2006) not allowed**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **No. Item** | **$ Cost** |  |
|  | **PST/GST** |  |  |

**Medical Needs:**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 1. |  | Urologist | (3 years) | 720 |  |
|  |  |  | (Onward) | 1,125 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Psychiatry | 5,970 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | Psychological Counselling - Family |  |  |
|  |  | (2 years) | 3,169 |  |
|  |  | (Onward) | 16,959 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4. |  | Registered Nurse Services **1** | 19,866 |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 5. |  | Acupuncture | (3 years) | 3,163 |  |
| 190 |  |  |  |  |  |
|  |  |  | (Onward) | 7,409 |  |
| 445 |  |  |  |  |  |

**Rehabilitation Support Services:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 6. |  | Cost of care assessed at age 65 | 3,770 |  |
| 226 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 7. |  | Kinesiologist supervision | 59,258 |  |
| 3555 |  |  |  |  |

**Personnel Care Support:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 8. |  | Personal Support Worker **2** | 725,443 |  |
| 43,527 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 9. |  | Childcare grandchildren | 3,200 |  |
| 192 |  |  |  |  |

**Equipment and External Aids/Devices:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 10. |  | Seating Assessment (Manual Wheelchair) | 5,781 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 11. |  | Environmental Control Unit | 44,869 |  |
| 5883 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 12. |  | Computer/Monitor/Printer | 5,865 |  |
| 763 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 13. |  | Internet Service | 5,228 |  |
| 317 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 14. |  | Tens Unit (Combined costs) | 2,274 |  |
| 297 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 15. |  | Computerized Electrical Standalone device | 27,885 |  |
| 1673 |  |  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 16. |  | Therapy Pool **3** | (USD) (57,084) |  |

**Educational and Vocational Support:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 17. |  | Educational Consultant | 15,922 |  |
| 955 |  |  |  |  |

**Transportation:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 18. |  | Taxi Services | 107,185 |  |

**Living Arrangements:**

|  |  |  |  |
| --- | --- | --- | --- |
| 19. | Home Modification Assessment | 6,468 |  |
| 388 |  |  |  |
|  |  | 1,071,589 |  |
| 58,411 |  |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total Reduction (Cdn$) | 1,130,000 |  |
|  | Total Reduction (USD$) | 57,084 |  |

Notes:

**1** Nursing Services allowed at one-half of claim, reduction from

Cost Report of $19,866.

**2** Personal Support Worker allowed at three quarters of claim (18

hours a day), reduction from Cost Report at $725,443 plus $43,527

taxes.

**3** Therapy Pool is US dollars, reduced from Cost Report

**219**  The net effect of my eliminating the costs in Table 1 are that the cost of future care total (CDN) $3,949,949 plus $201,605 in GST and PST, no US dollar component, for a total of $4,151,504. A short explanation for the expenses removed from the costing of the Barbara Baptiste report is as follows:

1. Urologist expense. This is covered by BC Medical Plan.
2. Psychiatry. If necessary this can also be covered through the BC Medical Plan.
3. Psychology counselling family (family/group). The cost of future care for Aberdeen will include personal counselling but not that for his family.
4. Registered Nurses services. I would allow only $19,866, one-half of the claim costs for a savings of $19,866, some registered nurse services can be provided by the public health system but it will be necessary in my view for additional support services especially in the latter stages of Aberdeen's life.
5. Acupuncture services. Aberdeen indicated that he tried these as a pain control system and it was of no use to him.
6. Cost of care assessment at age 65. This is an unnecessary expense.
7. Kinesiologist supervision. This is an unnecessary expense. Aberdeen is capable of planning his exercise routine and implementing same.
8. Personal Support Worker. I would allow 18 hours a day for a personal support worker. This would require Aberdeen to essentially be on his own for three hours in the morning and potentially three hours in the afternoon each day. It is crucial in my view that Aberdeen have assistance for evening times, particularly in light of his need to regularly adjust himself while sleeping. Although he is currently able to achieve this, it is in my view unlikely with aging that he could continue to do this. I would allow 18 hours a day of care for a personal support worker which would result in a reduction of $725,443 from the cost of the report.
9. Child Care Costs for Grandchildren is not appropriate.
10. Seating Assessment for Manual Wheelchair. This is available through GF Strong.
11. Environmental Control Unit. This is an unnecessary expense with a reconstructed home and regular assistance from a personal support worker. This is unnecessary.
12. Computer Monitor, Printer and Internet Services. These are expenses which Aberdeen would have incurred in any event and are not related to his injury and are therefore not compensable to him from the defendants.
13. Expenses related to the TENS Unit. This is an unnecessary medical expense although low cost.
14. Computerized Electrical Stimulation device. This is an experimental item of no appreciable benefit or justification and should not be included.
15. Therapy Pool. This is an unnecessary expense. Aberdeen with the assistance of his personal support worker can attend a public pool for such activities. The benefits of this involve further interaction into the community which will be of the long term benefit to Aberdeen.
16. Education Consultant. Although study programs and vocational counselling are of a benefit, further education is not appropriate or required.
17. Taxi Services. This would be an unnecessary expense in light of the assistance to be provided through a modified van and the assistance of a personal support worker.
18. Home Modification Assessment. This is an unnecessary expense in light of the new construction of a home called for in these reasons.

**(v) Cost of Care - Home Replacement**

**220**  Aberdeen's current home is a two-storey home which has the bedrooms on the upper floor. These are clearly inaccessible for Aberdeen. Although there was no direct concession on this point, the defendants do not appear to dispute that Aberdeen's home will have to be replaced-the cost of modification being impractical or prohibitive.

**221**  As noted earlier, Aberdeen's friends have modified his home to create a bedroom for Aberdeen in what was previously the dining room of the home on the main floor. Additionally, the bathroom has been modified and a number of ramps have been included.

**222**  Two experts provided evidence in regards to a replacement home for Aberdeen. The plaintiff called Richard E. Galan. His report costed out the billing costs of a 3739 square foot modified rancher style home with a 600 square foot garage, 150 square foot deck and 150 square foot patio. The floor area of the home was designed in such a way to provide the additional space required for the operations of a wheelchair. The home had a master bedroom and four other bedrooms as well as caregiver's living space.

**223**  The second expert called on behalf of the defendants was Edward deGrey. Mr. deGrey's report takes the approach of the purchase of 2300 square foot bungalow or one level home and modification of it with the addition of approximately 450 square feet.

**224**  The two reports represent two different approaches. Both approaches have their limitations.

**225**  Beginning with the Galan approach, although the approach is rational, the home proposed by Galan is far beyond what is required for Aberdeen. Realistically, Aberdeen needs a home with a master bedroom, one guestroom, and space for a caregiver. The evidence before me suggests that both of his children, Ryan and Jenny Aberdeen, are in the process of getting on with their lives and will shortly be moving out of the home, provided there are adequate caregivers in place for their father.

**226**  The positive side of the Galan report is the thorough way in which Galan has calculated the costs of miscellaneous architectural considerations necessary for a home for someone with a disability at the level of Aberdeen. This includes kitchen modifications, wall protectors, high traffic non-skid flooring, automatic door openers, and numerous bathroom, hallway, and landscape modifications.

**227**  The limitations of the deGrey report appeared to be that it is really based on the assumption of a suitable 2300 square foot being available with the possibility of modification for the addition of a further 450 square feet. deGrey conceded in cross examination that no such home was available in Aberdeen's neighbourhood to suit that purpose.

**228**  In addition, deGrey appeared to take a somewhat unique approach to the needs of Aberdeen, and the costing of such. Frankly, in cross examination, deGrey appeared belligerent and hostile to suggestions posed to him. He simply dismissed a number of the modifications in the Galan proposal as being too expensive and seemed to focus on costs and cost savings rather than what was reasonable for the needs of someone with Aberdeen's level of disability and his medical needs and needs for care. At one point, deGrey went so far as to question why certain house plans were not provided to him, commenting that it was curious that plaintiff's counsel had not provided such. These remarks by deGrey were inappropriate and unfortunately leads one to conclude that he was acting more as an advocate for his position than as a true expert.

**229**  I preferred the Galan approach to the replacement of Aberdeen's home with the following limitations. I would reduce the proposed living room size to 220 square feet for a reduction of 40 square feet. I would eliminate the 3rd and 4th bedroom as well as the guest bedroom for a saving of 552 square feet, and as such revise the proposed designed residence to 2364 square feet, which, when one adds the ten percent addition for design, construction (236 square feet) and the fifteen percent increase for hall circulation (355 square feet) gives a total floor area of 2955 square feet.

**230**  Additionally, I would reduce the architectural and design fee component to twenty percent or $67,500, based on a total construction cost of $335,500. As such, the total cost for construction prior to special construction equipment and fixture costs would be $405,000.

**231**  In regards to the special construction equipment and fixture costs, I would again reduce the architectural fees to twenty percent and reduce the various costs claimed to reflect the reduced square footage of the home, reduced as such from 3739 square feet to 2955 square feet. This would mean that the additional costs that he sets out as Table C expenses in his report would be $82,231 plus $16,446 for the twenty percent architectural and other fees which, when added to the $405,000 equals a total construction costs for the new residence of $503,667.

**232**  Based on the appraisal information available, which is the appraisal of Aberdeen's current home, one can estimate that the cost of a lot would be $325,000. As such a new home and lot would cost $828,647.

**233**  The value of Aberdeen's current home must be subtracted from the cost of the replacement home. His current home is appraised at $465,000 which, with the reduction for real estate commission (7% on the first $100,000, 31/2% on everything thereafter, plus 6% GST equals $20,962) would leave a net receipt to Aberdeen from the sale of his home of $440,038.

**234**  As such, the cost to provide Aberdeen with a modestly sized home fit for his needs, on a lot equivalent to his current property and after considering the resale value of his home, would be $388,639. As such I award damages to Aberdeen for home replacement in the amount of $388,639.

1. **In Trust Claim**

**235**  In considering the in trust claim, I turn to the analysis of Harvey J. in the ***Brennan*** case (***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=) (S.C.)). In paragraph 95 of that decision, Harvey J. stated as follows:

95 In my view, it is useful to review briefly the factors which are considered in the assessment of such claims. They are:

1. where the services replace services necessary for the care of the plaintiff;
2. if the services are rendered by a family member, here the spouse, are they over and above what would be expected from the marital relationship?
3. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship;
4. it is no longer necessary that the person providing the services has foregone other income and there need not be payment for such services.

**236**  This case clearly upholds the principle of full compensation in quantifying the value of the contributions of family members. Damages should be awarded based on the market value of services provided. This case is however somewhat unique in that regard. A substantial amount of personal services have been provided to Aberdeen over the course of 48 months, from the time he left GF Strong until the valuation date at trial in October 2006, by family members who reside with him and by doing so, reduce their costs.

**237**  His daughter Jenny Aberdeen lives at home with her father and does not pay any rent. Her expenses are provided by him. She has however dedicated much of her time to assist in the care of her father.

**238**  The plaintiff's son Ryan Aberdeen resides at home and pays a nominal amount of rent. He assists to some degree in the home and is completely responsible for the outside care of the home. In addition he is a general caregiver for his father as is his sister Jenny.

**239**  Additionally, Aberdeen's estranged wife Gail Aberdeen has provided substantial care. She is coincidentally employed as a home care worker, earning approximately $15 an hour. The number of hours that she has spent in providing care to Aberdeen has varied over time. In the beginning it was as much as 10-15 hours a week, and it has gotten less since that time. Much of Aberdeen's success in recovering as best he can from the injuries sustained in the accident is a credit to Jenny, Ryan and Gail Aberdeen as well as the numerous close friends who have assisted Aberdeen in his recovery. The law provides for family members to advocate an in trust claim. I would calculate that claim as follows:

1. Jenny Aberdeen - $1,000 per month;
2. Ryan Aberdeen - $500 per month; and
3. Gail Aberdeen - $500 per month.

The total is $2,000 per month. That calculated over 48 months totals $96,000.

1. **Special Damages**

**240**  The parties have agreed on special damages at $45,000.00. The plaintiff is entitled to judgment in that amount for special damages.

|  |  |  |
| --- | --- | --- |
| **5.** | **Conclusions** |  |

**241**  I conclude that the Zanatta Defendants and Langley have both breached their duty of care to Aberdeen and Aberdeen has suffered a loss as a result. I apportion liability as between the two defendants 25% to the Zanatta Defendants and 75% to Langley.

**242**  Damages are assessed as follows:

1. Non-pecuniary loss: $311,000
2. Past wage loss (after applying ***Hudniuk***): $153,249
3. Future wage loss: $502,381
4. Cost of future care: $4,151,504
5. Cost of care - Home replacement: $388,639
6. In trust claim: $96,000
7. Special damages: $45,000

**243**  Thus, total damages are assessed at $5,647,773. Aberdeen has been successful and he is entitled to his costs on Scale B. If there are circumstances, of which I am unaware, counsel are at liberty to return to me on the issue of costs, as can be arranged through Trial Division.

GROVES J.

**End of Document**

[***Lock v. Floreani, [2017] B.C.J. No. 1483***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P5F-CKX1-DYFH-X092-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: February 20, 22-24, 27-28, March 1, 2017.

Judgment: July 27, 2017.

Docket: M153081

Registry: Vancouver

**[2017] B.C.J. No. 1483** | [*2017 BCSC 1313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R56-8V41-F22N-X3NT-00000-00&context=)

Between Teresa Lock, Plaintiff, and Ayodele Floreani, Defendant

(266 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Action by plaintiff for damages for injuries sustained in motor vehicle accident allowed — As plaintiff proceeded through intersection, she struck defendant, who was making left turn — Defendant was fully liable for accident as it was her failure to give way to plaintiff that caused accident — Plaintiff experienced soft tissue injuries, which resulted in chronic pain — Plaintiff entitled to non-pecuniary damages of $115,000, past wage loss of $54,689, $159,000 for loss of future earning capacity, $16,100 for costs of future care for the next five years and $1,876 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Contingencies — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Expenses and expenditures — Non-pecuniary loss — Action by plaintiff for damages for injuries sustained in motor vehicle accident allowed — As plaintiff proceeded through intersection, she struck defendant, who was making left turn — Defendant was fully liable for accident as it was her failure to give way to plaintiff that caused accident — Plaintiff experienced soft tissue injuries, which resulted in chronic pain — Plaintiff entitled to non-pecuniary damages of $115,000, past wage loss of $54,689, $159,000 for loss of future earning capacity, $16,100 for costs of future care for the next five years and $1,876 in special damages.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — Breach of rules of the road — Causation — Action by plaintiff for damages for injuries sustained in motor vehicle accident allowed — As plaintiff proceeded through intersection, she struck defendant, who was making left turn — Defendant was fully liable for accident as it was her failure to give way to plaintiff that caused accident — Plaintiff experienced soft tissue injuries, which resulted in chronic pain — Plaintiff entitled to non-pecuniary damages of $115,000, past wage loss of $54,689, $159,000 for loss of future earning capacity, $16,100 for costs of future care for the next five years and $1,876 in special damages.**

|  |
| --- |
| Action by the plaintiff for damages for injuries sustained in a motor vehicle accident. The plaintiff was driving in the HOV lane. Other lanes of traffic travelling in the same direction were congested and, as a result, were stopped at an intersection. As the plaintiff proceeded through the intersection, she struck the defendant, who was making a left turn. Immediately after the accident, the plaintiff experienced confusion and pain in her arm. She later experienced pain in her neck and back. She was given medications for pain, underwent physiotherapy and took time off work. At the time of the accident, the plaintiff was 41 years of age and was employed as a lab analyst. Her job was significantly physical. The plaintiff enjoyed physical activities such as hiking, biking and skiing. After taking some time off work, she returned to work on a graduated plan. Returning to work caused her pain and she made numerous mistakes because of her confusion. When she returned to fulltime work she was given light duties, but continued to experience pain. She was less productive and turned down overtime work. She eventually accepted a severance package from her employer and obtained EI benefits. The plaintiff was unable to participate in the recreational activities she previously enjoyed.  HELD: Action allowed.  The defendant was fully liable for the accident. The defendant, as the servient driver, was obligated to stop for oncoming traffic that constituted an "immediate hazard". The plaintiff's failure to slow down did not make her contributorily negligent. She was not obligated to foresee every possible risk that could exist as she proceeded through traffic. As a result of the accident, the plaintiff experienced soft tissue injuries which caused pain in her arm and back and result in chronic pain. The plaintiff was entitled to non-pecuniary damages of $115,000. In addition, she was entitled to past wage loss of $78,127 less a 30 per cent contingency for the likelihood she would have left her job in any event following her relocation. As a result, she was awarded damages for past wage loss of $54,689. While the plaintiff could not take advantage of all job opportunities that might have otherwise been available to her, she was capable of working at least part-time and her decision to leave her employment was a breach of her duty to mitigate. As a result, she was awarded damages of $159,000 for loss of future earning capacity. The plaintiff was also awarded damages of $16,100 for costs of future care for the next five years, including the cost of kinesiology, physiology, massage therapy, gym membership and medications, and $1,876 in special damages. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 174*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0H8-00000-00&context=)

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**Introduction**

**1**  On May 2, 2013, the plaintiff, Ms. Teresa Lock, was driving to work with her carpool companion, Rob McArthur, in Port Moody, British Columbia. It was approximately 7:00 a.m. and she was in the HOV lane, the curb lane, heading west on St. Johns Street. As she proceeded to enter the intersection of St. Johns and Williams Street, the defendant, Ms. Ayodele Floreani, was approaching the intersection eastbound on St. Johns and turning left onto Williams. As the defendant completed her left turn, the plaintiff collided with the defendant's vehicle, hitting its right rear quarter panel (the "Accident").

**2**  The road conditions were good. It was overcast but dry.

**3**  The plaintiff was driving a 2003 Volkswagen Golf and was wearing her seatbelt.

**4**  The front air bags deployed in the plaintiff's car. Her car was sufficiently damaged so as to be written off.

**5**  There are three lanes of through traffic on each side of that intersection. As well, there is a left turn lane.

**6**  During weekday mornings, traffic is often congested in St. Johns' centre lanes. On the morning the Accident occurred, the non-HOV westbound lanes were stopped behind the traffic line so as to avoid blocking the intersection.

**7**  The plaintiff's HOV lane was clear and she estimates that she was travelling at about 50-60 km/h.

**8**  As the plaintiff approached the intersection, she took her foot off the accelerator but did not brake.

**9**  Neither party saw the other in time to avoid the collision.

**Issues**

**10**  The issues to be determined in the case at bar are as follows:

1. liability and damages;
2. if she was not liable, any contributory ***negligence*** on the plaintiff's part; and
3. if there is entitlement, the quantum of damages for non-pecuniary damages, past loss of wages, loss of future capacity, cost of future care, loss of housekeeping capacity, and special damages.

**Liability**

**11**  The intersection where the Accident occurred is a busy one. The Accident occurred during rush hour and the volume of traffic in the non-HOV lanes did not permit the cars to clear the intersection on the green light. Consequently, they were stopped behind the stop line.

**12**  Ms. Ludwig, a witness who was in the lane to the left of the plaintiff, saw the defendant move slowly through the intersection as she made her left turn.

**13**  Ms. Ludwig did not suggest that the defendant was driving fast despite the plaintiff's comment that the defendant's car came out of nowhere.

**14**  The visibility of the intersection was not particularly good for either party. Ms. Lock's view to her left was blocked by traffic and Ms. Floreani's view of the HOV lane occupied by Ms. Lock was also blocked by the same traffic.

**15**  Since Ms. Floreani was making the left turn, it was her obligation to be certain there was no approaching car that would be an "immediate hazard".

**16**  In the case of *Williams v. Foster*, [*2012 BCSC 598*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3FJ-00000-00&context=), the defendant made a left turn from Broadway onto Glen Drive without stopping to determine whether there were any oncoming vehicles. At paras. 11 and 12 of *Williams*, Wong J. noted as follows:

[11] Mr. Bariana commenced his left turn when both the left and middle oncoming travelling lanes of traffic facing him at Glen Drive were stopped because of the traffic jam both east and west of that intersection. He made a continuous left turn without stopping, before entering the oncoming curb lane. He should have stopped to ascertain whether there was indeed any oncoming traffic, as the other two lanes of traffic would clearly obscure his line of vision. His failure to do so caused the collision. The traffic control signal was green and the plaintiff, travelling in the oncoming curb lane, was an immediate hazard if he continued to cross into the curb lane.

[12] As driver in the servient position, he failed to yield the right-of-way ... and is wholly liable for that collision.

**17**  Ms. Floreani's evidence was that she proceeded with care and, although she could not see the HOV lane, by the time she was crossing it onto Williams, she believed that, if there were a car coming through, it would have to stop for her.

**18**  She was not correct in that view. She was the servient driver and so was obligated to stop for oncoming traffic that constituted an "immediate hazard".

**19**  The secondary issue here is whether the plaintiff's failure to slow down and brake as she approached the intersection contributed to the collision, thus making her contributorily negligent.

**20**  The plaintiff is not obligated to foresee every possible risk that could exist as she proceeds through traffic.

**21**  In my view, requiring a plaintiff in a through lane, proceeding on a green light, to slow down and apply her brakes on the possibility that a servient driver could be turning left in front of her, would amount to a "counsel of perfection". As such, I conclude that such a finding is not reasonable. Beyond approaching the intersection cautiously, there was no requirement on the plaintiff to apply her brakes or slow down significantly.

**22**  Ms. Floreani was ticketed for failing to yield the right of way on a left turn (s. 174 of the *Motor Vehicle Act*, R.S.B.C. 1996. c. 318). I do not take anything from this except that I agree that it was her failure to give way to the plaintiff that caused the Accident.

**23**  I find the defendant fully liable for the Accident.

**Facts**

**24**  Ms. Lock was born in 1978 and is a 1998 graduate of a diploma program in wastewater technology. She is currently 41 years old.

**25**  At the time of the Accident, she was employed by Maxxam Analytics, ("Maxxam") an analytical testing laboratory, as a lab analyst. She began working for Maxxam in 2000, and was a senior employee there until 2015.

**26**  Her job at Maxxam required her to exercise her analytical skills to assess and process samples using several different instruments.

**27**  In the course of dealing with these samples, she first prepared them, then processed them, and then produced an analysis for the company's clients. This was a significantly physical job, requiring her to lift large bottles of fluid, uncap them and pour them as needed. She worked under an extraction hood where she could not pull the samples toward her, but had to lift them. As such, her job involved repetitive movements with both her hands. Her posture was hunched in order to work under the hood and to use a microscope. Speed was often important in processing the samples, as there was pressure to complete the analysis quickly.

**28**  The plaintiff's job was unionized. The collective agreement made overtime mandatory. However, this overtime was to be offered in order of seniority. As a result, she often worked overtime, particularly in the summer.

**29**  At her company, she was one of three people qualified to do mobile lab analysis.

**30**  Maxxam has two mobile labs that travel to remote locations to do lab analysis in the field. The mobile lab analyst job is not only intense, but it also garners substantial overtime. Ms. Lock would provide vacation relief for this position and would occasionally work in the third mobile lab if required. She enjoyed the pressure dynamics of the mobile lab work.

**31**  While in the field working in the mobile lab, her accommodation costs would be covered. The accommodations were not fancy, consisting of an Atco trailer, but she would at least save the cost of her board.

**32**  Ms. Lock grew up in Nelson, B.C., where she took full advantage of many opportunities to engage in physical activities, such as hiking, biking, and skiing. She was also a dancer and "loved to move".

**33**  She continued her active lifestyle after she moved to Vancouver to work for Maxxam and took up running, running five to seven kilometres three times a week after work. Running served to relieve her stress.

**34**  An enthusiastic motorcyclist, she enjoyed riding on weekends, taking trips to the Sunshine Coast, the U.S., the Fraser Valley, and Vancouver Island. She felt it allowed her to access a meditative state.

**35**  Her fiancé, Vince Hilgerdenaar, participated in this active lifestyle with her. They would go hiking and mountain biking together on the weekends.

**36**  On vacations, they "overlanded" - a type of self-sufficient camping in remote areas. This type of camping involves driving to campsites on service roads in a 4-wheel drive vehicle, setting up camp and then hiking the local trails. Needless to say, this is an activity that demands substantial endurance from participants.

**37**  Ms. Lock insisted on a 50/50 division of labour, not only during this type of camping, but in all the activities she enjoyed with Mr. Hilgerdenaar.

**38**  Travelling was another activity Ms. Lock enjoyed. She would backpack with a friend, carrying a substantial load, stay in youth hostels and thoroughly explore whatever region she was visiting. She saved carefully to be able to enjoy trips and took one every two years. She has visited Scotland, Greece and Spain with the same friend, Senya Kylmala. Had she not been injured, it was her plan to continue to travel with this friend.

**39**  Pre-accident, being physically fit was an important part of Ms. Lock's life and she took pleasure in strenuous outdoor activities.

**The Effect of the Accident**

**40**  Immediately after the collision, as she sat in the car, Ms. Lock felt pain in her left arm, was confused, and was unable to assess the passage of time.

**41**  She does not believe she suffered a loss of consciousness.

**42**  When first responders arrived at the scene, they held her head in a C-spine position, helped her out of her car, and put her on a spine board. She was taken to hospital by ambulance.

**43**  She was sent home after having spent most of the day in hospital, where she had x-rays, was given painkillers, and had a tetanus shot.

**44**  She remained confused and "shocky", was unable to process the passage of time and suffered pain in her back and neck.

**45**  The day after the Accident, a doctor she attended prescribed two weeks' absence from work and gave her a prescription for Naproxin, an anti-inflammatory and painkiller.

**46**  She went to her own doctor one week after the Accident. She was prescribed a number of medications including Kerolac, an anti-inflammatory and painkiller, Tylenol 3s for pain, and cyclobenzaprine, a muscle relaxant. The medications relieved her pain but she felt groggy and sluggish.

**47**  Her doctor advised that she take 30 days off work. During that time she consulted a physiotherapist whom she saw twice a week.

**48**  She worked hard to follow the advice she was given. She walked a bit every day but found it a struggle.

**49**  Her normal activities of daily life ("ADL") were causing Ms. Lock great difficulty. She was not able to walk, stand, or go grocery shopping without serious pain. She was regularly taking painkillers. Her sleep was interrupted because she could not get comfortable.

**50**  The prospect of returning to work was daunting but both her doctor and Maxxam's disability insurer were insistent that she try.

**51**  The insurer (Banyan) did not consult with the plaintiff about the graduated return to work it proposed. Banyan's plan was for a full-time return to work by July 2013.

**52**  She returned to work in July 2013 on a schedule of two hours a day, four days per week with Wednesdays off. She drove herself to work. Returning to work caused her pain: her entire left arm burned and her mid-back was sore and stiff.

**53**  She was assigned to the task of checking the other analysts' data. However, she found that she was making mistakes, including confusing output and input, which resulted in inaccurate reports to clients.

**54**  In the evenings, she was exhausted. She did not expand her graduated return to work to four hours, which is what her original return plan had entailed. In November, she was still struggling with her work assignments. She was worn out by the end of each day and stayed largely sedentary on the weekends to recover.

**55**  Her return to full-time work occurred in December 2013 when Banyan advised her by letter that her graduated return to work was over, and so she was required to return to work on a full-time basis. She was still suffering intense left arm and mid-back pain but felt she had no choice but to return to work full-time.

**56**  Her then boyfriend, Mr. Hilgerdenaar encouraged her to go for short walks. She rested and took painkillers during weekday evenings.

**57**  She attended physiotherapy once a week for five months or so. After her physiotherapy ended in February 2014, she performed those exercises at home. She subsequently went to a kinesiologist for more active therapy.

**58**  On her return, Maxxam accommodated her with light duties. However, she was still lifting and moving large containers of solvent, helping prepare samples, and doing gas chromatography, which required the use of both arms. She estimates she was doing about 35-40% of her normal duties.

**59**  Her co-workers helped her with heavier tasks. Despite this assistance, her normal ADL were still problematic and causing her pain. By 2014, she saw minimal improvement. She could stand, her cognitive confusion had abated, but the passive therapies she was using only accorded her short-term pain relief. She saw a chiropractor, a massage therapist and an acupuncturist.

**60**  She continued with light duties but still found she had difficulty with the numbers part of her job. The numbers seemed to meld in front of her eyes and her ability to focus was reduced.

**61**  Ms. Lock had always loved to read and, to her delight, she was able to read again by 2014. However, she could only read teenage novels, as they were at a level she could process.

**62**  Emotionally, she was frustrated, depressed, and angry that she could not speed the process of healing her body.

**63**  She was improving somewhat since her headaches and accident-related neck pain resolved after about five to eight months following the Accident.

**64**  At work, she was not performing her full job. Her output of processed samples declined to 20 to 40 per day from her pre-Accident output of 40 to 80 per day.

**65**  She found the preparatory work for processing samples impossible. Hunching over the samples under the fume hood, lifting the 250 ml glass bottles, capping and uncapping them, caused her pain and exhaustion.

**66**  She was offered projects in Inuvik and Manitoba. She turned them down because she could not do the work.

**67**  When mobile lab work was offered to her, she had to decline as she realized she could not stand the long drive, keep up with the required hours, or meet the clients' expectations. Post-Accident, she never worked in the mobile lab.

**68**  As for her leisure activities, she could no longer run. She had tried a walk/run program but the upper body movement required caused her pain to flare.

**69**  Her motorcycle riding caused her pain in her left arm and back.

**70**  She tried camping with Mr. Hilgerdenaar once or twice but he had to do all the set up and all the break down. Overlanding was not possible.

**71**  Ms. Lock's doctor referred her to a physiatrist, Dr. Waspe. At first, Ms. Lock was very hopeful Dr. Waspe could help her recover. She saw some minimal improvement with the new stretches and exercises recommended to her by Dr. Waspe. However, while her range of motion did improve, she was still in pain on a daily basis.

**72**  In the period October 2014 to January 2015, Maxxam's work declined. Ms. Lock was under less time pressure to process samples, sample volume dropped and she could stand and walk around more. Her symptoms improved.

**73**  She began using Trazodone. It seemed to help. Dr. Waspe recommended the use of a wrap for Ms. Lock's left arm to be applied any time she needed to use that arm. It also helped.

**74**  However, by June 2015, the slowdown of work at Maxxam resulted in a number of layoffs of support staff and Ms. Lock's work increased as a result. Maxxam began to ask her to perform more overtime, and the need for more preparatory work on the samples increased pressure on the plaintiff.

**75**  Ms. Lock refused overtime occasionally but she was conscious that her co-workers were unfairly burdened as a result.

**76**  She felt she was fighting to stay at work and fighting to stay "present" at work. She decided to speak to the General Manager, Rob Gilbert.

**77**  Maxxam needed to reduce its staffing levels due to the decline in demand for its services. With layoffs, the problem of "bumping" occurs as senior employees who are laid off may bump more junior employees out of their positions. This can be disruptive to the business. Consequently, Maxxam made it known that severance arrangements might be possible for employees who wished to leave voluntarily.

**78**  Ms. Lock discussed a possible severance arrangement with the General Manager.

**79**  Before she made the final decision to leave her employer of 15 years, she took a vacation with her fiancé's family. They all went to Machu Picchu, Peru in May 2015 for three weeks.

**80**  Her fiancé's parents are 57 and 70 years of age. As a result, Ms. Lock felt that their ages would limit their physical capacity and she would be able to keep up with them.

**81**  She managed a one-day hike to Machu Picchu that her fiancé characterized as a "walk in the park" compared to the kind of hiking they used to do pre-Accident.

**82**  However, it is still a 10 km hike that ascends to an elevation of 2,700 metres. During this hike, Ms. Lock carried a small backpack with her lunch and water in it.

**83**  After careful consideration, Ms. Lock approached Maxxam and made an arrangement with her employer that she would accept a severance amount of six months' salary. She signed her severance agreement in September 2015 after a protracted period of discussion with her union and management.

**84**  Her last day of work at Maxxam was October 2, 2015.

**85**  It should be made clear that Ms. Lock would not have been laid off or terminated involuntarily. With 15 years of employment with Maxxam, she was in the top third of the seniority list.

**86**  As well, she was well-liked and respected at Maxxam and her physical issues would have been accommodated.

**87**  However, Ms. Lock did not feel she could reach more than about 60% of her former capacity and she was not doing her fair share of the overtime or the work in the lab. She also wanted to focus fully on her recovery since she found herself just working day-to-day, functioning in pain, and unable to enjoy her life.

**88**  As a result of these concerns, Ms. Lock decided to leave her job.

**89**  Maxxam agreed to indicate 'K' on her Record of Employment as the reason for leaving. This indicates 'other' and Maxxam explained this by saying that medical documentation of a previous injury precluded the employee from continuing her employment.

**90**  Ms. Lock took her six months of severance that expired March 25, 2016, then applied for medical Employment Insurance benefits, got three months of medical E. I. and, once it was used up, she applied for and received regular Employment Insurance benefits.

**91**  In September 2015, she and Mr. Hilgerdenaar purchased a house in Kamloops for $415,000. In 2014, they had tried to buy a house for $600,000 in the Tri-Cities but did not obtain it. They discussed leaving the Lower Mainland. Her now fiancé got a job in Kamloops in July 2015 and they decided that they would move, buy a house and she would focus on her recovery. For the time being, they would live on one income.

**92**  I note that it was almost at the same time as the house purchase that she made the severance agreement with Maxxam.

**93**  She did not begin looking for work until she was in receipt of regular Employment Insurance benefits.

**94**  She did volunteer work at the Kamloops Wildlife Centre preparing food for the animals two hours per week. This work lasted about a year.

**95**  In January 2017, she obtained a three-month position at the Thompson-Nicola Regional District.

**96**  She found that this full-time clerical job, although sedentary, left her tired in the evenings. Her pain remained constant, particularly in her left arm and mid-back. She has tingling in her thumb, second and third fingers of her left hand for which no medical cause has been determined. The posture required by using the computer and keyboard hurts her back. She also has pain in her right arm, but attributes that to using her mouse and keyboard. This problem pre-dates the Accident.

**97**  She has continued with the exercises given to her by her kinesiologist. She uses her exercise ball, walks, uses weights, and does some moderate hiking.

**98**  Her time at a chronic pain clinic in Kamloops has taught her to modify her approach to tasks that cause her pain and fatigue. Now she can do some heavier tasks by dividing them into shorter periods of time over a couple of days. However, she is still in pain in her left arm and mid-back. Her sleep issues continue to impact her life even though she relies on sleep medications.

**99**  In summary, the plaintiff says that she has lost many of the pleasures in life that she enjoyed prior to the Accident. She says that she worked hard and played hard and that neither of those options remains open to her now because of her injuries.

**100**  She says she can no longer use her mountain bike, run, snowboard, overland camp, do demanding hikes, travel as extensively, or enjoy long rides on her motorcycle.

**101**  She relies on Mr. Hilgerdenaar to do the snow shovelling and the heavy tasks in the house.

**102**  There does not seem to be much doubt about the fact that the injuries she suffered in the Accident did not disable her from being able to carry out her former position as a lab analyst with Maxxam. However, to carry on the duties of that job in any reasonable way, she would have had to suffer pain, which would have left her with a reduced quality of life.

**103**  In cross-examination, the plaintiff stated that she would not have left Maxxam had she felt that she was able to carry on her job duties without suffering the attendant pain and exhaustion.

**104**  She wants to have a life that challenges her physically as well as a career that challenges her intellectually.

**105**  She states that the decision to move to Kamloops was not only based on the fact that she and Mr. Hilgerdenaar could find a home there at a lower cost. What was more compelling was the opportunity for the plaintiff to do whatever she could do to recover. While she worked, she felt she could not make this commitment to her own health.

**106**  The other factor that made a house in Kamloops a more sensible option was the possibility that the plaintiff would have no salary or a reduced salary. As for most young couples, a house in the Lower Mainland would likely require two salaries to pay the mortgage.

**107**  Her cross-examination revealed some confusion over whether or not Ms. Lock asserted she was acting on advice from her physiatrist, Dr. Waspe, when she voluntarily left Maxxam.

**108**  Ms. Lock temporized somewhat by saying that Dr. Waspe told her that her job was not helping her recovery. But she agreed that Dr. Waspe did not tell her to quit or that she was not capable of working.

**109**  Dr. Waspe's recommendation respecting the plaintiff's work was limited to providing a note for her employer which stated that the plaintiff could not do any overtime.

**Non-Expert Witnesses**

**Vince Hilgerdenaar**

**110**  Mr. Hilgerdenaar noted that, by the end of 2016, when the plaintiff had been off work for about 15 months, he saw some improvement in her symptoms. However, her sleep issues remained. He said that these issues had not existed before the Accident.

**111**  He emphasized the strength of their relationship but also noted that the plaintiff's fierce independence has been compromised by her physical injuries. He testified that this appears to bother her.

**112**  As well, he misses their highly active lifestyle together. He sees the plaintiff having to plan her activities carefully so that if she does something fairly active one day, she rests the next day. Their overlanding days appear to be done. Now they camp in prepared campsites, and use a tent trailer with heated floors as well as a comfortable bed.

**José Cuevo**

**113**  Mr. Cuevo, a lab analyst and former co-worker of the plaintiff at Maxxam, described the duties he performed in the mobile lab. It was his view that the plaintiff was not up to the requirements of the mobile lab after the Accident.

**114**  He noticed major changes in the plaintiff post-Accident. Before the Accident, she had been outgoing and sociable with other employees, while still being a very productive, efficient member of her group. He described her as "pulling her weight". After the Accident, she could not keep up and she was much more withdrawn.

**115**  He saw her supporting her left arm and holding it close to her body. When she was working on the instruments in the lab, if she had to change components and take parts off and on, she would require the help of her co-workers where, pre-Accident, she was capable of doing the tasks herself.

**116**  The plaintiff had trained him for the lab duties and on the duties required for the mobile lab.

**117**  He pointed out the necessity for speed and accuracy in processing the samples so that the data were correct and the due dates for the clients met. It is important to make certain the work flow is maintained. The problem-solving part of the job was ever present and kept it interesting.

**118**  The mobile lab was very busy from July to September and then until mid-December. The average person would work a 10 to12-hour day and possibly some weekends. The collective agreement required that overtime be offered first on the basis of seniority but all the employees tried to be fair about the allocation of overtime.

**119**  It was my impression from Mr. Cuevo that constant overtime was not enjoyed by the employees and the expectation was that the burden would be shared.

**120**  There was certainly work available in the mobile lab that the plaintiff could have had were she able to do it. The plaintiff had always had the ability to interact with consultants in the field, and as Mr. Gilbert put it, he had many scientifically trained employees who were very talented but had no ability to meet clients and consultants and deal with them face-to-face. This particular ability made the plaintiff even more valuable in the mobile lab.

**121**  Mr. Cuevo described the very physical duties in the lab, including the following: receiving samples, usually 20 in a box, not letting them crowd, lifting and scooping out samples, as well as capping and uncapping sensors and solvents. He also described the 250 ml jars from which 10 ml of liquid is placed into 43 ml vials, with solvent then added. Preparation of the samples includes weighing them. All of these processes require the use of both hands.

**Rob Gilbert**

**122**  The plaintiff's general manager at Maxxam, Mr. Gilbert, observed how the plaintiff changed post-Accident. She had been a good employee with flexible skills pre-Accident. She had never turned down an opportunity to work in the mobile lab. However, after the Accident, she could not keep up with her regular duties and the additional pressure of the work in the mobile lab was not within her capabilities.

**123**  Mr. Gilbert valued her as an employee but he could see that the extra work others were asked to do because she could not do it was creating tension for the plaintiff. As such, he noted, she would try to do the work, and then would pay for the extra effort with negative health consequences.

**124**  He was clear that Maxxam tried to accommodate her through helping her avoid the most taxing of her duties, extraction. In addition, they had others help her to service the lab instruments, as she found it difficult to take off, and put on, parts.

**125**  The mobile lab work is profitable for Maxxam and in 2014-2015, some large jobs came up. Mr. Gilbert would "absolutely" have offered them to the plaintiff had she been able to do them. Instead, others were trained to do the work.

**126**  It was Mr. Gilbert whom the plaintiff approached about leaving Maxxam with severance pay. He was sorry to see her go but was aware that she had struggled to try to keep up her previous level of productivity over the two years since the Accident.

**127**  He confirmed that, despite her work issues, due to her seniority, she would not have been at risk of being laid off or terminated. As well, in his 28 years with Maxxam, he was unaware of anyone who had been disciplined or terminated for refusing overtime.

**128**  During the discussion with the plaintiff about leaving Maxxam, she did not tell him that she was thinking of moving to Kamloops.

**Expert Witnesses**

**Dr. Soltani**

**129**  Dr. Soltani treated the plaintiff after the accident. She has been the plaintiff's physician since 2012.

**130**  Her evidence was that the plaintiff was a compliant patient who followed all recommendations made to her, including following Banyan's return to work plan.

**131**  When the plaintiff did not make the progress Dr. Soltani had hoped for in response to the physiotherapy and active rehabilitation she had directed, in August 2014, she referred her to a physiatrist, Dr. Waspe.

**132**  From that point on, until the plaintiff stopped seeing Dr. Waspe, it was Dr. Waspe who treated the plaintiff's injuries arising from the Accident.

**133**  Dr. Soltani saw the plaintiff in September 2015 just before she resigned from her job with Maxxam and received six months' severance. At that time, she and the plaintiff discussed the availability of Medical Employment Insurance ("Medical E.I."). Dr. Soltani's recollection was unclear as to whether the plaintiff was going to be laid off due to her lack of productivity resulting from her injuries. Certainly, Dr. Soltani believed the plaintiff was unable to work at that time, even though she had been back at work since December 2013.

**134**  On January 18, 2016, she endorsed another medical certificate indicating that the plaintiff could not work until August 31, 2016. This certificate entitled the plaintiff to receive Medical E.I.

**135**  But at the same time, the plaintiff told Dr. Waspe that she intended to start looking for work in March 2016.

**136**  On July 28, 2016, despite not examining the plaintiff, Dr. Soltani signed another medical certificate certifying that the plaintiff was fit for light duties as of August 2, 2016 on the basis of an examination. This certification entitled the plaintiff to receive regular E.I. benefits, though Dr. Soltani denied that that was why she had signed the certificate.

**137**  Curiously, her report states as follows:

July 28, 2016

Ms. Lock continued with regular stretching and exercises. She finished her medical EI and will start her regular EI.

**138**  Her medical-legal report diagnoses chronic myofascial pain in her neck, shoulder and lumbar spine, as well as continuing sleep disturbances. Dr. Soltani was not aware that the plaintiff had had pain in her neck pre-Accident and that neck pain related to the Accident had resolved five to eight months post-Accident.

**139**  Dr. Soltani attributed the plaintiff's sleep issues to the "psychological effects of [the] injuries". However, the plaintiff had sleeping problems pre-Accident that must be taken into account. The plaintiff agreed that she had told Dr. Soltani about those sleep issues pre-Accident. Dr. Waspe agreed that the plaintiff's partner's loud snoring could contribute to the plaintiff's sleep problems.

**140**  Dr. Soltani's summary under "Clinical Impressions" fails to mention the plaintiff's ongoing issues with pain in her left arm, though the report itself contains many references to this problem.

**141**  I note that under "Clinical Impressions" she stated that, despite finding that it was unlikely that the plaintiff would be able to work overtime or at full capacity as a lab analyst in the near future, her prognosis was still good.

**142**  I take from this prognosis that it is Dr. Soltani's view that the plaintiff will be able to work again.

**143**  I found Dr. Soltani to be somewhat of an advocate for the plaintiff. She clearly wants to help the plaintiff in any way she can, including helping her obtain E.I. benefits for as long a period as possible. It also appears that neither the doctor nor the plaintiff remembered that she had reported neck pain and sleep problems prior to the Accident.

**144**  At the same time, there is not much doubt that the plaintiff suffers from "chronic myofascial pain". Whether that pain is subjective or objective in source seems to be of little moment when the pain is present particularly in her left arm. That pain did not arise until after the Accident.

**Dr. Waspe**

**145**  Dr. Waspe is the physiatrist, a specialist in physical medicine and rehabilitation to whom Dr. Soltani referred Ms. Lock on August 19, 2014.

**146**  Dr. Waspe saw the plaintiff in her clinic five times with the last appointment in September 2016. In addition, she had four phone appointments with Ms. Lock.

**147**  Dr. Waspe's report documents extensive analysis of the plaintiff's pain, primarily found in her left shoulder and arm, with tingling over her elbow and into her first three fingers.

**148**  She concludes that the pain demonstrated by the plaintiff does not conform to patterns which would indicate sources in particular nerve roots. She says somewhat ambiguously that there may be some ulnar nerve entrapment in the left arm despite Dr. Singh's findings to the contrary. However, she says that the plaintiff's myofascial pain, and pain avoidance behaviour with concomitant deconditioning, have resulted in central pain sensitization from an overstimulation of the central nervous system and greater perception of pain by the plaintiff than would otherwise be expected.

**149**  She attributes this "windup phenomenon" to the Accident.

**150**  Thus, the plaintiff is left with pain even though the underlying causative soft tissue injuries have probably long since resolved.

**151**  She is clear that the sleep problems the plaintiff attributes to the Accident are partly caused by the plaintiff's partner's obstructive sleep apnea. She agreed in cross-examination that the plaintiff has not trialed any ameliorative procedures to manage her sleep disruption.

**152**  She does not believe the plaintiff will ever fully recover. However, she believes that the plaintiff will likely continue to improve as long as she maintains her exercise program and does not perform a job that requires certain postural positions and long work hours that exacerbate her symptoms.

**153**  She opines that the plaintiff should work, and needs to work, but that she is partially disabled from doing so as a lab analyst due to the psychosocial stressors of emphasis on productivity, postural requirements and extended work hours.

**154**  It is her impression that the plaintiff could only continue to work as a lab analyst with a "benevolent employer" who would, for example, allow her to take breaks to stretch, not require her to do jobs with exigent postural requirements, and not require overtime hours.

**155**  In other words, it is Dr. Waspe's view that the plaintiff could work, even as a lab analyst, if she had an employer who would accommodate her needs.

**156**  It is my view that Dr. Waspe's report is relatively objective and careful. I find that she was a fair and reliable expert.

**Christine Weston**

**157**  Ms. Weston is a Functional Capacity Evaluator. She tested the plaintiff on May 10 and 11, 2016. Her qualifications were accepted by the defendant.

**158**  She describes her job as the independent evaluation of a plaintiff's current ability to sit, stand, carry and bend, walk and climb stairs. The limitation of her report is that such an evaluation is only a snapshot in time: the assessment of the plaintiff's function on that particular day.

**159**  Ms. Weston's report, while thorough and interesting, does not add much to the picture of the plaintiff post-Accident.

**160**  There is little doubt that the plaintiff can perform most tasks without inherent limitations, but her pain, while mostly subjectively "cued", interferes with some physical actions.

**161**  Ms. Weston's conclusion is that Ms. Lock can perform in a position that requires "Light to Medium strength work category for 6-8 hours per day".

**162**  In Appendix 3 to her report, she defines these work categories as follows:

**L- Light Work** - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity of condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/ or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

**M - Medium Work** - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

**163**  It is apparent from the Weston report that Ms. Lock has the capacity to perform the duties of her position as a lab analyst, with the qualification that she suffers from pain that appears to limit her stamina.

**164**  Ms. Lock terminated the functional testing "due to subjective reports of reaching her safe maximum as tolerated by her left arm pain and mid back pain."

**165**  During her functional testing of the plaintiff, Ms. Weston did not observe any objective cues of an increase in pain in the plaintiff's left arm and mid-back. However, Ms. Lock reported to Ms. McKenzie, the vocational rehabilitation expert, that the day following the second day of functional capacity evaluation testing, she suffered pain at a level of 5 out of 10, pain that is noted by Ms. McKenzie to meet the definition of "Very disabling ..."

**Dawn McKenzie**

**166**  Ms. McKenzie is a registered rehabilitation professional and a certified vocational rehabilitation professional. These are diploma courses and her academic qualification is a Bachelor of Social Work (Honours) from the University of Victoria.

**167**  She notes that the plaintiff has demonstrated functional ability to perform the activities of a lab analyst. However, Ms. McKenzie is of the view that she is not competitively employable as a lab analyst in a full-time capacity.

**168**  Ms. McKenzie opines that the ongoing pain suffered by Ms. Lock when doing protracted standing in a forward stooped position such as that required when working under an extraction hood is the factor that would make it impossible for the plaintiff to work full-time as a lab analyst without accommodation for the pain in her left arm.

**169**  Regarding the plaintiff working as a lab analyst, Ms. McKenzie states as follows at page 14 of her report:

She [the plaintiff] might be successful in this work in future IF she had work with a benevolent employer who will make accommodations for her in relation to left upper extremity use.

[Emphasis added.]

**170**  In the report, she recommended that Ms. Lock work with a Vocational Rehabilitation Counsellor to research the selection of her suggested alternate occupations. These suggestions included the positions of Construction Inspector, Crane Operator, Civil Engineer, Geographic Information Systems Technician, Heavy Duty Equipment Operator, Computer Systems Analyst and Occupational Health and Safety Officer.

**171**  The plaintiff did not find any of the above suggested forms of employment to interest her. Although contrary to what her physiatrist stated, she would like a sedentary job without deadlines or overtime that does not require her to work in a busy environment.

**Damages**

**A. Causation**

**172**  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.

**173**  The "but-for" test is the general test for factual causation. The negligent conduct must be substantially connected to the injury. This test was affirmed and set out in *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=) at paras. 8-10:

[8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's ***negligence*** was *necessary* to bring about the injury ? in other words that the injury would not have occurred without the defendant's ***negligence***. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's ***negligence*** made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, *per* Lord Bridge; *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=).

[10] A common sense inference of "but for" causation from proof of ***negligence*** usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's ***negligence*** probably caused the loss. See *Snell* and *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.

[Emphasis in original.]

**174**  The trial judge is to adopt a "robust and pragmatic approach to determining if a plaintiff has established that the defendant's ***negligence*** caused her loss": *Clements* at para. 46. At the same time, causation need not be established with scientific precision: *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=) at 328. Where causation is established by inference only, it is open to the defendant to argue or call evidence that the injury was inevitable: *Clements* at para. 11. There is no such evidence here.

**175**  The plaintiff must also establish legal causation, which arises once factual causation is proven. Legal causation is examined at the damages stage of the analysis. 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 para. 18.

**176**  In considering the issue of factual causation, I have reviewed the medical evidence and the evidence of the plaintiff.

**177**  It is clear that she was a strong and healthy person before the Accident, with an active lifestyle, and was well-respected at her job.

**178**  While the Accident did not appear to be a serious one, or cause obvious injury, it now appears that the sequelae of the accident include continuing pain in the plaintiff's left arm and mid-back. These have not resolved despite being soft tissue injuries that have likely healed.

**179**  I find that the plaintiff has proved factual causation: but for the defendant's ***negligence***, the plaintiff would not have suffered the injuries from which she continues to endure pain.

**180**  The defendant did not offer any controverting medical evidence.

**181**  I will deal with legal causation under the head of non-pecuniary damages.

**B. Damages**

***Non-Pecuniary Damages***

**182**  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.

**183**  A non-exhaustive list of relevant factors to consider when determining an appropriate award for non-pecuniary loss was developed by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* [*(2004), 237 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

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

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

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**184**  However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

**185**  The plaintiff in this case was 36 years old at the time of the Accident. Generally speaking, her age is not a substantial factor in determining non-pecuniary damages.

**186**  The nature of her injury was soft tissue. However, the pain it has caused has proved to be particularly difficult to overcome, partly due to its uncertain origin and cause.

**187**  Nevertheless, the plaintiff has been consistent in reporting ongoing pain in her left arm over her elbow and down into her hand. She reports accompanying sleep disturbances, although causation here is not entirely due to the Accident, as Dr. Waspe agrees that her partner's snoring likely contributes to her poor sleep. In addition, she has some pain in her mid-back.

**188**  With respect to the sleep disturbances, there is some evidence of pre-existing sleep issues reported to Dr. Soltani. However, it seems self-evident that pain would interrupt sleep and I attribute part of the plaintiff's sleep problems to her continuing pain.

**189**  The plaintiff has undertaken physiotherapy, exercise programs, used medication, all with only minimal results. She continues to use an exercise ball, does the exercises prescribed by her kinesiologist, walks, and uses light weights, but her pain continues. It is now chronic.

**190**  Dr. Soltani, her family practitioner, describes her as a "compliant patient". From that I take that she followed her doctor's treatment recommendations.

**191**  Consequently, almost four years after the Accident, she still suffers pain and a somewhat restricted lifestyle.

**192**  The level of her disability is somewhat difficult to state. This is because it is partly subjective. Her own physiatrist states that she is, at worst, only partially disabled from her job as a lab analyst. In fact, she has demonstrated the functional capacity to perform a lab analyst's required duties.

**193**  However, she has been unable to find a comparable level of employment since leaving Maxxam in October 2015. Moreover, even the relatively relaxed three-month clerical position she found in January 2017 resulted in fatigue and pain during her workday evenings.

**194**  Emotionally, she has found it difficult to accept the reality of her continuing pain and the limitations it imposes.

**195**  Ms. Lock has lost the formerly active lifestyle she enjoyed, including the particularly strenuous outdoor activities she formerly engaged in with her partner.

**196**  Any physical activity she undertakes must be tempered with the knowledge that, if she pushes herself too hard, she will suffer pain the next day.

**197**  She can no longer take long trips on her motorcycle, do overland camping, or extreme hiking.

**198**  Her life is not entirely devoid of pleasant outdoor activity: she walks regularly with a friend, goes to yoga weekly, enjoys taking her dogs for walks, does some hiking, and camps in organized campsites with her partner and friends.

**199**  However, she can no longer indulge her passion for strenuous activity and this is a loss that she finds hard to bear.

**200**  The fact that her injury has evolved to cause chronic pain is an unfortunate but not unforeseeable consequence. She is a person of "ordinary fortitude" whose injury is a reasonably foreseeable consequence of the defendant's ***negligence***.

**201**  Counsel for both parties have offered a number of cases on the topic of non-pecuniary damages.

**202**  The plaintiff suggests that an award of non-pecuniary damages should be $125,000 based on her continuing pain and loss of lifestyle. She relies on *Kam v. Van Keith*, [*2015 BCSC 1519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GWF-M0T1-F8KH-X2FP-00000-00&context=) where non-pecuniary damages were awarded in the amount of $125,000; *Rizzolo v. Brett*, [*2010 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2M8-00000-00&context=), where the Court upheld non-pecuniary damages of $125,000; and *Chantal v. Righere*, [*2014 BCSC 1086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0XJ-00000-00&context=), where non-pecuniary damages were awarded in the amount of $120,000.

**203**  Ms. Lock points to the comments made by Garson J.A. in *Rizzolo* at para. 37:

[37] As can be seen from those cases, trial judges have assessed non-pecuniary damages at well over $100,000 where there is an element of significant ongoing pain and particularly, where the plaintiff had previously enjoyed an active lifestyle ...

**204**  The defendant, on the other hand, says that the range of non-pecuniary damages should be $50,000 to $60,000. I find that this range is too low to compensate the plaintiff for her continued pain and loss of lifestyle.

**205**  The cases on which the defendant relies are as follows: *Dial v. Grewal*, [*2010 BCSC 759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-221V-00000-00&context=) where $50,000 in non-pecuniary damages was awarded; *Langley v. Heppner*, [*2011 BCSC 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33F-00000-00&context=) where $55,000 in non-pecuniary damages was awarded; and *Proctor-McLeod v. Clark*, [*2013 BCSC 1207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M167-00000-00&context=) where $60,000 in non-pecuniary damages was awarded.

**206**  In the cases proffered by the defendant, the injuries to the plaintiffs did not have the same substantial effect as those suffered by Ms. Lock and were not of the same duration.

**207**  I must assess damages that are fair to both parties and I do so by looking at the range of damages in comparable cases. Here I find the words of Garson J.A. in *Rizzolo* to be apposite. In my view, a fair and reasonable award of non-pecuniary damages in this case is $115,000.

***Past Loss of Wages***

**208**  In considering past loss of wages, I must look to the amount that the plaintiff would have earned had she not been injured in the Accident.

**209**  The date of the Accident was May 2, 2013.

**210**  The plaintiff must prove, but for the Accident, what she would have earned, not on a balance of probabilities, but on an assessment of damages based on a consideration of hypothetical events that constitute a real and substantial possibility. The relative weight of such hypothetical events is to be assessed according to their relative likelihood: *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. 44-49.

**211**  The plaintiff missed one month of work then, under the direction of her employer's long term disability consultant, Banyan, she attempted a graduated return to work that was to culminate in a return to full-time hours by July 22, 2013. She was unable to make this transition and ultimately returned to her full-time position at the end of December 2013.

**212**  She performed her full-time and some overtime work after December 2013 until her physiatrist provided a letter on June 8, 2015 advising that Ms. Lock's hours of work should be limited to 8 hours a day and 40 hours a week.

**213**  In June 2015, she approached her employer about leaving Maxxam voluntarily with some severance. After negotiating a severance agreement with the participation of her Union, as her exclusive bargaining agent, and her employer, she accepted six months' severance with her last day of work being October 2, 2015. Therefore, she was in receipt of wages until March 25, 2016, some three years after the Accident.

**214**  Following the end of her severance pay, she was on Medical Employment Insurance until July 2016, followed by receipt of regular E.I. benefits.

**215**  The only employment she has had subsequent to receiving E.I. was a temporary three-month clerical job that terminated just after trial on March 24, 2017. She found this position through a connection with an employment counsellor.

**216**  There was no evidence that she had sought any job commensurate with her lab qualifications although her physiatrist believed she could work and should work as long as her limitations could be accommodated. There was also no evidence that she attempted to retrain for any other job. In this context, I note that she had contacted Thompson Rivers University before her move to Kamloops to discuss a possible return to school.

**217**  I accept that it is somewhat likely that she would have continued at Maxxam had it not been for the Accident and would have worked overtime and in the mobile lab. Her partner had a job he enjoyed and they each owned a condominium in the Tri-Cities area.

**218**  However, the analysis of past wage loss is somewhat complicated by the fact that the plaintiff and her partner were trying to buy a house and had been unsuccessful in obtaining the one they bid on in the Tri-Cities. Market forces were causing a steep rise in housing prices.

**219**  Given that the lower housing prices in Kamloops would allow them to get into the housing market, I find that there is a substantial likelihood that the plaintiff and her partner would have moved there regardless of the Accident's occurrence.

**220**  I would put the relative weight of this contingency at approximately 30% so that any award I make for past wage loss must be subject to this contingency.

**221**  I am supported in this conclusion by the evidence that the plaintiff, in spite of her limitations, was at no risk of being terminated by Maxxam post-Accident and was being accommodated. She was not asked to do extractions and she received assistance with the replacement of machine parts. There is no evidence that she had asked for additional accommodation other than limiting her work hours to exclude overtime. Maxxam had respected that request.

**222**  Mr. Curtis Peever, an economist, presented as an expert for the plaintiff. He estimated that her total loss of earnings up to trial can be calculated by reference to her pre-Accident earnings in the years 2007-2015, netted for income tax and the employee portion of E.I. premiums. He says that this "net" past loss of earnings is estimated at $72,000 including a 1% increase on May 1, 2016.

**223**  In addition, the plaintiff earned $6,576 in her short-term job. Subtracting 21% for income tax and EI premiums (totalling $1,380.96), the net amount she earned was $5,195. Mr. Peever did not include this amount as a deduction in his report because the information was not available at the time he prepared it.

**224**  I accept his calculation less $5,195. Moreover, as he indicated, I would also include an additional amount for RRSP contributions of $2,035, as well as $9,287.46 for repayment of short-term disability benefits the plaintiff received.

**225**  The total of past wage loss before deduction of the contingent amount is $78,127.46.

**226**  From that amount I deduct 30%, which is $23,438.24 as an assessment of the 30% likelihood that the plaintiff would have left her job in any event and moved to Kamloops with her partner to access that city's cheaper housing market.

**227**  Therefore, I award $54,689 in past wage losses.

***Loss of Future Capacity***

**228**  Quoting Goepel J.A. once again in *Grewal* at paras. 48-49*:*

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

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

**229**  The factors to be considered in making such an assessment are found in the following cases: *Parypa v. Wickware*, [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=); *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=); and *Kwei v. Boisclair* [*(1991) 60 B.C.L.R. (2d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=) (C.A.).

**230**  These relevant factors are oft-cited but bear repeating once again:

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her, had she or he not been injured; and
4. whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market. However, I consider this point to be somewhat diluted as a result of the Court of Appeal's dismissal of the judge's award of damages founded on this factor: *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=).

**231**  The plaintiff left her longstanding employment on the basis that her job duties caused her to suffer pain that made her less able to do her job. Her physiatrist has opined that she is not capable of remaining employed full-time as a lab analyst. She has not said that the plaintiff cannot work. Instead, she has said that the plaintiff would benefit from working and should do so.

**232**  I have considered the pain and suffering of the plaintiff in the award of non-pecuniary damages, as it is under that head that I am able to recognize the effects of the injuries she sustained and the fact that she can work, but with continuing pain.

**233**  One of the confounding factors here is that the plaintiff worked as a lab analyst for almost two years following the Accident. However, admittedly, as Dr. Waspe put it, this was at the cost of a reduced ability to perform her ADL with any enjoyment of life.

**234**  As well, she has demonstrated an ability to perform the movements required in the role of lab analyst, but again, with pain.

**235**  The plaintiff has not seriously explored what work is available to her in the Kamloops area since her relocation there. While she took up a short-term clerical position for three months starting in January 2017, I have no evidence of any subsequent willingness to invest time in trying to find a job without an onerous production rate.

**236**  She has a two-year diploma to attest to her intellectual capability and a fifteen-year history with an employer to attest to her qualities as a reliable employee.

**237**  She has spent her time since her relocation largely doing leisure activities, with a focus on rest and rehabilitation.

**238**  She voluntarily left what would have constituted exactly what she is looking for: a "benevolent employer". This employer would have been required to accommodate her as a senior employee despite suffering some hardship. In this context, it is worth quoting *Central Okanagan School District No. 23 v. Renaud* *[1992] 2 S.C.R. 970* at para. 19:

... More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test...

**239**  I am concerned that the plaintiff has failed to prove that she should be awarded the kind of substantial damages she seeks for loss of future capacity, alleging a possibility that she does not have "the ability to perform any occupation on a full-time basis" (plaintiff's argument, para. 229).

**240**  It is my view, on all the evidence, that she is now capable of working at least part-time, but could work full-time as long as no overtime is required. Despite this, except for her brief clerical stint, she has not made much effort to find even part-time employment.

**241**  This does not meet her obligation to demonstrate she is "less capable overall from earning income from all types of employment".

**242**  Is she less marketable or attractive as an employee to potential employers? Because she continues to have pain in her left arm, it is probable that an employer who requires an employee who is able to perform some physical labour or keyboarding would not want an employee with a history of medical issues relating to her left arm.

**243**  I find that it is probable that she cannot take advantage of all job opportunities that might otherwise have been open to her had she not been injured. For example, she is not able to perform the functions required in Maxxam's mobile lab, with its substantial overtime, lengthy driving distances, and somewhat spartan accommodations.

**244**  As noted above, Mr. Peever is a labour economist who prepared a report for the plaintiff.

**245**  As I have noted, I cannot adopt his assumptions to support a loss of future capacity of $650,000 (a modified figure suggested by plaintiff's counsel) to age 70, as contended for by the plaintiff.

**246**  I agree that it is unlikely she will be able to earn the same level of income as she did at Maxxam. But it would be unfair to visit all of the loss of future capacity to her retirement age on the defendant.

**247**  Ms. Lock is partly the author of her own loss of employment earnings since it is clear that she ought to have remained in the employ of Maxxam and enjoyed the reasonable accommodation that her union position afforded her. I find that this decision reduced her loss of future capacity damages substantially; she has breached her duty to mitigate in favour of a lifestyle choice.

**248**  The defendant suggests that an appropriate way of assessing loss of future capacity is to accept Dr. Waspe's interdiction of overtime for the plaintiff. This is a demonstrable future loss supported by reliable medical advice.

**249**  Mr. Ross, the defendant's expert accountant, calculates that her average overtime amount pre-Accident from 2007 to 2012 earned her $12,498.57 annually (357 hours multiplied by $35.01). Using Mr. Peever's risk and choice multiplier of 13.779 and adding in a benefits amount of 10% (as assumed by Mr. Peever), results in the following equation: $12,498.57 x 13.779 x 1.1 = $189,440 (rounded up) for loss of overtime to age 70.

**250**  I am not convinced that the plaintiff could reasonably be expected to work until age 70. However, I do not have the requisite evidence regarding the quantum of her loss of future capacity calculated with an expected retirement at age 65. As a result, I approximate her future loss with an expected retirement at age 65 to be $159,000. In essence, I have simply reduced the assessment of 31 years of overtime loss to 26 years of overtime loss.

**251**  Consequently, I award $159,000 for the plaintiff's loss of future capacity to age 65.

***Cost of Future Care***

**252**  The plaintiff contends that the cost of future care to which she is entitled is $97,000. This quantum is comprised of an initial outlay of $33,000, and annual costs of $2,140. The costs are taken from the recommendations of Dr. Waspe, Dr. Soltani, and Ms. McKenzie, with the latter focusing on vocational rehabilitation counselling.

**253**  I see no justification for vocational rehabilitation counselling. The plaintiff has already had the benefit of a consultation with Ms. McKenzie and has rejected her recommendations for possible positions based on her vocational and aptitude testing.

**254**  The same is true of vocational retraining. Ms. Lock's talents and interests, according to Ms. McKenzie, lie in the realistic, investigative and conventional domains for which her pre-injury occupation was well-suited. The plaintiff claimed that she loved the environmental industry and it is entirely possible, in my view, that she will find a niche in that industry for which she is already qualified. As well, she has not demonstrated any particular interest in being retrained in any new area.

**255**  I did not receive any evidence of a need for psychological counselling. In Dr. Waspe's report at page 14, she reports that the plaintiff "felt that she was stable from a mental health perspective." Therefore I will not award an amount for psychological counselling.

**256**  I will award her annual costs in the following amounts for a period of five years, a period that I find will allow her to maximize her recovery and support her while she returns to work:

|  |  |  |
| --- | --- | --- |
| Kinesiology $300 x 5 | $1,500 |  |
| Physiotherapy $1,080 x 5 | $5,400 |  |
| Massage therapy $1,080 x 5 | $5,400 |  |
| Gym with aquatic centre |  |  |
| $660 x 5 | $3,300 |  |
| Medications & injections |  |  |
| management |  |  |
| $100 x 5 | $500.00 |  |
| **TOTAL:** | **$16,100** |  |

**257**  I will leave it to the parties to determine the present value of this amount.

***Loss of Housekeeping Capacity***

**258**  The plaintiff's evidence is that, since the pain management clinic has taught her how to approach her tasks by parsing them out over time, she is now able to contribute more fairly to household duties. However, she is unable to do as much of the heavy duties, such as shoveling snow as she was pre-Accident.

**259**  I appreciate that, following the Accident, her newfound dependence resulted in her partner taking on more duties than she would have liked. However, I cannot say that the evidence supports a substantial award under this head.

**260**  I do not intend to conflate this issue with future cost of care damages by querying whether the plaintiff has hired or will hire help to assist her.

**261**  I did not hear any evidence from the plaintiff or her partner that would lead me to conclude that he has assisted her beyond what would normally be expected of a partner.

**262**  I will not award loss of housekeeping capacity since I have awarded an amount of non-pecuniary damages that would include an amount for "loss of personal capacity".

***Special Damages***

**263**  With the exception of the cost of a new bed which was not recommended in the medical reports, and for which there is no evidence would assist in reducing her loss of sleep, I accept the special damages as outlined in the amount of $1,876.66.

**Conclusion**

**264**  In the result, I award the following damages:

1. Non-Pecuniary Damages: $115,000;
2. Past Loss of Wages: $54,689;
3. Loss of Future Capacity: $159,000;
4. Loss of Housekeeping Capacity: $0; and
5. Special Damages: $1,876.66

In addition, as noted earlier in these reasons, I have calculated the plaintiff's total cost of future care at $16,100 for the next 5 years and have left it to the parties to calculate the present value of this amount.

**Costs**

**265**  The plaintiff will have her costs.

**266**  If the parties wish to speak to costs, they may arrange a mutually convenient time through the Registry.

L.D. RUSSELL J.

**End of Document**

[***Samos Investments Inc. v. Pattison, [2001] B.C.J. No. 2702***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-619P-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Bauman J.

Heard: September 17 - 21 and 24 - 27, 2001.

Judgment: December 20, 2001.

Vancouver Registry No. A990956

**[2001] B.C.J. No. 2702** | 2001 BCSC 1790 | 22 B.L.R. (3d) 46 | 110 A.C.W.S. (3d) 245 | 2001 CarswellBC 2989

Between Samos Investments Inc., plaintiff, and James A. Pattison, P. Nicholas Geer, Donald C. Selman, Jim Pattison Ltd., Jim Pattison Industries Ltd., 461847 British Columbia Ltd., Great Pacific Industries Inc., Great Pacific Capital Corp., Westar Group Ltd., Canadian Imperial Bank of Commerce, defendants

(186 paras.)

**Case Summary**

**Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class actions, certification, considerations (including when class action appropriate).**

|  |
| --- |
| Application by Samos Investments for the certification of its action as a class action, and application by several of the defendants to strike portions of the statement of claim alleging a breach of fiduciary duty. Samos alleged that several individuals were involved in a conspiracy regarding a widely traded public company. The alleged conspiracy involved a series of corporate transactions undertaken by the company over a number of years. One of the directors of the company increased his ownership in the company and eventually took the company private. Samos alleged that this director and the other defendants were guilty of fraudulent misrepresentation, the misuse of confidential information and breached their fiduciary duties towards the minority shareholders of the company in conducting these transactions. The proposed class of plaintiffs included shareholders who held shares in the company during three significant time periods. The directors argued that they did not owe any fiduciary duties towards the shareholders.  HELD: Application by Samos dismissed.  Application to strike portions of the statement of claim dismissed. There were many individual issues that needed to be resolved. In addition, there was a real possibility of conflict between the proposed class members. There was not an air of reality to the claim. There was no evidence of any other investors making any complaints about the transactions. It was not plain and obvious, however, that the statement of claim did not disclose a cause of action based on a breach of fiduciary duty. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24).

Class Proceedings Act, [*R.S.B.C. 1996, c. 50, ss. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=), 4(1), 4(1)(a), 4(1)(c), 4(1)(d), 37, 37(2).

Company Act, R.S.B.C. 1996, c. 62, s. 252(2).

Ontario Securities Act.

Securities Act, *R.S.B.C. 1996, c. 418*.

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| --- |
| [Quicklaw note: Supplementary reasons for judgment were released September 24, 2002. See [*[2002] B.C.J. No. 2169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6064-00000-00&context=).] |

**Counsel**

D.W. Roberts, Q.C., W.A. Baker and M. Molloy, for the plaintiff. I.G. Nathanson, Q.C., G.B. Gomery and S.R. Schachter, for the defendants, Pattison et al. J.P. Taylor, Q.C., and C.J. Russell, for the defendant, Donald C. Selman. A.D. Borrell, for the defendant, 461847 British Columbia Ltd. W.M. Everett, Q.C., and A.E. Fitzpatrick, for the defendant, Westar Group Ltd. J. Wood, Q.C., B.C. Elwood and L.D. Hynes, for the defendant, Canadian Imperial Bank of Commerce.

|  |
| --- |
| **BAUMAN J.** |

**1**   These reasons will dispose of the application by the plaintiff, Samos Investments Inc., to certify its action against the defendants under the Class Proceedings Act, *R.S.B.C. 1996, c. 50* (the "Act").

**2**  The plaintiff's application is extraordinary. It seeks to certify on behalf of a single, diverse class, a proceeding which alleges a civil conspiracy spanning some five years and which includes a series of complex corporate transactions involving a widely traded public company.

**3**  As a potential class proceeding, this case is far removed from the single-incident mass tort claim (for example, Bywater v. Toronto Transit Commission [*(1998), 83 O.T.C. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-24BV-00000-00&context=); [*27 C.P.C. (4th) 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-24BV-00000-00&context=) (Ont. (Gen. Div.)), or the defective product case (for example, Campbell v. Flexwatt Corp., [*[1998] 6 W.W.R. 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.), aff'g [*(1996), 25 B.C.L.R. (3d) 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S226-00000-00&context=) (S.C.)).

**4**  It is more like the class proceeding litigation spawned by the alleged fraud involving Bre-X Minerals Ltd., but as I will discuss, the complexity of the many steps in the fraud alleged here easily trumps what effectively was one misrepresentation in Bre-X, viz.: "There is a lot of gold in the Busang."

1. THE PLAINTIFF'S THEORY

**5**  The Amended Statement of Claim helpfully begins by defining a number of terms and I include those definitions as Appendix I to these reasons.

**6**  It is necessary to discuss the pleadings in detail, but I begin by sketching a brief history of Westar Group Ltd. and the essential case of the plaintiff.

**7**  I do so by borrowing from my reasons on an earlier application in this proceeding, [*[2000] B.C.J. No. 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X22V-00000-00&context=), "Samos Investments No. 1"):

[18] Westar was a special act company incorporated in 1977. It was then known as British Columbia Resources Investment Corporation ("BRIC").

[19] BRIC was a widely held public company due, in part, to the government give-away of the Bearer Shares.

[20] Through its various subsidiaries, BRIC was engaged in resource industries, including lumber, oil, gas and coal. In 1988, the company was renamed Westar. With the exception of the Roberts Bank coal terminal (Westshore), Westar's operations became generally financially unsuccessful, suffering recurring losses and generating large debt.

[21] In 1992, Pattison (I will respectfully use only surnames at times) became a director of Westar. In 1992 and 1993, Geer became a director, the president, the chairman and the CEO of Westar. Since 1993, Westar has been managed by the defendant, Jim Pattison Industries Ltd. ("JPIL") under a management services agreement which paid JPIL $1.2 million per year.

[22] At this point, the Pattison Defendants, through JPIL and its affiliates, had an approximately 14% share interest in Westar.

[23] Due to its financial difficulties, Westar's debt (the DRA Debt) as of 20 January 1994, was $220 million. Westshore had a separate credit facility and its debt at this time was $99.3 million.

[24] Westar and Westshore also "enjoyed" substantial tax loss pools. They were in excess of $500 million. These tax loss pools were both disclosed and undisclosed and they were available to off set against future taxable income or capital gains.

[25] As I understand the theory of the plaintiff, Pattison, at this early point, recognized the underlying value of Westar represented by the Westshore Terminal.

[26] The plaintiff alleges that Pattison settled upon a plan to increase his share ownership in Westar, cause Westar to sell off the terminal, shelter the proceeds by use of the tax loss pools, take Westar private and enjoy the fruits of his vision.

[27] The scheme was accomplished, it is alleged, by a complex series of corporate machinations by which the shares of Westar were massively diluted by the issuance of new shares to the Pattison Defendants and CIBC at less than fair market value - at a value depressed by what the plaintiff alleges was the fraud and "economic intimidation" of the defendants.

**8**  The plaintiff then offers this overview in its pleading:

...

1. By 1992 the Pattison Defendants had acquired approximately 27.6 million shares of Westar, or approximately 14.3% of all of the issued Westar shares.
2. From late 1992 through the mid-1997 the members of the Pattison Defendants acted fraudulently and in concert in a civil conspiracy and common scheme to increase the Pattison Defendants' ownership of Westar shares at less than fair value and to the detriment of the minority shareholders of Westar. The members of the Pattison Defendants furthered this scheme by unlawfully abusing their management and insider position in Westar. The ultimate result of this common scheme and these unlawful acts was that the Pattison Defendants were enabled to take Westar private in 1997 and acquire for their own benefit, and to the detriment of the minority shareholders, a profit of approximately $500 million.
3. This common scheme and these unlawful acts were facilitated by the Pattison Defendants' control of the management of Westar through a variety of means, including through JPIL's management contract with Westar, through Geer's position as the Chief Executive Officer of Westar, through Pattison, Geer and Selman holding directorships in Westar, and through economic influence over most if not all of the other directors of Westar.
4. It was during the material time of 1992 to early 1997 when the Pattison Defendants controlled the management of Westar, that the corporate members of the Pattison Defendants purchased and owned shares, debt, Rights and Notes of Westar while engaging in unlawful acts in pursuit of the Pattison Defendants' common scheme.
5. The unlawful acts committed by the Pattison Defendants, with the knowing assistance of CIBC in 1994, included misuse of undisclosed material inside information, failure to disclose material information to minority shareholders, misrepresentations to and economic intimidation of the minority shareholders, breach of fiduciary duties owed to minority shareholders and to Westar, violations of the Securities and Company Acts, and conduct which oppressed and unfairly prejudiced the minority shareholders.
6. The unlawful acts of the Pattison Defendants occurred at various times and in the context of certain key transactions involving Westar which were conceived, structured, and carried out by the Pattison Defendants in furtherance of their common scheme. These key transactions were sophisticated and complex, but will be generally identified herein as:
7. the 1994 Debt Restructuring by which the Pattison Defendants increased their equity interest in Westar from 14.3% to 46.24%;
8. the 1995 Consolidation, 1996 Debt Restructuring, and the 1997 Income Fund Transaction, by which the Pattison Defendants increased their equity interest in Westar to 80% and sold Westar's key asset the Westshore Terminal;
9. the 1997 Going Private Transaction, by which the Pattison Defendants took Westar private and gained 100% ownership of Westar.

**9**  I turn to summarize the steps in the alleged conspiracy as described in the Amended Statement of Claim and here I am repeating what I said in Samos Investments No. 1.

**10**  On 20 January 1994, it was announced that the defendant 461847 B.C. Ltd. ("461"), which was owned by CIBC as to 50% and Seabright as to 50%, had purchased Westar's $220 million DRA Debt from Westar's lenders at a discount of $98 million. The debt was therefore now payable by Westar to 461.

**11**  Westar's Board of Directors agreed to a Master Restructuring Agreement, which set out the details of the payment plan between Westar and 461. Under this agreement, Westar would pay down the $220 million debt to $216 million, and then convert the debt to Notes issued to 461. 461 would retain half of the Notes, and offer the other half for sale to Westar shareholders through a Rights offering. Westar would then issue new shares to all holders of the Notes; the new share issuance would include both voting common shares and non-voting shares (convertible to voting common shares 1 for 1).

**12**  While Geer and Pattison abstained from voting on the Master Restructuring Agreement, the three remaining directors (Selman, Kaplan and Koffman) were close and long-time business advisors of Pattison and allegedly had personal loyalties to him.

**13**  On 19 May 1994, Westar issued a notice (the "1994 Information Circular") calling for a shareholders' meeting to be held on 30 June 1994, and soliciting shareholder approval of the Master Restructuring Agreement. The 1994 Information Circular was prepared by Westar at the direction of and to the knowledge of Pattison, Geer, JPIL, and Selman.

**14**  On 30 June 1994, the shareholders approved the Master Restructuring Agreement.

**15**  On 7 July 1994, 461 published a Rights Offering Prospectus (the "1994 Rights Prospectus") and sent it to Westar shareholders. The 1994 Rights Prospectus, signed by Pattison and Geer, repeated most if not all of the representations contained in the 1994 Information Circular.

**16**  The 1994 Debt Restructuring, because of the new share issuance, resulted in a massive dilution of Westar's outstanding shares held by minority shareholders. Correspondingly, the Pattison Defendants, through JPIL and its affiliates purchase of the Rights and the acquisition of the new shares, increased their ownership of Westar shares from 14.3% to 46.24%.

**17**  On 16 March 1995, Westar issued a notice (the "1995 Information Circular") calling for a shareholders' meeting to be held on 28 April 1995, and seeking shareholder approval to consolidate Westar shares 125 to 1. The 1995 Information Circular was prepared by, at the direction of, and to the knowledge of Pattison, Geer, Selman, and JPIL.

**18**  On 28 April 1995, the shareholders approved the share consolidation.

**19**  Owners of less than 125 shares were left with scrip in place of the shares. Upon consolidation, the Pattison Defendants' equity interest in Westar increased from 46.24% to 46.99%.

**20**  On 1 September 1995, Great Pacific Industries Inc. acquired CIBC's Westar shares, and the Pattison Defendants' equity interest in Westar increased to 64%.

**21**  On 17 May 1996, Westar issued a notice (the "1996 Information Circular") calling for a shareholders' meeting to be held on 28 June 1996, and soliciting shareholder approval of a final restructuring of Westar's debt.

**22**  The terms of the restructuring were that the Notes, at the holders' election, would be either repaid in cash or exchanged for convertible preferred shares ("CP Shares") of Westar. The CP Shares would be convertible to common shares according to a formula based on trading prices of the common shares.

**23**  On 28 June 1996, the shareholders approved the debt restructuring.

**24**  Between 9 August and 8 October 1996, a series of transactions by the Pattison Defendants pursuant to the 1996 Debt Restructuring (consisting of exchanging Notes for CP Shares and converting CP Shares to common shares) resulted in an increase in the Pattison Defendants' equity ownership of Westar to 80%.

**25**  On 9 October 1996, Westar shares traded at $29.25.

**26**  On 30 October 1996, Westar announced that its Board of Directors was considering the possibility of an Income Fund involving Westshore.

**27**  On 5 November 1996, Westar shares rose to $40 allegedly due to the announcement.

**28**  On 3 December 1996, Westar announced that a preliminary prospectus had been filed with the securities commission in every province for a public distribution of trust units in Westshore's Income Fund.

**29**  On 3 December 1996, Westar shares rose to $45.

**30**  On 16 December 1996, Westar issued a notice (the "1996 Income Fund Information Circular") calling for a shareholders' meeting to be held on 27 January 1997, to approve the sale of Westshore to the Income fund. This notice was prepared under the direction of and to the knowledge of Pattison, Geer, JPIL, and Selman.

**31**  By 13 January 1997, Westar shares rose to $65 as the market reacted favourably to the impending sale of Westshore to the Income Fund.

**32**  On 27 January 1997, the shareholders approved the sale of Westshore to the Income Fund for $663.6 million in cash.

**33**  On 21 May 1997, Westar applied to the court, ex parte, for an interim order pursuant to s. 252(2) of the Company Act, [*R.S.B.C. 1996, c. 62*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61MX-00000-00&context=), for Westar to hold an extraordinary shareholders' meeting to consider approval of a plan for the Pattison Defendants to take Westar private.

**34**  The plan proposed that the minority shareholders would elect to be bought out by Westar (or deemed to be bought out by Great Pacific Capital Corp. if no election was made) for $70 per share.

**35**  On 22 May 1997, Westar issued a notice (the "1997 Information Circular") calling for a shareholders' meeting to be held on 27 June 1997 and soliciting approval of the plan to go private.

**36**  Westar, at the direction of Pattison, Geer, Selman, and JPIL, applied to the court for an order to approve the plan to go private, and the application was supported by an affidavit sworn by Geer.

**37**  On 27 June 1997, the shareholders approved the plan to go private.

**38**  On 30 June 1997, the British Columbia Supreme Court, by order, approved the plan to go private.

**39**  As a result of the 1997 Going Private Transaction, the Pattison Defendants acquired 100% of the equity ownership of Westar.

**40**  Westar's primary asset at the time of the 1997 Going Private Transaction was the large amount of cash from the sale of Westshore for $663.6 million. On taking Westar private, it is alleged that the Pattison Defendants acquired this asset for their sole benefit and that it amounted to a tax free profit of over $500 million.

**41**  In respect of each step in the alleged scheme, the plaintiff particularizes various and sundry allegations of unlawful conduct by the defendants and unlawful acts against the minority shareholders, including breach of fiduciary duties, breach of equitable obligations, fraudulent misrepresentation, misuse of confidential information, failure to disclose material information, oppressive and unfairly prejudicial conduct, violations of the Company Act and the Securities Act, *R.S.B.C. 1996, c. 418*, and unjust enrichment.

**42**  To appreciate the breadth of the allegations in respect of each transaction in the conspiracy, it is necessary to reproduce substantial portions of the Amended Statement of Claim.

**43**  In respect of the 1994 Debt Restructuring, we find these allegations:

1. In the 1994 Information Circular and 1994 Rights Prospectus statements were made to the minority shareholders which were misleading and untrue to the knowledge of Pattison, Geer, Selman, JPIL, and 461 and Westar, as follows:
2. "...the volume shipped through Westshore's coal terminal has fallen substantially from the record levels in 1991, and does not seem likely to improve significantly in the near future."
3. "Group's efforts to restructure its debt were hindered by the fact that cash flow generated by Westshore in 1993 and expected to be generated in 1994, is insufficient at current interest rates to service the Westshore debt, meet the interest requirements of the DRA Debt and permit repayment of the principal thereof."
4. "In any event, the provisions of the Westshore Standstill Agreement do not permit Westshore's cash to be applied to service the DRA Debt."
5. "For a period of almost two years after maturity of the DRA, the company did not reach agreement with the Group lenders on any basis for structuring the DRA Debt. As a result, the company has concluded that, if it continues with its current debt service requirements, some form of insolvency proceedings will become likely";
6. "If the [1994 Debt Restructuring resolutions] are not passed...the Company believes that without relaxation of its debt service requirements, some form of insolvency proceeding will become likely";
7. that Westar's DRA lenders were in a position to demand immediate repayment of the DRA Debt which "would, in all likelihood, have put the Company into some form of bankruptcy proceedings";
8. that "in the absence of the [1994 Debt] Restructuring, the viability of Westar as a going concern is highly uncertain"; and,
9. that an "independent" committee of directors led by Selman had been active in the negotiations of the Master Restructuring Agreement and recommended approval of it, and had determined that the Richardson Greenshields Report included in the 1994 Information Circular was adequate to support this recommendation.
10. In the 1994 Records further statements were made to minority shareholders which were misleading and untrue to the knowledge of Pattison, Geer, Selman, JPIL, 461, and Westar and the Pattison Defendants, including statements to the effect that:
11. Westar had a lack of success in restructuring the DRA Debt before the 1994 Debt Restructuring;
12. the Directors, in particular Selman, who were to negotiate the restructuring of the debt were "independent";
13. the proposal for restructuring the debt would not contemplate a going private transaction;
14. JPIL had "no intention of acquiring more common shares and Rights following the Special Meeting" of June 30, 1994;
15. JPIL or its affiliates might purchase additional Rights in the open market depending upon market price and other market conditions;
16. JPIL had not reached a decision on July 25 and 26, 1994 with respect to whether or not and to what extent it would exercise the additional subscription privilege conferred on Rights holders;
17. JPIL had not reached a decision on August 11 and 12, 1994 with respect to whether or not and to what extent it would exercise the additional subscription privilege conferred on Rights holders;
18. in September 1994 JPIL and its affiliates had no intention of acquiring any further securities of Westar; and
19. the Pattison Defendants' intentions were to acquire and hold Westar shares for investment only.

**44**  The plaintiff then deals with what it alleges was the intended impact of the misrepresentations:

1. The misrepresentations made by statements and omissions in the 1994 Information Circular, 1994 Rights Prospectus and in the 1994 Records, to the knowledge of Pattison, Geer, Selman, 461, Westar and CIBC, were designed to:
2. intimidate the shareholders by expressly and/or implicitly threatening that 461, i.e., the Pattison Defendants through Seabright, and CIBC, would enforce the DRA Debt security bringing about the insolvency of Westar unless the shareholders approved the Master Restructuring Agreement and the issuance of approximately 450 million shares, and to thus encourage the minority shareholders to approve of, or to not disapprove of, the 1994 Debt Restructuring; and,
3. discourage the minority shareholders from exercising, acquiring or retaining Rights, so as to provide greater opportunity for the Pattison Defendants to acquire Rights through open market purchases and through the exercise of the Additional Subscription Privilege;
4. depress the market prices for Rights and Westar shares and permit the Pattison Defendants to acquire outstanding Rights at less than fair market value.

**45**  Advancing to the 1995 Share Consolidation, the plaintiff again alleges the provision of misleading and untrue information to Westar shareholders and it alleges that these misrepresentations were intended by the defendants to encourage minority shareholders who held less than 125 shares to abandon their shares and/or scrip.

**46**  The Amended Statement of Claim then turns to the 1996 Debt Restructuring and the plaintiff alleges sundry misleading and untrue statements made in the 1996 Information Circular and in the 1995/1996 Records. Again, it is alleged that the effect of these various statements and omissions was to misrepresent to minority shareholders that there was good reason to approve of the 1996 Debt Restructuring and no good reason to disapprove of it.

**47**  Paragraph 102 of the Amended Statement of Claim then concludes in respect to the 1996 Debt Restructuring:

1. The Pattison Defendants continued the above misrepresentations and failures to disclose to the minority shareholders in order to use the undisclosed information for the Pattison Defendants' own advantage, in further breaches of fiduciary duties owed to the minority shareholders, when the Pattison Defendants bought the Notes of CIBC on August 9, 1996, when they converted all Notes to 4.6 million CP shares on August 15, 1996, and when they converted these CP shares to common shares in the two transactions of September 3 and October 8, 1996 as pleaded in paragraphs 92, 94, and 95 herein, in failing to inform the minority shareholders of:
2. the full potential of Westshore and its sustainable cash flow;
3. their research, creation, organization and development of the Westshore Income Fund, and their intention of selling Westshore to such fund so as to enhance the value of the shares of Westar;
4. the existence of an undisclosed Tax Loss Pool of $500 million, approximately, which would enable the proceeds of a sale of Westshore to be tax free.

**48**  The Amended Statement of Claim advances to the 1997 Going Private Transaction and at para. 122 calls it:

... the culmination of the series of unlawful acts of Pattison, Geer, Selman and the Pattison Defendants, commencing with the 1994 Debt Restructuring and continuing with the 1995 Consolidation and 1996 Debt Restructuring, and 1997 Income Fund Transaction, as pleaded supra.

**49**  The plaintiff continues and describes the nature of the misleading and untrue statements by certain of the defendants leading to the approval of the Plan of Arrangement:

1. The representations made in the 1997 Information Circular and in the Affidavit of Geer filed in support of Court approval of the Plan of Arrangement, as pleaded in paragraphs 114 and 115 herein, were misleading and untrue to the knowledge of Pattison, Geer, Selman, JPIL, and Westar in that:
2. neither the Plan of Arrangement nor the share price of $70 per share was fair to the minority shareholders, as the minority shareholders' proportionate share of the proceeds of sale received by Westar on the sale of Westshore to the Income Fund would and should have been much greater had it not been for the unlawful acts of the Pattison Defendants in respect of the 1994 Debt Restructuring, 1995 Consolidation, and 1996 Debt Restructuring;
3. the committee of directors who recommended the Plan of Arrangement to minority shareholders were not independent, but were long-time business advisors and associates of Pattison who held personal loyalties to Pattison, and who knew or should have known of the previous series of unlawful acts by the Pattison Defendants as pleaded herein and that these had resulted in the massive dilution of the minority shareholders' proportionate share of the equity of Westar;
4. by failing to disclose to the Court the unlawful acts of the Pattison Defendants which occurred in respect of each of the 1994 Debt Restructuring, 1995 Consolidation, 1996 Debt Restructuring, and the 1997 Income Fund Transaction, the Pattison Defendants misrepresented to the Court the history of their management of Westar and the fairness of the Plan of Arrangement;
5. by failing to disclose to the minority shareholders the Pattison Defendants' history of abuses of their management and insider position in Westar and their unlawful acts in respect of the 1994 Debt Restructuring, 1995 Consolidation, 1996 Debt Restructuring, and the 1997 Income Fund Transaction transactions, the Pattison Defendants misrepresented to minority shareholders the fairness of the Plan of Arrangement.

**50**  The relief sought includes equitable or general damages or statutory compensation and exemplary, aggravated and/or punitive damages.

**51**  In para. (h) of the prayer for relief, the plaintiff proposes: "the damages to be an aggregate award on behalf of all members of the class under Part 4, Division 2 of the Class Proceedings Act ...".

1. THE PROPOSED CLASS

**52**  The plaintiff proposes as a single class (with limited exceptions, including for example, the defendants) all persons who were shareholders of Westar as of any of the following dates:

1. at any time during the period January 20, 1994 to and including September 1, 1994 (the "1994 Debt Restructuring");
2. all owners of less than 125 shares at any time during the period March 14, 1995 to and including April 28, 1995 (the "1995 Consolidation"); and
3. at any time during the period May 14, 1996 to and including May 22, 1997 (from the 1996 Debt Restructuring to the 1997 Income Fund Transaction and the 1997 Going Private Transaction).

**53**  Samos itself was the registered owner of 1,000 BRIC shares as of 1982.

**54**  Those became eight Westar shares upon the 1995 Consolidation. Samos held its shares until the conclusion of the 1997 Going Private Transaction.

1. CERTIFICATION REQUIREMENTS

**55**  Section 4 of the Class Proceedings Act lists the criteria for certification:

Class certification

1. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
2. the pleadings disclose a cause of action;
3. there is an identifiable class of 2 or more persons;
4. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
5. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
6. there is a representative plaintiff who
7. would fairly and adequately represent the interests of the class,
8. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
9. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
10. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
11. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
12. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
13. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
14. whether other means of resolving the claims are less practical or less efficient;
15. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**56**  The plaintiff on this application has made detailed submissions under each subsection of s. 4(1).

**57**  The defendants have likewise said all that could be said under each of the requirements.

**58**  Under the "cause of action" criterion, for example, much was said by the defendants, in particular CIBC, about the infirmities of the plaintiff's pleadings and their alleged failure to plead material facts founding various claims, especially that of breach of fiduciary duty. This was said in the context of a 59 page Statement of Claim.

**59**  But the threshold for a plaintiff under s. 4(1)(a) of the Act is relatively low - the test is the same as that on a Rule 19(24) application, that is, the "certain to fail" or the "plain and obvious" test: among others, see Elms v. Laurentian Bank of Canada [*(2001), 90 B.C.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), [*2001 BCCA 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), aff'g [*(2000), 73 B.C.L.R. (3d) 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X059-00000-00&context=) (S.C.) and Denis v. Bertrand & Frere Construction Company Limited, [*[2001] O.J. No. 1583*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-F65M-638M-00000-00&context=) (22 November 2000) Doc. 315-1999CP (Ont. S.C.J.).

**60**  Because of the view I take when the application is considered under ss. 4(1)(c) and (d), I will assume for the purposes of argument that the plaintiff has satisfied s. 4(1)(a) of the Act. I set to one side, however, the application by the Pattison Defendants to strike certain portions of the Amended Statement of Claim under Rule 19(24).

**61**  Counsel have provided me with an extensive list of authorities on the certification of class proceedings, primarily in British Columbia and Ontario.

**62**  Since the hearing of this application, the Supreme Court of Canada has published its decisions in Hollick v. Toronto (City), [*[2001] S.C.J. No. 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-F5KY-B4XT-00000-00&context=) and Rumley v. British Columbia, [*[2001] S.C.J. No. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S15P-00000-00&context=) and counsel have helpfully provided written submissions on those cases.

**63**  In an effort to summarize the many relevant decisions, I have prepared the compendium of cases which is attached as Appendix II to these reasons. Appendix II will, I hope, provide a useful summary of the cases as well as indicate the class proceedings jurisprudence to which I have had reference.

**64**  I will begin with some first principles.

**65**  In Hollick v. Toronto (City), Chief Justice McLachlin discussed Ontario's Class Proceedings Act, [*S.O. 1992, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G31-DY33-B016-00000-00&context=) and noted that it is similar to that adopted in British Columbia.

**66**  The Chief Justice began by saying that the legislative history of the Class Proceedings Act makes it clear that it should be construed generously (para. 14).

**67**  The Chief Justice then noted the three advantages to class action proceedings (at para. 15):

The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

**68**  McLachlin C.J.C. stressed that the drafters rejected a "preliminary merits test" at the certification stage (at para. 16):

It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclose[] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. [*(1997), 34 O.R. (3d) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5KY-B45D-00000-00&context=) (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

**69**  Finally, the Chief Justice discussed the common issues criterion in the Ontario legislation (at para. 18):

A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

**70**  I note that the British Columbia legislation is even more generous on the "common issues" criterion by making it irrelevant "whether or not those common issues predominate over issues affecting only individual members."

**71**  Justice Winkler of the Ontario Superior Court of Justice has written many of the pioneering decisions on class proceedings.

**72**  On the certification application in Carom v. Bre-X Minerals Ltd. (see Appendix II), Winkler J. dealt with the common issue criterion. First, he said (at O.R. 193) that:

... common issues are not synonymous with common causes of action. ... The necessary nexus for certification is that the claims asserted raise "common, though not necessarily identical" issues of fact or law. ...

**73**  Finally, he said, (at O.R. 194):

The sense of a common issue in the context of a class proceeding is, therefore, one which will not only move the litigation forward as a matter of logic, but is an issue in respect of which a finding will contribute to the case in a legally material way.

**74**  As I said in my introduction, the case before me is not a single mass tort or defective product proceeding.

**75**  That said, I have found the most assistance in cases which approach (none equal) the case before me: those dealing with proposed class actions for fraudulent/negligent misrepresentation and breach of fiduciary duties in cases involving, primarily, investments.

**76**  These include (see Appendix II for their citations):

Abdool v. Anaheim Management Ltd.

Carom v. Bre-X Minerals Ltd.

Collette v. Great Pacific Management Co.

Elms v. Laurentian Bank of Canada

Korte v. Deloitte, Haskins & Sells

McDougall v. Collinson et al.

Maxwell v. MLG Ventures Ltd.

Millard v. North George Capital Management Ltd.

Millgate Financial Corp. v. BF Realty Holdings Ltd.

Rosedale Motors Inc. v. Petro-Canada Inc.

**77**  Coincidentally, certification was allowed in whole or in part in five of the cases and refused in the other five.

**78**  It is instructive to contrast the cases in an effort to extract common themes.

**79**  Certification was allowed in Carom, Elms, Korte, Maxwell and Millard.

**80**  The facts in each case are briefly summarized in Appendix II and I will not repeat them.

**81**  The first point that emerges is that in each case the central allegation concerned essentially a single transaction.

**82**  In Elms, it was an allegation of a failure to warn the plaintiffs that the monies they invested were unsecured by the lands.

**83**  In Maxwell, the complaint concerned the breach of two sections of the Ontario Securities Act as a result of alleged misrepresentations in an offering circular and the class was simply all shareholders who tendered their shares in response to the offer in the circular.

**84**  Millard was somewhat different. There the class was to be 200 investors who lost money as a result of the alleged fraud - a ponzi scheme or schemes - perpetrated by the principal defendants.

**85**  There was, however, an allegation of a common sales pitch used to attract the investors.

**86**  Carom involved, of course, the alleged fraud in the run up of shares in Bre-X Minerals Ltd. The allegations covered an extensive time period (May 1993 to 26 March 1997) and voluminous misrepresentations.

**87**  But as Justice Winkler pointed out (at O.R. 194), the plaintiffs were effectively asserting a single misrepresentation: "that there was gold in minable quantities in the Busang."

**88**  It is not clear from the reasons in Korte exactly what type of fraud was alleged by the plaintiffs, but the court noted that success for one of the plaintiffs meant success for all of them and the defendants conceded that no assessment of the claims of individual plaintiffs was required.

**89**  A case decided in Ontario after the conclusion of argument on this application - Kerr v. Danier Leather Inc., [*[2001] O.J. No. 4000*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-FCYK-21TF-00000-00&context=) (Ont. S.C.J.)- continues the single transaction theme. There, the plaintiffs sought to represent a class of persons who allegedly suffered losses as a result of misrepresentations made by the defendants in an initial public offering through a prospectus.

**90**  The alleged misrepresentations related to the forecast of revenues, profits and earnings for the fourth quarter of 1998 and for the fiscal year ended 27 June 1999. As Justice Cumming noted (at para. 41): "The claim of the class members involve an alleged single, common misrepresentation made to all class members."

**91**  The second point that emerges from these cases is really a reflection of the first: the proposed class in each case was largely homogeneous; the same fraud or misrepresentation was made to all and that triggered each of their losses - although the quantum of each loss might not have been similar.

**92**  The third point is in turn a reflection of the second: each class member's loss was easy to quantify, that is, amount invested less amount realized when the fraud/misrepresentation became generally known.

**93**  This point is especially made by reference to Carom, the most ambitious of the certified class proceedings. There, Justice Winkler certified the proceeding in respect of the class of persons who purchased Bre-X shares between 1 May 1993 and 26 March 1997 and who suffered a net loss after the scandal broke.

**94**  I turn to contrast the cases where certification was denied. Once again, these include Abdool, Collette, McDougall, Millgate Financial Corp. and Rosedale Motors Inc.

**95**  In Abdool, Justice Moldaver (Flinn J. concurring in the result) was most concerned about the number of individual issues that would need to be resolved after determination of the common issues. He said (at para. 130) that after some or all of the common issues were determined in favour of the plaintiffs "... this would be but the beginning, not the end, of liability inquiry. Thereafter, separate trials would be required in connection with each of the plaintiffs to determine the matter of detrimental reliance ...".

**96**  Moldaver J. was also concerned about the differences in the claims advanced by individual class members (at paras. 124 and 125):

Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

That being so, consideration of those factors in the context of this case reveals the existence of four of the five grounds, namely:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
2. The relief claimed relates to separate contracts involving different class members;
3. Different remedies are sought for different class members;
4. The class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members.

**97**  In Collette, Justice Macaulay considered a misrepresentation case which resulted in the proposed class members losing monies on certain mortgage investments. There was a plea of systemic ***negligence***.

**98**  My colleague did find a number of common issues, but he noted (at para. 65):

It follows from my earlier discussion of reliance that commonality is much more limited than the plaintiff suggested. This is not a case of a single offering made to a homogenous class. Different investors will have learned of the investment opportunity in different ways and at different times, whether through discussion with advisors or by reviewing promotional materials or both. Some investors may have purchased based on information or advice received from other sources. Different investors will have differing risk tolerances according to their personal circumstances and the structure of their investment portfolio. Some, but not all will likely have reviewed other contractual documents relating to the two projects as recommended in the promotional material.

**99**  Macaulay J. analyzed the decisions in Carom to the extent that negligent misrepresentation, in addition to fraudulent misrepresentation, was eventually certified (at para. 90):

Claims in negligent misrepresentation are most likely to be certified where the common question focuses on the conduct or knowledge of the defendant, usually at a particular point in time, and the resolution of that issue will move the litigation along. Ultimately, that was the case in Bre-X, even though individual issues of reliance remained to be determined separately. In Bre-X, the common questions related to a pivotal issue, the defendant's alleged knowledge of fraud. The resolution of that issue for or against the defendant would be expected to significantly impact the resolution of remaining issues including the questions of individual reliance.

**100**  McDougall is another British Columbia case. That certification application foundered on a number of grounds, including a lack of identifiable common issues and conflicts between the investor groups who were to form the proposed class.

**101**  Justice Daphne Smith concluded, on the common issues criterion (at para. 122):

Due to the difficulty in identifying the common issues, the numerous conflicts between the investor groups both before and after the settlements, and the predominant number of individual issues raised by the pleadings, I have concluded there are no identifiable common issues, that if resolved, would advance the litigation in the interests of the class.

**102**  In Millgate Financial Corp., the central issue was whether the conveyance of certain real estate assets by BF Realty Holdings Ltd. to a subsidiary corporation constituted a breach of the provisions of certain trust indentures issued by BF Realty.

**103**  Justice Cumming considered the preferable procedure criterion and I reproduce his analysis (at paras. 50-52 inclusive):

There are other factors to consider as well. The issues of damages within the context of a class proceeding may well vary depending upon which grouping or subclass a member falls within. Some debentureholders purchased their securities at the initial offering and remain holders, some purchased and sold after the Conveyance and yet others purchased the debentures well after, and with knowledge of, the Conveyance.

The proposed class contains a large number of individuals and corporations who purchased their debentures at different times for varying prices. Some of the members did not own some or all of the debentures now the subject of their claims when the alleged misrepresentations were made. The information that each class member possessed, as a basis to make a decision to take steps to oppose the Conveyance, varied. Individual discovery is required to determine the contents of any representations made, as well as whether reliance was placed upon any given statement to the detriment of the debenture holder. The proposed class will contain members who did not detrimentally rely upon any statements made by the defendants.

The Amended Statement of Claim alleges in paragraphs 39, 40 and 41 that there was a failure to properly inform debentureholders of certain material facts and that various misrepresentations were made to debentureholders. The alleged misrepresentations vary somewhat as made to different debentureholders. As well, an essential element in any misrepresentation claim is the proof of 'reliance' upon the so-called representation by each person to whom it has been made. Hedley Byrne & Co. v. Heller & Partners Ltd.(1963), [1964] A.C. 465 (U.K. H.L.) at 501, 502, 514. The fact that the named plaintiffs may prove their reliance on certain representations would not prove the case of the remainder of the class. Canning v. University of Toronto [*(1984), 48 O.R. (2d) 360*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JGPY-X4M4-00000-00&context=) (Ont. H.C.) at 363; Sherman v. Drabinsky [*(1990), 74 O.R.(2d) 596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S35P-00000-00&context=) (Ont. H.C.) at 599, 600. Procedural fairness requires individual discovery and production in respect of those members who claim there was a misrepresentation relied upon to the member's detriment. Abdool v. Anaheim Management Ltd. [*(1995), 21 O.R. (3d) 453*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4HJ-00000-00&context=) (Ont. Div. Ct.) at 466, 477. In respect of the 'misrepresentation' claim, certification would result in several individual trials. See Mouhteros v. DeVry Canada Inc. at para. 31.

**104**  The learned judge concluded that a class action did not constitute the preferable procedure for addressing the claim of the plaintiffs at that time.

**105**  Finally, in Rosedale Motors Inc., Justice Sharpe (then of the Ontario Court, General Division) dealt with a plaintiff who sought to certify an action alleging misrepresentation, breach of contract, unconscionability and breach of fiduciary duty in relation to the sale of a franchise by the defendant.

**106**  Justice Sharpe applied his own reasoning in Controltech Engineering Inc. v. Ontario Hydro (Appendix II) (at O.R. 787):

In my view, the present case presents the same difficulty as did the claim in Control Tech, The [sic] franchise agreements were entered by each franchisee individually after discussion with Petro-Canada representatives. While some of the alleged misrepresentations were contained in the brochure, the claim does not turn on the brochure alone. The claims of all class members do not turn on a single common representation but rather in large part upon what was said by individual Petro-Canada representatives to individual class members in separate meetings that led to the creation of relatively complex business relationships.

**107**  What emerges from these cases is evidence of a marked reluctance to certify actions where there would be the need to resolve a number of issues individually, where there are differences in the claims or conflicts of interest between the proposed class members, and where, in misrepresentation cases, there is no commonality as to the representation received or the timing of receipt.

**108**  Indeed, in the case of conflicts of interest within the class, "reluctance" is not the appropriate word - in that case, the certification should be refused: Western Canadian Shopping Centres Inc. v. Dutton (see Appendix II).

**109**  In Dutton, McLachlin C.J.C. stated (at para. 40):

Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

**110**  On these points, it is useful, as well, to look again at Carom v. Bre-X Minerals Ltd., because it is as important a case in the context of the actions which Justice Winkler refused to certify. These included the action against the engineer - because the duty of care issue required an analysis of the individual circumstances of each class member, and the actions against the brokers - because the standard of care owed to clients was individual in nature and varied widely.

1. APPLICATION OF PRINCIPLES

**111**  Mr. Nathanson, for the Pattison Defendants and Messrs. Wood and Elwood for CIBC, have made exceedingly detailed submissions on what they say is a lack of commonality of issues and interests between shareholders within each of the three time periods chosen by the plaintiff to define the class and between shareholders period to period.

**112**  This lack of commonality extends, they urge, to actual conflicts in the interests of various shareholders within the class.

**113**  I recall the class definition suggested by the plaintiff, that is, with certain exclusions, all persons who were shareholders of Westar as of any of the following dates and circumstances:

1. at any time during the period 20 January 1994, to and including 1 September 1994 ("Period 1 Shareholders");
2. all owners of less than 125 shares at any time during the period 14 March 1995 to and including 28 April 1995 ("Period 2 Shareholders"); and
3. at any time during the period 14 May 1996 to and including 22 May 1997 ("Period 3 Shareholders").

**114**  As to Period 1 Shareholders, I have already reproduced paragraphs 59 and 60 of the Amended Statement of Claim.

**115**  Those paragraphs allege misleading and untrue statements to the shareholders contained in the 1994 Information Circular, the 1994 Rights Prospectus and the 1994 Records. Those documents in turn were published and distributed on various dates within Period 1.

**116**  We are left then with various alleged misrepresentations published at various times within Period 1.

**117**  At the same time, the defendants note that shares in Westar were actively trading.

**118**  A total of 109,257,804 Westar shares were traded in Period 1 and these represent 66% of the common shares of the company held by persons other than JPIL as of 6 July 1994.

**119**  During the period September 1994 to 13 May 1996, that is, effectively, the gap period within the proposed class (except for those with less than 125 shares in Period 2) 153% of the common shares held by persons other than JPIL and 461 were traded.

**120**  During Period 3, trading volume represented approximately 48% of the common shares held by persons other than JPIL and 461.

**121**  As with Period 1, the plaintiff again complains of numerous misrepresentations made at various times within this period leading to shareholder approval of the Plan of Arrangement.

**122**  In light of the active trading of Westar common shares during this period, what emerges is a scenario where different representations were made to different shareholders, potentially inducing wholly different reactions, that is, encouraging some to sell, others to buy and still others to stand pat.

**123**  The contrast with what effectively was a single misrepresentation in Carom is striking.

**124**  The defendants submit that reliance by shareholders on the various misrepresentations alleged in the Amended Statement of Claim is a critical aspect to the plaintiff's theory.

**125**  Mr. Elwood for CIBC says that this is implicitly acknowledged by the plaintiff, because it proposes to exclude from the proposed class, persons who only held shares during 2 September 1994 to 13 March 1995 and 29 March 1995 to 13 May 1995, the so-called "gap periods".

**126**  Counsel submits:

... The reason why the Plaintiff excluded the Gap Shareholders, although not clear from the Statement of Claim, is apparent as a matter of logic: the Gap Shareholders were not harmed by the alleged wrongful conduct, either because there were no actionable representations during the gaps, or because the impugned transactions had "concluded". Put another way, the effect of the Defendants' alleged wrongdoing was neutral during the gaps, and could not have had a causative effect on the price the Gap Shareholders paid or received, because the alleged wrongdoing depressed the value of their shares equally at the time they purchased and at the time they sold.

**127**  I agree with this submission.

**128**  To my mind it underlines the fact that the plaintiff's case calls for numerous individual enquires as to shareholder reliance within each period in the proposed class and this tends to belie the submission that there are, in reality, common issues which if resolved will advance this litigation in a material way.

**129**  The fact of different representations at different times within each period also leads to actual conflicts between shareholders within the same period. It may be in the interests of one shareholder to say that those representations upon which he or she relied were causative of loss while those made to others were neutral.

**130**  The lack of a single misrepresentation to a homogeneous group which characterizes this claim, recalls the facts in Collette, Millgate Financial Corp. and Rosedale Motors Inc. where that consideration, amongst others, led to a refusal to certify the proceedings.

**131**  The case before me for certification suffers further when one considers the potential for real conflicts between, for example, the class members in Period 1 and a class member who only joined in Period 3.

**132**  Mr. Nathanson submits that it would be in the interests of the latter class members to stress the wrongs done them later in the chain of torts and conversely to downplay those allegedly done earlier.

**133**  On the other hand, the Period 1 shareholder could well be more interested in arguing that the real damage was done early in the piece by the massive share dilution wrought by the 1994 Debt Restructuring.

**134**  Conflicts arise even as between class members who held shares throughout the three periods where some, but not all, may have taken advantage of the 1994 Rights Offering or taken up the CP Shares and converted them to common shares in 1996.

**135**  The reality of conflicts between class members is made manifest by the plaintiff's statement of what it calls "common issue #1". Under the heading "Civil Conspiracy" the plaintiff proposes this as a common issue:

Are the defendants liable to the members of the plaintiff class for civil conspiracy for each of or all of the 1994 Debt Restructuring, the 1995 Consolidation, the 1996 Debt Restructuring, the 1997 Income Fund and Going Private Transaction ...

[Emphasis added.]

**136**  This suggests the possibility of certain of the transactions being within the conspiracy and certain without. Once again, the shareholders from different periods may well wish to advance different theories of the conspiracy to further their particular claims at the expense of shareholders from other periods.

**137**  The potential for conflict between members of the proposed class extends to the theory of damages various shareholders may wish to advance.

**138**  As noted earlier, the plaintiff advances a claim for an aggregate award on behalf of all members of the proposed class under Part 4, Division 2 of the Act.

**139**  In its plan for proceeding, the plaintiff states:

Phase 2 - Determination of Damages

1. The plaintiff proposes that there are two relevant periods for the purpose of determining damages:
2. the 1994 Debt Restructuring to the 1997 Going Private Transaction;
3. the 1996 Debt Restructuring to the 1997 Going Private Transaction.

The Plaintiff proposes that the aggregate damages be awarded by the Trial Judge on a per share basis and distributed pro rata, according to the proportion of the applicable damage period in which the Class member owned his/her shares.

**140**  Mr. Nathanson notes this proposal, quotes from the plaintiff's submission and then responds:

...

1. Paragraph 228 sheds some light on the plaintiff's reasoning:

In fact, for all shareholders who held their shares during the period of the alleged wrongs, the damage assessment is a common issue. The assessment is the same for those shareholders who held shares at the 1994 Debt Restructuring through to the Plan of Arrangement, and similarly, is the same for those shareholders who held shares at the beginning of the 1996 Debt Restructuring to the Plan of Arrangement.

1. The first point to note is the plaintiff's concession, according to this formulation, that the damage assessment is not the same for shareholders who held shares from 1994 to 1997 as for shareholders who held from 1996 to 1997.
2. The second, and much more important, point is that the plaintiff's reasoning does not take into account all the shareholders who bought or sold shares during 1994, 1996 and 1997. ...
3. The plaintiff's proposal treats the damages purely as a function of the length of time during which a member of the class held its shares. This assumes that the loss was suffered evenly through the periods the plaintiff has defined, an assumption which is not tenable. Such an assumption will favour some members at the expense of others, without reference to their personal situations. Members who bought or sold shares may find that, through a lawsuit brought on their behalf, with favourable findings of fact, they have recovered smaller damages than the facts would justify.
4. The plaintiff's proposal is an attempt to avoid the conflicts which exist within the proposed class and underscores their existence. The plaintiff would avoid the conflicts by the arbitrary allocation of shareholders to two classes, without reference to the quantum of their individual claims. The court cannot assume that each and every shareholder, properly advised, would agree to such a proposal. Such an allocation cannot be imposed upon the proposed class to make the conflicts disappear.

...

**141**  I agree with the thrust of this submission.

**142**  The potential for conflicts extends to the plaintiff's claim for a restitutionary remedy or equitable relief.

**143**  Counsel for CIBC identifies two shareholders for the purpose of his submission: a "1994 Shareholder", that is a shareholder who held shares between 20 January 1994 and 1 September 1994 and who sold them, for example, on 1 December 1994 and a "1997 Shareholder", that is a shareholder who, for example, acquired more than 125 shares on 1 December 1994 and sold the shares at the end of January 1997, after the income fund transaction was concluded.

**144**  Mr. Nathanson notes that the plaintiff's restitutionary remedy is outlined in paragraph 146 of the Amended Statement of Claim and that it is advanced on the basis of unjust enrichment or in the alternative, constructive trust such that under either approach the Pattison Defendants must be required to disgorge their profits of $500,000,000.

**145**  Counsel stresses the plaintiff's reliance on the Supreme Court of Canada's decision in Soulos v. Korkontzilas [*[1997] 2 S.C.R. 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VS-00000-00&context=), [*146 D.L.R. (4th) 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VS-00000-00&context=) and submits that there the court recognized two bases upon which a constructive trust claim might be advanced: where there has been an "enrichment" of the defendant and a corresponding "deprivation" of the plaintiff, and alternatively a constructive trust may apply absent an established loss "to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions" (per McLachlin J. (as she then was) at para. 14).

**146**  Mr. Nathanson then argues:

1. It is not clear on which of these legal theories the 1994 Shareholder would wish to base his or her claim. If the facts support the contention (as Mr. Roberts has submitted in earlier hearings) that the bulk of the benefit obtained by the Pattison defendants (and, one must assume, the corresponding detriment) was in 1994, then a 1994 Shareholder would wish to emphasize unjust enrichment. If, however, it appears that the full extent of the benefit was only realized by the Pattison defendants in 1996 and 1997, then the 1994 Shareholder would emphasize the seriousness of the defendants' conduct in the earlier period, and develop an argument emphasizing the importance of these wrongful acts to the enrichment ultimately achieved by the Pattison defendants. At this stage, it cannot be said how a 1994 Shareholder will definitely wish to proceed, but it is obvious that a shareholder who only acquired shares afterwards might take quite a different view.

**147**  And he makes a similar point in respect of the 1997 Shareholder and then highlights the conflict between the two:

1. As with the 1994 Shareholder, the 1997 Shareholder may wish to advance a restitutionary or equitable claim on either one of two bases. A 1997 Shareholder may advance his or her claim on the basis that the Pattison defendants realized their benefits in January, 1997, giving rise to a restitutionary claim for the 1997 Shareholder on the basis of unjust enrichment. His or her position might be that a 1994 Shareholder is limited to a claim for damages. On the other hand, in circumstances in which a 1994 Shareholder would argue that the bulk of the benefit obtained by the Pattison defendants, together with the corresponding detriment to the shareholders, was realized prior to December 1, 1994 (when the 1997 Shareholder acquired his or her shares), the 1997 Shareholder, in the alternative, would not base his or her equitable claim on unjust enrichment, but would rather emphasize the wrongfulness of the Pattison defendants' later conduct and the significance of that conduct to the ultimate realization of the benefits achieved by the Pattison defendants. It can thus be seen that the position to be taken by the 1997 Shareholder will conflict with that of the 1994 Shareholder.

**148**  Again, I agree with the thrust of these submissions.

**149**  Having concluded that when analyzed, what superficially might appear as common issues are distinctly uncommon between members of the proposed class and having further identified the real potential for conflicts between proposed class members, it is not strictly necessary to undertake the preferability analysis under s. 4(1)(d) of the Act, but I will do so.

**150**  In Western Canadian Shopping Centres Inc., the Supreme Court of Canada described the preferability analysis in this manner (at paras. 42 and 44):

While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

*Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.*

[Emphasis added.]

**151**  This case has been pleaded as one of conspiracy. While there are individual steps in the conspiracy, the plaintiff alleges a "common scheme" from late 1992 through mid 1997 (para. 11 of the Amended Statement of Claim).

**152**  I have concluded that that plea offers only superficial commonality. In reality, the pleadings allege many torts, affecting many individuals in varying degrees and in substantively different ways.

**153**  That concern in Hollick v. Toronto (City) [*(1999), 181 D.L.R. (4th) 426*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4M5-00000-00&context=), [*46 O.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4M5-00000-00&context=), aff'g [*(1998), 168 D.L.R. (4th) 760*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1S9-00000-00&context=), [*42 O.R. (3d) 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1S9-00000-00&context=) (Ont. Div.Ct.) led the Ontario Court of Appeal to observe (at para. 16 and 22):

My conclusion is that there are no common issues which can be *manageably tried* or will advance the litigation and thus, in the end, I would deny certification on this basis without leave to reapply.

... [The members of the plaintiff class] are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. *A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable*. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. ...

[Emphasis added.]

**154**  In my view, these same considerations in the case at bar lead to the conclusion that a class proceeding here would not be the preferable procedure for the fair and efficient resolution of whatever common issues might be extracted from the mass of allegations levelled at these defendants.

1. AN AIR OF REALITY TEST?

**155**  If certified, this proceeding would subject the defendants to an exceedingly expensive defence against allegations of the most serious nature. One cannot imagine a fraud or conspiracy more scandalous than that pled here. And because of s. 37 of the Act, if certified, the plaintiff will prosecute the proceeding protected from an award of costs against it if it does not make out its allegations, subject only to the limited exceptions set out in s. 37(2).

**156**  This leads counsel, in particular Mr. Wood for CIBC and Mr. Taylor for Mr. Selman, to urge that the court, at the end of its analysis of the statutory criteria for certification, must conduct a reality check, that is, it must ask itself: is there an air of reality to the plaintiff's claim of an identifiable class with common issues such that considerations of fairness, efficiency and access to justice tip the balance in favour of certification?

**157**  Or is this the case of the artful pleader, who has crafted a claim that meets the "cause of action" criterion (low as the threshold for that is) but one which is utterly lacking in reality as a class proceeding.

**158**  Counsel for CIBC stresses the possibility of abuse of the class proceedings legislation by the "entrepreneurial plaintiff" and argues:

1. One mechanism for protecting against abuse of the British Columbia Class Proceedings Act is to require that there be an air of reality to the plaintiff's allegation of an "identifiable class" before permitting allegations of fraud on the shareholders of a public company to be certified as a class action. Another mechanism for protection against abuse is a liberal exercise of the discretion which the Court has to disallow certification even where the conditions for a class action may be met, if the unfairness to the defendants outweighs the benefits to be gained by such a proceeding.

**159**  In support of this submission reliance was placed on these paragraphs in Justice Carthy's judgment for the Ontario Court of Appeal in Hollick v. Toronto (City):

...

[12] This leaves open the question of whether the merits may be considered in any respect under s. 5(1)(b). I see no error in looking beyond the pleadings and to the evidence presented to assist in the application of the criteria set forth in s. 5(1)(b), (c) and (d). If it were otherwise any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court. Similarly, the mere allegation that the class action is the preferable procedure would prevent the court from making its own assessment of the evidence under s. 5(1)(d).

[13] On the other hand, it would be wrong to test the existence of a class by looking for evidence that the members of the proposed group have, individually, a claim on the merits. The Divisional Court may have overstepped that line in the excerpts quoted above, but reading the reasons as a whole, I think O'Leary J. was expressing his concern about a *perceived lack of reality to any proposed linkage between the plaintiff's claim and the class which is defined as 30,000 persons in a large geographic area.*

[14] In circumstances such as are described in the statement of *claim one would expect to see evidence* of the existence of a body of persons seeking recourse for their complaints, such as, a history of "town meetings", demands, claims against the no fault fund, applications to amend the Certificate of Approval, and, *in general, evidence to give some credence to the allegation that, in the words of s. 5(1)(b) "there is an identifiable class"*. There was evidence of complaints over an extended period of time from a sizeable geographic area, but the Divisional Court seemed to be dubious that this was sufficient evidence of a class.

[Emphasis added.]

**160**  So there is a distinction between looking for evidence that members of the proposed class have individually a claim on the merits and testing the reality of the proposed linkage between the plaintiff's claim and the proposed class.

**161**  The former is not an appropriate enquiry on the certification application, but the latter is.

**162**  This aspect of the Court of Appeal's reasoning was affirmed by the Supreme Court of Canada in Hollick.

**163**  Chief Justice McLachlin states (at para. 20):

The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an air plane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

**164**  The Chief Justice then concludes (at paras. 25 and 26):

I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub [*(1998), 40 O.R. (3d) 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1K4-00000-00&context=) held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at 4.60.

In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

**165**  Hollick, of course, was a case of alleged nuisance created by a municipal landfill operation. So in seeking to ensure an identifiable class, the court sought evidence of some rational relationship between the class and the common issues, that is, the interference in the enjoyment of property by means of noise and physical emissions.

**166**  That, I conclude, is an air of reality test of a sort: in the type of case where an identifiable class of persons with common issues is not obvious, the putative representative must show that the proposed class is defined sufficiently narrowly by leading evidence on the certification application. In Hollick, it was evidence that other members of the proposed class complained of the nuisance.

**167**  In the case at bar, how does the plaintiff demonstrate a rational relationship between the proposed class and the alleged common issues? Mr. Roberts urges, of course, that this is a corporate fraud claim - the class in such a case is obvious and it extends, by definition as it were, to those who held shares at the times relevant to the pleaded wrongs.

**168**  But it is to be stressed that much of the Amended Statement of Claim pleads, as it must, the detrimental effects on the proposed class caused by the alleged wrongs of the defendants. I will not exhaustively repeat the allegations in the Amended Statement of Claim, but I recall the pleas of "economic intimidation of the minority shareholders", and "unfairly prejudiced the minority shareholders" in respect of the 1994 Debt Restructuring.

**169**  Again, in respect of the 1994 Debt Restructuring I note the plea that the various misrepresentations and omissions were designed to "intimidate the shareholders ... to thus encourage the minority shareholders to approve ..."; to "discourage the minority shareholders from exercising, acquiring or retaining Rights" (para. 63).

**170**  It is in the context of those types of claim that the defendants ask: where is the evidence of other shareholders who share the plaintiff's view that there was intimidation, sundry misrepresentations, improper encouragement and discouragement engendered by the conduct of the defendants?

**171**  Where is the evidence of other shareholders making complaint, for example, to the regulators who vetted or at least exercised a supervisory role over many of the corporate transactions which make up the alleged conspiracy?

**172**  Mr. Geer's affidavit discloses that in June 1996, four institutional investors, including the likes of MacKenzie Financial Corp. and Altamira, collectively held 24.7% of the voting common shares of Westar, excluding those held by Mr. Pattison.

**173**  Further, as of December 1996, TD Asset Management Inc. controlled 20.7% of the voting common shares held by members of the public other than Mr. Pattison.

**174**  In searching for an air of reality to the plaintiff's claim, the defendants ask, in effect, where are the complaints from these large, sophisticated investors that they were intimidated, prejudiced and wrongly encouraged to approve transactions which were contrary to their economic interests?

**175**  The defendants say that the lack of any such evidence confirms that the plaintiff's claims have been plucked out of thin air indeed.

**176**  In my view, these are relevant questions to ask and to require the representative plaintiff to produce evidence in respect of, on the certification hearing for the purpose, not of testing the merits of the claims, but so as to satisfy, in the words of Chief Justice McLachlin, "the commonality requirement" within the proposed class.

**177**  The absence of such evidence on the application before me is another reason, an alternative reason, for my disposition.

**178**  In the result, the plaintiff's application to certify this proceeding as a class proceeding is dismissed.

1. THE PATTISON DEFENDANTS RULE 19(24) APPLICATION

**179**  By Notice of Motion dated 15 November 1999 (but ordered returnable on the certification application) the Pattison Defendants seek an order under Rule 19(24) striking those portions of paragraphs 14, 64-66, 69, 71, 73, 104-108, 125-127, 138, 142, 143, 145 and 146 of the Amended Statement of Claim which advance claims based upon a fiduciary duty or equitable obligation owed by the Pattison Defendants to the minority shareholders of Westar.

**180**  On the issue of fiduciary duties generally, the plaintiff cites amongst others, Guerin v. Canada, [*[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=), [*13 D.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=) (S.C.C.), Lac Minerals Ltd. v. International Corona Resources Ltd., [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=), [*61 D.L.R. (4th) 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=) (S.C.C.), Frame v. Smith, [*[1987] 2 S.C.R. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=), [*42 D.L.R. (4th) 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=) (S.C.C.), 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=), [*117 D.L.R. (4th) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=) (S.C.C.) and C.A. v. Critchley [*(1998), 166 D.L.R. (4th) 475*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YH-00000-00&context=), [*60 B.C.L.R. (3d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YH-00000-00&context=) (C.A.).

**181**  The Pattison Defendants' primary submission centres, however, on the proposition that except in quite limited circumstances which do not arise here, directors, at least, do not owe fiduciary duties to shareholders.

**182**  The test on the Rule 19(24) application has, of course, been settled by the Supreme Court of Canada in Hunt v. Carey Canada Inc., *[1990] 2 S.C.R. 959*, *74 D.L.R. (4th) 321* (S.C.C.) (at D.L.R. 336):

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming 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. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out ...

**183**  On the more difficult issue of whether directors owe fiduciary duties to shareholders, the plaintiff relies on various authorities. A number of them were noted by McEachern C.J.B.C. in Malcolm v. Transtec Holding Ltd. [*(2001), 86 B.C.L.R. (3d) 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1JW-00000-00&context=), [*2001 BCCA 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1JW-00000-00&context=) (at paras. 21 and 22):

I pause to point out that there is no suggestion the defendant directors profited in any way from these transactions.

There are some authorities where directors have been found to have a fiduciary duty towards other shareholders. In this respect see Dusik v. Newton [*(1985), 62 B.C.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-FBFS-S15S-00000-00&context=) (C.A.); Coleman v. Myers (1977), 2 N.Z.L.R. 297 (C.A.); Edelweiss Credit Union et al. v. Cobbett [*(1992), 68 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M16N-00000-00&context=) (B.C.C.A.) at 280. In all those cases, however, there was either a family relationship or a special relationship of trust and dependency between the plaintiffs and defendants where the latter were seeking to take unfair advantage of the others for personal gain or profit. Those cases have no application to the facts of this case where the defendants, without any prospect of personal gain, were attempting to assist the plaintiff and his fellow officers in circumstances where, without their help, there would be no possibility of recovering anything for their shares.

**184**  The Ontario Superior Court of Justice had occasion to recently consider the issue again in the context of a motion to strike in Private Equity Management Co. v. Vianet Technologies Inc. [*(2000), 48 O.R. (3d) 294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4TC-00000-00&context=) (Ont. S.C.J.). Justice Nordheimer wrote (at paras. 30-33):

The essence of the challenge to this claim is the defendants' contention that directors do not owe fiduciary duties to shareholders and since the claim for breach of fiduciary duty is directed toward the individual defendants, all of whom (with the exception of Ginsberg) were directors of either Develcon or Vianet, it cannot stand. However, it appears that the principle, that directors do not owe fiduciary duties to shareholders, is not without its exceptions.

This issue arose in Maxwell v. MLG Ventures Ltd. (1995), 40 C.P.C. (3d) 304 (Ont. Gen. Div.) where Ground J. said at p. 311:

With respect to the proposed amendments to the statement of claim alleging breaches of fiduciary duty on the part of Stavro, I accept the submission of counsel for the plaintiff that there may well be situations where, in the context of a particular transaction, a particular director may owe a fiduciary duty to a group of shareholders.

The issue also arose in Algonquin Mercantile Corp. v. Cockwell, [*[1997] O.J. No. 4616*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD21-JNS1-M4SB-00000-00&context=), [*43 B.L.R. (2d) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD21-JNS1-M4SB-00000-00&context=) (Gen. Div.) where Madam Justice Greer said, at para. 31:

While this may be true, it is clear that our Courts have moved forward in expanding the law governing fiduciaries. Even if some of Algonquin's pleas are novel as they involve Algonquin as an individual shareholder of Enfield, in my view, these claims should not be struck at the pleadings stage. The law of torts is fluid and ever-expanding. In my view, the facts as pleaded with respect to all of these alleged breaches are so closely interwoven, that it will be up to the Trial Judge to determine whether there is sufficient evidence to support any or all or none of them.

Again, therefore, it is not plain and obvious that the allegations that the individual defendants owed fiduciary duties to the plaintiffs in the particular circumstances of this case cannot succeed. The statement of claim in this regard therefore ought not to be struck out.

**185**  The plaintiff may face significant hurdles in seeking to apply the law developed in these cases to directors of a widely held corporation like Westar, but difficult cases and novel pleas are not enough to drive a plaintiff "from the judgment seat" on a summary application to strike. In my view, it is not plain and obvious that the paragraphs in the Amended Statement of Claim disclose no cause of action. This application by the Pattison Defendants is dismissed.

BAUMAN J.

\* \* \* \* \*

**186**

APPENDIX I

DEFINITIONS

The terms used herein of "affiliate", "associate", "insider", "material fact", "material change", "security", and "special relationship" have the meanings as found in the Securities Act, S.B.C. 1985, c. 83 as amended, which together with all Regulations, Rules, and Forms thereunder, are herein referred to as the Securities Act (where reference is made to the 1996 Securities Act it means the Securities Act, *R.S.B.C. 1996, c. 418*), and the Company Act, R.S.B.C. 1979, c. 59, as amended, and all Regulations, and Forms thereunder, are herein referred to as the Company Act (where reference is made to the 1996 Company Act it means the Company act, [*R.S.B.C. 1996, c. 62*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61MX-00000-00&context=)).

"Additional Subscription Privilege" means the privilege of a Rights holder, who exercised at least 500 Rights, to subscribe for additional Notes not subscribed for at the time of expiry of the Rights pursuant to the initial exercise, as described in the 1994 Rights Prospectus;

"Bearer shares" means the 10,289,355 unregistered common shares represented by Bearer share certificates, originating as 5 free shares issued to residents of British Columbia under the BRIC Act, as amended;

"CP shares" means the convertible preferred shares of Westar into which the Notes were converted in the 1996 Debt Restructuring, and which had Rights attached allowing for their conversion to common shares at a conversion formula which reflected market trading prices for common shares of Westar;

"DRA" means the Debt Restructuring Agreement dated for reference June 15, 1987, as amended by subsequent agreements;

"DRA Debt" means the debt owed by Westar to four banks including CIBC under the DRA, which was purchased at a $98 million discount by 461 in January 1994, and which was the subject of the 1994 Debt Restructuring and the 1996 Debt Restructuring;

"EBIDT" means earnings before interest, depreciation, and taxes;

"Goepel Shields Report" means the report to the Westar Board of Directors by Goepel Shields Partners Inc. of April 30, 1996, which was attached as Schedule "A" to the 1996 Information Circular;

"Income Fund" means the Westshore Terminals Income Fund, a trust established in 1996 under the laws of British Columbia, which purchased all of the common shares and Notes of Westshore;

"Master Restructuring Agreement" means the Master Restructuring Agreement made as of April 15, 1994, between Westar and 461 providing for the terms and implementation of the 1994 Debt Restructuring, which was presented for approval at the Annual and Special Meeting of Shareholders on June 30, 1994;

"Notes" means the adjusting balance notes issued by Westar for the DRA Debt as part of the 1994 Debt Restructuring. The Notes were issued to 461 which in turn offered 50% of them to shareholders in a Rights Offering;

"Pattison Defendants" means the Defendants Pattison, Geer, Selman, JPL, JPIL, 461, GPC, and GPI, together with 488430 British Columbia Ltd. ("488"), and No. 34 Seabright Holdings Ltd. ("Seabright"). Seabright was at all material times herein a wholly owned subsidiary of GPC, and 488 was at all material times a wholly owned subsidiary of Seabright, and any actions of Seabright and 488 referred to herein were at the direction of and on behalf of Pattison and/or JPL, JPIL, GPI and GPC;

"Plan of Arrangement" means the plan of arrangement by which the Pattison Defendants took Westar private in 1997 under the provisions of the 1996 Company Act;

"Richardson Greenshields Report" means the report to the Westar Board of Directors by Richardson Greenshields of Canada Ltd. of May 19, 1994, which was attached as "Schedule A Valuation and Fairness Opinion" to the 1994 Information Circular and to the 1994 Rights Prospectus;

"Rights" means the Rights issued by 461 on July 26, 1994 and exercisable up to August 31, 1994, which allowed those Westar shareholders holding at least 500 shares to subscribe for Rights to purchase up to 50% of the Notes and thereby entitling the same shareholders to receive a proportionate number of new shares of Westar, together with an Additional Subscription Privilege as described in the 1994 Rights Prospectus, all as part of the 1994 Debt Restructuring;

"Rights Offering" means the offering of Rights by 461 in the 1994 Rights Prospectus on July 7, 1994, exercisable up to and including August 30, 1994, as part of the 1994 Debt Restructuring;

"Seabright - CIBC Agreement" means the agreement of January 20, 1994 between Seabright, GPCC, and CIBC establishing, inter alia, the rights and obligations of each of Seabright and CIBC in respect of their respective shareholdings and in particular the voting of shares received by CIBC in the 1994 Debt Restructuring;

"Shares(s)" means the voting and non-voting common shares in the capital of Westar, including Bearer shares;

"Subscription" means the exercise of Rights under the 1994 Rights Prospectus on the basis of $0.56 principal amount of Notes for each Right at an exercise price of $0.32, provided the Rights holder was the holder of at least 500 Rights;

"Tax Loss Pools" means the Westar and Westshore tax losses;

"Westshore" means Westshore Terminals Ltd., a subsidiary of Westar;

"Westshore Amendment Agreement" means the Agreement entered into by Westshore on May 17, 1994 amending the terms for repayment of the Westshore Debt, as previously governed by the Westshore Standstill Agreement;

"Westshore Debt" means the debt owed by Westshore to a bank, which debt took priority to the DRA Debt and was subject to the Westshore Standstill Agreement, and the Westshore Amendment Agreement;

"Westshore Standstill Agreement" means the agreement made in October 1992, restricting payment of Westshore's cash flow to Westshore's bank lender;

"Westshore Terminal" means the coal terminal at Roberts Bank owned and operated by Westshore;

"1994 Debt Restructuring" means the restructuring of the DRA Debt that took place in 1994 commencing with the purchase of the DRA Debt by 461, and followed by the Master Restructuring Agreement which was put to the shareholders for approval, and which involved the issuance by Westar of Notes to 461, and the Rights Offering by 461 allowing shareholders to purchase 50% of the Notes, and which involved the issuance of Westar shares to holders of Notes, and the acquisition of outstanding Rights by the Pattison Defendants, all of which resulted in an increase in the Pattison Defendants' interest in the outstanding shares of Westar from 14.3% to 46.24%;

"1994 Information Circular" means the Notice of Meeting and Management Information Circular dated May 19, 1994 prepared by the management of Westar and distributed to shareholders, calling for an Annual and Special Meeting of shareholders to be held on June 30, 1994 to approve the Master Restructuring Agreement;

"1994 Rights Prospectus" means the prospectus dated July 7, 1994 with respect to the Rights Offering made by 461 which was part of the 1994 Debt Restructuring;

"1995 Consolidation" means the 125 shares to 1 share consolidation of Westar shares which occurred in April 1995;

"1995 Information Circular" means the Notice of Meeting and Management Information Circular dated March 16, 1995 prepared by the management of Westar, and distributed to shareholders, which called for an Annual General Meeting of shareholders to be held on April 28, 1995, and sought shareholder approval of the 1995 Consolidation;

"1996 Debt Restructuring" means the final step in the restructuring of the DRA Debt, by which Notes were, at the election of the holders of Notes, to be repaid in cash or converted to CP shares, which had rights permitting such CP shares to be converted to common shares at a conversion formula based on market trading prices for common shares. In the 1996 Debt Restructuring, the Pattison Defendants increased their equity interest in Westar to approximately 80% in two transactions on September 5 and October 9, 1996;

"1996 Information Circular" means the Notice of Meeting and Management Information Circular dated May 17, 1996, prepared by the management of Westar, and distributed to shareholders, which called for an Annual and Special Meeting of shareholders to be held on June 28, 1996, and sought shareholder approval of the 1996 Debt Restructuring;

"1996 Income Fund Information Circular" means the Notice of Meeting and Management Information Circular dated December 16, 1996 prepared by the management of Westar, and distributed to shareholders, which called for a Special meeting of shareholders to be held on January 27, 1997, and sought shareholder approval of the sale of Westshore to the Income Fund;

"1997 Income Fund Transaction" means the sale by Westar of Westshore to the Income Fund for $663.6 million net, for which the Pattison Defendants had solicited proxies to obtain shareholder approval pursuant to the 1997 Income Fund Information Circular;

"1997 Going Private Transaction" means the steps by which Westar was taken private by the Pattison Defendants under the Plan of Arrangement;

"1997 Information Circular" means the Notice of Meeting and Management Information Circular dated May 22, 1997 prepared by the management of Westar and distributed to the shareholders which called for an Extraordinary and Annual General Meeting of shareholders to be held on June 27, 1997 to pass a Special Resolution to approve the Plan of Arrangement to take Westar private under the provisions of the 1996 Company Act.

\* \* \* \* \*

APPENDIX II

Case

909787 Ontario Ltd. v. Bulk Barn Foods Ltd. (2000), 2 C.P.C. (5th) 61, [*138 O.A.C. 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDC1-FJDY-X0DX-00000-00&context=) (Ont. Div. Ct.).

Facts

D was engaged in the franchising of bulk food stores. P was a franchisee of the D. Alleged breach of term of contract to supply products priced at a competitive level. Alleged that the D, as a purchasing agent, was in a fiduciary relationship with the P's. By overcharging, alleged breach of fiduciary duty by D. Appeal from order granting certification.

1. of Action

Breach of contract, breach of fiduciary duty.

Certified?

N

Reasons

No fiduciary relationship was established as none of the usual hallmarks of a principal-agency relationship were present between the D or the franchisees. The action should not have been certified on that basis. No common cause of action on a contractual basis was established. In order for each person to become a member of the class, he/she would have to succeed in showing not just what the charge was for a given commodity but that it was available locally from other suppliers at a lower price. Such an action would be unmanageable.

Case

Abdool v. Anaheim Management Ltd. [*(1995), 21 O.R. (3d) 453*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4HJ-00000-00&context=), [*121 D.L.R.(4th) 496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4HJ-00000-00&context=), [*31 C.P.C. (3d) 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4HJ-00000-00&context=), [*78 O.A.C. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4HJ-00000-00&context=) (Ont. Div. Ct.).

Facts

Purchasers of condominium units as tax-sheltered investments brought action against developer and owner of project, developer's solicitors, assignees of trust company that financed most of the purchases, real estate brokers who solicited the purchases and accounting firm that reviewed financial forecast distributed to P's. Chambers judge refused certification.

1. of Action

Misrepresentation, breach of fiduciary duties, breach of Securities Act.

Certified?

N

Reasons

Pleadings revealed no cause of action against some D's. There were causes of action revealed against other D's, but unique circumstances indicate that there were problems in establishing common issues. The question of whether a single letter was a misrepresentation is a common issue, however class proceedings are not the preferable procedure for resolution of this common issue in this case, as liability would turn on individual issues regarding each P. Misrepresentation is appropriate for certification in some cases, although issue of reliance raises a significant individual issue that must be addressed.

The goals of class action legislation which should be considered when determining whether a class proceeding is the preferable procedure are: 1) judicial economy, or the efficient handling of potentially complex cases of mass wrongs; 2) improved access to the courts; 3) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations. With respect to access to justice, the court should "permit advancement of small claims where legal costs make it uneconomic to advance them. The total amount of the claims is not the consideration (here each individual claim was $300,000 and up).

Representative P is sufficient if there is no conflict of interest and P is shown to be an individual who will fairly and adequately advance the mass claims.

Case

Anderson v. Wilson [*(1999), 175 D.L.R. (4th) 409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=), [*44 O.R. (3d) 673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=), [*36 C.P.C. (4th) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=), [*122 O.A.C. 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=), leave to appeal to S.C.C. dismissed, [*[1999] S.C.C.A. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-F8D9-M2HK-00000-00&context=).

Facts

D's clinics providing EEG test. Patients alleged to have been exposed to Hep B.

1. of Action

***Negligence*** and infliction of nervous shock.

Certified?

Y

Reasons

Uninfected patients: Nervous shock ideally suited for certification as there are many persons with the same complaint, each of which would represent a modest claim that would not justify an independent action. Individual reactions would likely be similar to the alleged tort. Common issue of liability and punitive and exemplary damages. Common issue could be tried without a significant involvement of the uninfected members and, if appropriate, s. 24 of the CPA could be used to assess aggregate relief and proportional or average application of that relief.

Infected patients: Cause of action and commonality found that suggested resolution of their claims as a class action. Common issue was the standard of care expected of the clinics and whether they fell below the standard. This could fairly be tried as a common issue and involved a matter that, if determined, would move the litigation forward. Causation could not be handled as a common issue because question of causation individual to each P. It followed that liability and damages failed as common issues. Common issue on causation would be unfair to D's.

Case

Austell v. Smith 634 Fed. Suppl. 326 (W.D.N.C. 1986).

Facts

Minority shareholders brought action following merger from which they dissented. Application on behalf of all minority shareholders who were required to surrender shares upon merger; shares which were allegedly artificially suppressed in value by the conduct of the D's.

1. of Action

Breach of Securities Act, fraudulent, oppressive conduct.

Certified?

Y

Reasons

Law and fact common to the class (same transaction, same

proxy materials). Complete identity among all members of

the class as to all questions of law and fact or all

claims and defences is not required for certification;

an action can be certified if D's have defences against

some class members and not others. Claims were based on

the same transaction, therefore named P's should

adequately represent the class. Court concerned with

multiplicity of suits and expense of individual

litigation.

(re: U.S. Federal Rules of Civil Procedure, R 23(a)

pre-requisites to certification).

Case

Bendall v. McGhan Medical Corp. [*(1993), 106 D.L.R. (4th) 339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1NF-00000-00&context=), [*14 O.R. (3d) 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1NF-00000-00&context=), [*16 C.P.C. (3d) 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1NF-00000-00&context=) (Ont. (Gen. Div.)).

Facts

Class action commenced on behalf of persons who received silicone gel breast implants.

1. of Action

***Negligence***, breach of warranty, breach of contract, negligent misrepresentation, and strict liability.

Certified?

Y

Reasons

Criteria of CPA (Ont.) met. With respect to "preferable procedure" the court must consider the 3 objectives of the CPA as outlined in Abdool v. Anaheim. This certification turns on (and the court should err on the side of) protecting peoples' right of access to the courts. The cost of experts alone is prohibitive. The fact that there are only 2 P's so far does not weigh in this analysis. This is remedial legislation and should be addressed with a purposive approach. Section 5 states "the court shall certify", therefore it is mandatory. Certification is procedural in nature, thus the court was vested with broad latitude to deal with individual issues. U.S. Federal Rule is more restrictive as it refers to common questions of fact and law that predominate over any questions affecting individuals. Also, "predominant issue" is necessary in U.S., not in Canada. Certification is a fluid, flexible process, it is conditional and always subject to de-certification.

Case

Berry v. Pulley [*(2001), 197 D.L.R. (4th) 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-FFTT-X1KH-00000-00&context=) (Ont. S.C.J.).

Facts

Pilots of merging airline companies could not negotiate an integrated seniority list and the matter was submitted to binding arbitration. Pilots of larger co. rejected the terms of the arbitration award. Pilots of smaller co. brought an action against pilots from larger co.

1. of Action

Unlawful conspiracy, wrongful interference with economic relations, wrongful interference with contractual relations.

Certified?

Y

Reasons

Cause of action in tort disclosed in the pleadings; proposed classes of P's and D's known and identifiable; material facts relevant to determination of liability appeared to be the same for most of the D's within each subclass. The fact that damages awarded might require individual assessments after a determination of the common issues was not a sufficient reason for refusing to certify the class. Certification avoids a multitude of costly lawsuits which may lead to inconsistent results.

Case

Bywater v. Toronto Transit Commission [*(1998), 27 C.P.C. (4th) 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-24BV-00000-00&context=), [*83 O.T.C. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-24BV-00000-00&context=) (Ont. (Gen. Div)).

Facts

A fire occurred in a subway tunnel that was part of the Toronto Transit Commission (TTC) subway system, and approx. 100 people were treated for smoke inhalation. The TTC admitted liability.

1. of Action

***Negligence*** (damages claimed for personal injury, property damage and Family Law Act claims).

Certified?

Y

Reasons

There was no issue as to whether the pleadings disclosed a cause of action given the admission of liability. The fact that the identities of many possible class members was unknown was not a defect in the class definition and the proposed class was largely adopted by the court. The claims of the class raised the common issues of liability and the circumstances surrounding the fire. The admission did not eliminate the common issue of liability as without a certification order no admission bound the TTC in respect of the members of the proposed class. A class action was the preferable procedure as such a proceeding would undoubtedly promote judicial economies. The P was an appropriate representative P as she would fairly and adequately represent the interests of the class and did not have interests in conflict on the common issues. She submitted a workable litigation plan. Partial summary judgment was granted.

Case

Campbell v. Flexwatt Corp., [*[1998] 6 W.W.R. 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*(1997), 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*98 B.C.A.C. 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*15 C.P.C. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.).

Facts

Certification sought by consumers who had installed radiant heat ceiling panels that were subsequently ordered disconnected by the Chief Electrical Inspector of the Province. D's argued chambers judge erred in certifying; P argued error with respect to the framing the one of primary common issues.

1. of Action

CSA: negligent certification of an unsafe product. Province & Municipal D's: failed in statutory duty to inspect according to standards. Manufacturers: designed, manufactured and marketed defective panels.

Certified?

Y

Reasons

The pleadings raised a cause of action against D municipality. Common issues were raised which, for reasons of fairness and efficiency, ought to be determined in one proceeding. Common issues did not have to be identical among all members of the class. The threshold primary issue (whether the panels were fit for their intended purpose) was common to all named D's. If the panels were found to be unfit, then secondary issues could be addressed and sub-classes could be determined.

Purpose of CPA (B.C.) is to make available a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding or, if pursued individually, have the potential to overwhelm the courts' resources. Certification is not a matter of discretion, strictly speaking, because s. 4(1) of the CPA mandates certification if criteria are met. Discretion is in the assessment of the circumstances. The chambers judge has the ability to vary his order as the action proceeds and the need arises, and may even decertify the proceeding.

Representative P should be someone who would fairly and adequately represent the interests of the class, who has produced a workable plan for advancing the proceeding, and who does not have, on the common issues, an interest that is in conflict with the interests of other class members. "Typicality" requirement (U.S. requirement) not a part of B.C. nor Ont. CPA. Thus, it is not necessary that a representative P have a cause of action against each D in order to certify a proceeding.

Common issues do not have to be issues which are determinative of liability, they need only be issues of fact or law that move the litigation forward. To require every common issue to be determinative of liability for every P and every D would make class proceedings with more than one D virtually impossible.

Case

Carom v. Bre-X (1998), 20 C.P.C. (4th) 163, [*62 O.T.C. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62XR-00000-00&context=), (Ont. (Gen. Div.)).

(Motion to strike out statement of claim for not disclosing a reasonable cause of action.)

Facts

P's were shareholders of Alta. company developing gold mine in Indonesia. Following a series of communications about its gold resources, the company's stock rose from 50 cents to $228 a share, and the shares split ten for one. Later, the stock price plummeted with reports that the gold claims were unsubstantiated. Testing revealed that the gold samples had been "salted". Allegation that D's conspired to increase share prices for their own benefit by fraudulent communications. Main action was against Bre-X insiders, Nesbitt Burns and First Marathon (Bre-X-Carom I). The second action was against SNC-Lavalin (SNC-Carom II) and others. The third action named a Bre-X insider's spouse and Spartacus (Spartacus action) . Five actions were brought against stock brokerage firms and individual analysts (Brokers actions).

1. of Action

Conspiracy, fraudulent misrepresentation, negligent misrepresentation,***negligence***, and breach of Competition Act, breach of Professional Engineers Act.

Reasons

The certification motions proceeded in stages. Motion to strike out statements of claim dismissed, except breach of fiduciary duty claim against brokerages/analysts, and claim of breach of Professional Engineers Act against SNC-Lavalin struck out.

Pursuant to R. 21.01(1)(b) the facts as pleaded in the statement of claim are assumed to be true for the purpose of determining whether the claim discloses a reasonable cause of action, and no other evidence is admissible. The court should be reluctant to strike a claim under this rule, unless the claim is "certain to fail".

Negligent Misrepresentation: A proper pleading must allege the constituent elements of each cause of action, as well as the material facts on which they are founded. All 5 elements of negligent misrepresentation were pleaded, and there were sufficient material facts to support all the elements but for reliance. Two B.C. cases stand for the proposition that in some circumstances, reliance may be inferred in a negligent misrepresentation action.

Fraudulent Misrepresentation: It is not necessary to state explicitly that the claim is one of fraud, as long as the requisite elements and material facts have been pleaded.

All statements of claim include references to other representations allegedly made by the D's, the particulars of which are known to the D's but not to the P's. To the extent that such allegations relate to the claims for fraud, they are struck for lack of particularity.

Breach of Fiduciary Duty: Whether a broker owes a fiduciary duty must be determined on the facts of each case. The P's failed to plead material facts as against any of the brokers sufficient to establish a fiduciary relationship. Reliance, in some form, is a fundamental element of a fiduciary relationship. Some cases suggest reliance may be inferred, but they were in the context of negligent misrepresentation, and are not applicable in this case. It is not possible in a class proceeding to plead material facts in respect of each class member, since generally the identities of the class members and the particulars of their claims are not known. At a minimum, however, the elements of the cause of action and the material facts which underlie them must be pleaded in respect of the representative P.

Conspiracy: One can only determine whether the P should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the D did in fact commit the other alleged torts. Having examined the statement of claim the court found that it was not "plain and obvious" that the claim in conspiracy would fail; the elements of a conspiracy have been adequately pleaded.

Case

Carom v. Bre-X [*(1999), 44 O.R. (3d) 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=), [*35 C.P.C. (4th) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=), [*98 O.T.C. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=), [*46 B.L.R. (2d) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=) (Ont. S.C.J.).

Facts

Second stage of certification. The motion addressed further aspects of class descriptions and the remaining criteria of common issues, preferable procedure, and representative P's.

Certified?

Y

Reasons

The Bre-X-Carom I Action

Common Issues: The necessary nexus for certification is that the asserted claims raise "common, though not necessarily identical" issues of fact and law. A common issue in a class proceeding is one that will not only move the litigation forward as a matter of logic, but its resolution will contribute to the case in a legally material way. In this case, the P's tort claim of conspiracy did constitute common issues. The allegation that fraud permeated every statement raised a common issue on fraudulent misrepresentation regardless of whether individual issues might arise. The claim in negligent misrepresentation did not raise a common issue. The claim for breach of the Competition Act raised common issues which arose from the same factual background as the conspiracy and fraudulent misrepresentation claims. There was also a common issue about whether exemplary or punitive damages should be assessed. The claim for aggravated damages, however, was individual in nature.

Preferable Procedure: In determining the preferable procedure for the resolution of common issues, the court must consider the s. 6 of the CPA. Grounds in s. 6 cannot be raised as absolute bars, but they may be considered in the context of the CPA's 3 goals of judicial economy, access to justice, and behaviour modification. It was not fatal to certification that a final determination of the proceedings would require trials of individual issues. Class action was the preferable proceeding for the resolution of the common issues regarding conspiracy, fraudulent misrepresentation, and breach of the Competition Act. Re negligent misrepresentation: if it had raised a common issue, a class proceeding would not have been the preferable procedure (overturned at C.A.)

Rep P's: Subject to providing a suitable litigation plan, the P's satisfied the representative P criterion that they could fairly and adequately represent the interests of the class without conflict of interest on the common issues.

Certified?

N

Reasons

SNC-Lavalin-Carom II Action (engineering companies).

Misrepresentation: The essence of claims against the engineering companies was misrepresentation, and the existence of a duty of care was pivotal to that claim. The test for determining whether a duty of care exists involves a two-part test of whether there was a prima facie duty of care and whether that duty was limited by policy considerations. In this case, while the P might be able to establish a prima facie duty of care, there were individual issues whether there were policy considerations which would override the prima facie duty. Thus the duty of care issue required an analysis of the individual circumstances of each member of the proposed class, and thus no common issues arose. A finding of knowledge of the P class could be made at a common issue trial, however the final criterion of whether the info. was used for the specific purpose for which it was prepared was absent. Even if common issues were present, a class procedure would not be the preferable procedure for dealing with misrepresentation claims as the substance and complexity of the individual issues overwhelmed the common issues. The proposed common issues arose only if certain assumptions were made. Also, the P conceded that the issues of reliance, causation, and damages must be determined in individual trials. It was impossible to conceive of a method in which the ***negligence*** or negligent misrepresentation claims could be advanced fairly, efficiently, or manageably through a class proceeding.

Competition Act: Claim for breach of the Competition Act did raise a common issue about whether members of the P class suffered a loss "as a result of" the conduct of the D's. The proposed common issues were questions of mixed fact and law arising from a common factual background. Although not dispositive of the claims, a resolution of these issues would be capable of advancing the litigation. However, a class proceeding was not the preferable procedure for resolving the common issues. A common issue trial would not resolve the key issue of whether any loss that class members suffered was "as a result of" the actions of the D's. That issue, along with the actual losses suffered, would have to be established in individual trials.

Representative P: Did not meet the requirements of the CPA. The trading activity of the P was idiosyncratic, which had the result of producing no common issues and caused him to fail the test of being able to adequately and fairly represent the class. Where the cause of action or the common issues proposed depend upon individual characteristics of the P rather than a commonality within the class, then the approval of a distinctive P as the class representative works a manifest unfairness to the P class. Further, the proposed representative P had a conflict of interest.

Certified?

N

Reasons

The Brokers Actions

Common Issues: Central theme was the alleged ***negligence*** of the individual analysts employed by the several brokerage firms. The P's theory for these actions could be reduced to the two alternative submissions: misrepresentation and a breach of a duty to warn.

Duty to warn, in essence is dependent on the standard of care owed to a particular client. The relationships were individual in nature, a variety of relationships had to be examined, and the standard of care varied widely. Thus duty to warn was an individual, not a common issue.

Claims for fraudulent, negligent misrepresentation and for the breach of the Competition Act turned on the analysts' research. Absent the representations in the reports, the analysts had no duty to the P's, nor would an essential element exist for the claims in fraudulent misrepresentation or for breach of the Competition Act. However, there was a common issue on the basis that it was arguable that a finding could be made at a common trial that there was a point in time at which the analysts were, or ought to have been, aware of the alleged fraud. Such a finding would advance the litigation. Thus, the standard of care required of the analyst in making statements and any breach of that standard were common issues. There were also common issues in respect of the claim under the Competition Act.

Preferable Procedure: Class proceeding was not the preferable procedure for the resolution of the common issues. Individual trials were needed to establish essential elements of reliance, causation and damages, and would be complex, lengthy, time- consuming, and individualistic. The common issues would occupy a small part of any trial. Neither access to justice nor the behavioural modification of the D's would be achieved through a class proceeding.

Case

Carom v. Bre-X, [*(2000), 196 D.L.R. (4th) 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B51S-00000-00&context=), [*51 O.R. (3d) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B51S-00000-00&context=), [*1 C.P.C. (5th) 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B51S-00000-00&context=), [*138 O.A.C. 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B51S-00000-00&context=), [*11 B.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B51S-00000-00&context=) (C.A.), appl. for leave to appeal to S.C.C. dismissed, [*[2000] S.C.C.A. No. 660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G49V-00000-00&context=).

Facts

Certification affirmed by the Divisional Court. P's appealed to C.A. from the finding that negligent misrepresentation not certifiable.

Certified?

Y

Reasons

Chambers & Divisional Court erred on a matter of general principle. There was no sufficient difference between the Ps' claims in fraudulent and in negligent misrepresentation to justify the certification of one and not the other. Given the accepted definitions of the torts of fraudulent and negligent misrepresentation, there was no principled basis for treating them differently on the question of certification. Further, there was a substantial overlap of factual issues common to both torts. It was sensible and desirable that the negligent misrepresentation claim be placed with the other three claims. The standard for certification should not be set too high because this would compromise the procedural objectives of the CPA of judicial economy and promotion of access to justice. It is not necessary that the P's in a class action present identical issues of fact or law, there need only be common issues of fact or law that move the litigation forward. Certification can be the preferable procedure in situations far short of the final resolution of the lawsuit.

Case

Chace v. Crane Canada Inc. [*(1997), 44 B.C.L.R. (3d) 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2D6-00000-00&context=), 14 C.P.C. (4th) 197, [*(1997) 101 B.C.A.C. 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2D6-00000-00&context=) (C.A.).

Facts

Toilet tanks produced at a certain plant during a specified period had a higher in-service failure rate as compared to its other plants. A number of people brought actions/made insurance claims for tank failures. D appealed that the issues could not constitute common issues, and class proceedings were not the preferable procedure.

1. of Action

***Negligence***

Certified?

Y

Reasons

Criteria of CPA met. The common threshold issue was whether the D's breached a duty of care; its resolution would move the litigation forward. The P's were alleging an inherent defect, which was exactly the type of question for which a class action was ideally suited. Although it might have been doubtful that a crack alone could raise an inference of ***negligence***, it was not so obvious as to be beyond debate at the certification stage. If as discovery proceeded it became apparent that the representative P's could not adequately represent a particular group of P's, then an additional subclass(es) could be named. There was nothing to suggest that the issue of awarding punitive damages could not be certified in a class proceeding, and it would be premature to exclude the possibility at such an early stage. It was difficult to see how the claims of more than 100 P's could be litigated other than by a class proceeding.

Case

Chadha v. Bayer Inc. [*(2001), 200 D.L.R. (4th) 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J0-00000-00&context=), [*54 O.R. (3d) 520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J0-00000-00&context=), 8 C.P.C. (5th) 138, [*147 O.A.C. 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J0-00000-00&context=), [*15 B.L.R. (3d) 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J0-00000-00&context=) (Ont. Div. Ct.), rev'g [*(1999), 45 O.R. (3d) 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4H4-00000-00&context=) (Ont. S.C.J.).

Facts

P's alleged that they and other owners of buildings sustained damages as a consequence of a conspiracy by the D's to fix the price of iron oxide used in concrete bricks. Appeal from certification.

1. of Action

Conspiracy to unduly prevent/lessen competition in breach of the Competition Act.

Certified?

N

Reasons

Error in finding that a class proceeding was the preferable procedure. Erred by interpreting s. 5(1)(d) CPA restrictively, contrary to the express provisions of the CPA and prior judicial authority, which called for a broader interpretation of the preferable procedure requirement. The judge should have considered all of the factors that were relevant to the determination of preferable procedure: the nature of the proposed common issues; the individual issues that would remain after determination of the common issues; the factors listed in s. 6 of the CPA; the complexity and manageability of the proposed action; alternative procedures for dealing with the claims asserted; the extent to which certification furthered the objectives underlying the Act; and the rights of the P's and D's. The judge erred with respect to the proposed common issues and the nature of individual issues to be determined. Even if the P's succeeded in establishing the existence of a conspiracy, the litigation would not be advanced in a material way. The certification did not further the objectives of the CPA and the manageability of the proposed action. The resolution would signal the beginning of an individual liability inquiry.

Case

Collette v. Great Pacific Management Co. [*(2001), 86 B.C.L.R. (3d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1DB-00000-00&context=), [*2001 BCSC 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1DB-00000-00&context=).

Facts

Approx. 1,000 to 1,500 investors purchased investments in certain mortgages from Great Pacific, or the other two D's, Sector Financial Services, Sector Securities Inc. The investors lost most of their money. The P says the mortgage investments were so bad that they should not have been offered for sale to anyone. P alleged that the conduct of the D's amounted to a type of systemic negligent misrepresentation.

1. of Action

Negligent misrepresentation, breach of contract, ***negligence***.

Certified?

N

Reasons

Given all the factors to consider for negligent misrepresentation, the pleadings disclosed a cause of action. The P raised an arguable issue respecting proof of inferred reliance. There was an identifiable class of 2 or more persons. Because of the problem of proving reliance by all members of the class, common issues were limited to questions relating to the knowledge and role of the D's relating to the offer. These were common, but not predominate issues. A class proceeding was not the preferable procedure for resolution of the common issues as the prudent nature of the investment, information provided, and reliance could only be established on an individual inquiry. Any benefit proposed to be gained by trying the common issues must be considered in the overall context of the issues to be tried. Claims in negligent misrepresentation are most likely to be certified where the common question focuses on the conduct and the knowledge of the D, usually at one point in time, and the resolution of that issue will move the litigation along.

Case

Controltech Engineering Inc. v. Ontario Power [*(1998), 72 O.T.C. 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F8KH-X49N-00000-00&context=), (Ont. (Gen. Div.)), aff'd [*(2000), 130 O.A.C. 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F30T-B4NB-00000-00&context=), (Ont. Div. Ct.).

Facts

The D, Ontario Hydro, requested proposals for a plan to provide it with electricity from renewable energy technology. D received bids for the 3-stage bid process from 51 parties, including the P. The P's bid went to the final stage; 6 months later the D terminated the program. The P alleged that it spent substantial sums of money and passed up other business opportunities to participate in the bid which was wrongfully terminated.

1. of Action

Fraudulent or negligent misrepresentation, breach of contract, misuse of confidential information, intentionally causing economic harm, restitution, unjust enrichment, inducing breach of contract.

Certified?

N

Reasons

Pleadings disclosed a cause of action. The other bidders did constitute an identifiable class. The claim for fraudulent or negligent misrepresentation was not based on any single misrepresentation, so it would be necessary to consider evidence of reliance of each individual member of the proposed class. Even though there was a common factual core to the claims, that common core did not amount to a common issue. The breach of contract claim was not isolated from the alleged misrepresentations and does not raise common issues either. The claim for misuse of confidential information did not present common issues, because potential valuable information was unique to each bidder. The claim for restitution or unjust enrichment was derivative of the confidential information claim, and so fell on the same basis. The issue of the release or waiver had to be resolved for each P individually, depending on the circumstances. The remaining claims were not isolated from the other claims, and did not raise a common issue. Class proceedings was not the preferable procedure given the variety and importance of the individual issues that would be left to be resolved after a determination of any common issue.

Case

Denis v. Bertrand & Frere Construction Company Ltd., [*[2001] O.J. No. 1583*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-F65M-638M-00000-00&context=) (Nov. 22, 2000), Doc. 315-1999 CP (Ont. S.C.J.).

Facts

P's were homeowners whose house foundations were deteriorating. Claim that the foundations were deteriorating because they contained fly ash supplied by D Lafarge to D Bertrand, who used them in manufacture if its concrete products which were used in the foundations of the P's and other class members' homes.

1. of Action

Bertrand: ***negligence***, breach of contract of implied warranties in Sale of Goods Act.

LaFarge: ***negligence***, punitive damages sought.

Certified?

Y

Reasons

Low threshold to meet to establish a cause of action at certification stage of the proceeding in order to protect access to courts ("plain and obvious test"). Purpose of class definition: identifies persons who have a potential claim of relief, identifies parameters of the lawsuit so as to identify those persons who are bound by its results, and it describes who is entitled to notice pursuant to the CPA. Thus for the mutual benefit of the P and D the class definition ought not to be unduly narrow or unduly broad. It is not necessary to demonstrate that the common issues will in themselves determine liability; the common issues only need to move the litigation forward upon their resolution. A class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues.

Case

E.C.W.U. v. Royal Trust Co. [*(1997), 201 A.R. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JN6B-S1HK-00000-00&context=), [*14 C.C.P.B. 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JN6B-S1HK-00000-00&context=) (Alta. Q.B.).

Facts

Members and former members of a pension plan alleged that funds were illegally removed from the plan. They sought return of the funds to the plan, and distribution of funds to members as appropriate.

1. of Action

Illegal removal of funds from pension plan.

Certified?

Y

Reasons

Considered factors for certification as set out in Korte v. Deloitte Haskin & Sells. The class was clearly defined, the principal issues of fact and law were the same, success for one P meant success for all P's, and no individual assessment of the claims had to be made. It was inappropriate to require each member of the pension plan to commence separate actions. The appropriate class structure was delineated, as the parties in any action have to be clearly defined. The criteria for severance of issues were not met as the issues were complex and intertwined.

Case

Elms v. Laurentian Bank of Canada [*(2001), 90 B.C.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), [*5 C.P.C. (5th) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), [*2001 BCCA 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=).

Facts

A land developer purchased undeveloped parcels of land and registered mortgages against them. Over 200 investors each opened a self-directed RRSP with the Bank, the Bank forwarded the money to the lawyers and received the assignments. The developer received the funds once the assignments were registered. The value of the mortgages were three times the price of the land. The scheme ended in bankruptcy. The investors brought an action against the lawyers and the Bank, claiming they should have been warned that the monies invested were unsecured by the lands.

1. of Action

***Negligence***, breach of trust, breach of fiduciary duty.

Certified?

Y

Reasons

It was not plain and obvious that the action against the lawyer would fail. The lawyer would have known that the investors relied upon him to protect their interests, and should have been alerted to the possibility of harm from various unusual features of this transaction. There was a triable issue as to whether the Bank had a duty to warn. Common issues could be issues of fact or law and did not have to be identical for each member of the class. Issues were common if their resolution materially advanced the litigation. The lawyer and the Bank owed a duty to the investors based on their relationship with all of them. Individual circumstances did not affect the nature of that duty. At this stage the facts and legal proposition appeared to be common to all. The only economic way for the investors to proceed was through a class action. There were no practical alternatives available.

Case

Endean v. Red Cross Society [*(1997), 148 D.L.R. (4th) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=), [*[1997] 10 W.W.R. 752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=), [*36 B.C.L.R. (3d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=), [*11 C.P.C. (4th) 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=) (S.C.)

Facts

Persons allegedly infected with Hepatitis C through blood transfusions applied for certification and appointment of Endean as representative P.

1. of Action

***Negligence*** (& vicarious liability), spoliation.

Certified?

Y

Reasons

The statement of claim set out a cause of action in ***negligence*** and for spoliation. There was an identifiable class of two or more persons. The claims of the class members raised eight common issues. A class proceeding was the preferable procedure for the fair and efficient resolution of the common issues in this case. The difficulties with respect to third parties could be accommodated by giving them leave to participate in the trial of common issues as advised. Difficulties associated with assessment of damages could be dealt with through flexible procedures available under the CPA. The main consideration was that the complexity and cost of establishing liability would have precluded the majority of class members from access to the court in individual actions. Endean was the appropriate representative P and would fairly and adequately represent the interests of the class.

Case

Endean v. Red Cross Society [*(1998), 157 D.L.R. (4th) 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29T-00000-00&context=), [*82 B.C.L.R. (3d) 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2C5-00000-00&context=), [*50 C.P.C. (4th) 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2C5-00000-00&context=), [*2000 BCCA 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2C5-00000-00&context=).

Facts

Claim in spoliation decertified.

Reasons

It is plain and obvious that the statement of claim discloses no cause of action in spoliation (intentional destruction of documents). The S.C.C. has established that spoliation is an evidentiary rule that raises a presumption, not an independent tort.

Case

Gibb v. Delta Drilling Co. 104 F.R.D. 59 (N.D. Texas, 1984).

Facts

The D issued two prospectuses for an IPO. The P's alleged misrepre- sentation by the D's in the prospectuses because they were false or because they failed to state material facts.

1. of Action

Misrepresentation, breach of ss. 11, 12 of the Securities Act.

Certified?

Y

The class action is a bona fide method for redressing violations of the securities laws as the laws are complex and actions under them are expensive. Commonality found in the nature and materiality of the claimed omissions from, and the contents of, the allegedly misleading statements. Typicality found as claims are same for entire class, except for damages. Representative P's adequate; class does not include employees of the D.

Case

Harrington v. Dow Corning Corp., [*[1996] 8 W.W.R. 485*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=), [*22 B.C.L.R. (3d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=), [*48 C.P.C. (3d) 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=), [*31 C.C.L.T. (2d) 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=) (S.C.).

Facts

Application for certification of a class action by over 1000 women against certain manufacturers of breast implants and related companies. They alleged injury from silicone gel breast implants.

1. of Action

Negligent manufacture and distribution, failure to warn, conspiracy, fraud, misrepresentation, joint venture.

Certified?

Y

Reasons

The pleadings disclosed a cause of action and there was an identifiable class of persons. The claims of class members raised a common issue regarding the general fitness of implants, and a class proceeding was the preferable procedure for the fair and efficient resolution of the issue. Individual assessment of damages was not a barrier to certification. The proposed representative P's interests on common issues did not conflict with those of other class members. But, because the representative P did not have personal experience with the implants of all D manufacturers, there would be a separate representative for each subclass who had personal experience with implants of that manufacturer. Suppliers of raw or semi- processed silicone materials used in the manufacture of breast implants excluded from certification, as such limited involvement did not impose a manufacturer's duty. Failure to warn claim can be pursued individually. Claims in conspiracy, fraud, misrepresentation, joint venture struck as vague and devoid of specificity.

Case

Harrington v. Dow Corning Corp. [*(2000), 193 D.L.R.(4th) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*[2000] 11 W.W.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*82 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*47 C.P.C. (4th) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*144 B.C.A.C. 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*2 C.C.L.T. (3d) 157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), leave to appeal to S.C.C. refused, [*[2001] S.C.C.A. No. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G4BN-00000-00&context=).

Certified?

Y

Reasons

No error in determining that "fitness" was a generic issue common to all silicone implants. To be a common issue an issue of fact or law need not be one that was determinative of liability, but one that would move the litigation forward. This case was ideally suited for resolution by a class action in a multi-staged proceeding, with trials of both common and individual issues. Correct to include non-residents in the class as the D's were manufacturers of an allegedly defective product that they marketed throughout Canada. To exclude non-residents from the action because they had not used the product in B.C. would contradict the principles of order and fairness. To the extent that the D's could establish that some claims were not the same, the non-residents could be excluded by a subsequent order.

Case

Hollick v. Toronto (City) [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), aff'g [*(1999), 181 D.L.R. (4th) 426*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4M5-00000-00&context=), [*46 O.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4M5-00000-00&context=) (C.A.).

Facts

30,000 persons seeking damages and an injunction with respect to noxious odours and noise emanating from a landfill site. Chambers judge certified, overturned at Div. Ct. Div. Ct. upheld at Ont. C.A. and S.C.C.

1. of Action

Nuisance, ***negligence***, Rylands v. Fletcher, 3 L.R.H.L. 330, breach of s. 99 of the EPA.

Certified?

N

Reasons

With respect to s. 5(1)(a), the question is not whether the claim is likely to succeed (preliminary merits test), but whether the suit is appropriately prosecuted as a class action. However, there must be a minimum evidentiary basis to support certification. Here, cause of action disclosed and identifiable class found with reference to objective criteria. In identifying common issues, the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be common only where its resolution is necessary to the resolution of each class member's claim, and the issue is a substantial ingredient of each of the claims. Here, there was a rational connection between the defined class and the common issues, and the representative P need not show that everyone in the class shares the same interest in the resolution of the asserted common issue.

In the absence of legislative guidance, the preferability inquiry should be viewed in light of the 3 objects of judicial economy, access to justice, and behaviour modification. The court must take into account the importance of the common issues in relation to the claims as a whole. Preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions. In this case, a class action was not the preferable means of resolving the claims. When the common issue was seen in the context of the entire claim, it became difficult to say that the resolution of the common issue would significantly advance the action, or serve the interests of access to justice. No claims have been made against the Small Claims Trust Fund which suggests that the claims are either so small as to be negligible or too large and thus should be pursued individually. The argument that behaviour modification is a significant concern should be rejected for similar reasons.

Case

Howard Estate v. British Columbia [*(1999), 66 B.C.L.R. (3d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2256-00000-00&context=)

, 32 C.P.C. (4th) 41, [*26 E.T.R. (2d) 210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2256-00000-00&context=) (S.C.)

Facts

Application by estate for certification of an action for the recovery of probate fees paid to the province.

1. of Action

Legislation (charging a fee) ultra-vires the province.

Certified?

Y

Reasons

The application disclosed a cause of action and an identifiable class of persons who raised common issues. There was a suitable representative P, as no conflict of interest with the other class members was shown. The issue of whether the probate fee was a tax was common to all, as was the issue of recovery of the monies paid. A class action was the preferable procedure in this case. If this action was not certified there would be claims by other estates for recovery of monies paid. There could be as many as 6,500 claimants, all with essentially the same claim. Notwithstanding the constitutional challenge, certification was appropriate in this case.

Case

Koo v. Canadian Airlines International Ltd., [*[2000] B.C.J. No. 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25Y-00000-00&context=).

Facts

The P's alleged that the D deliberately oversold its flights to maximize its profits at the expense of passengers left off the flights. P1, a BC resident, was unable to fly because of mechanical problems. P2, an Ont. resident, had a reservation that was cancelled.

1. of Action

Breach of contract.

Certified?

N

Reasons

The pleadings disclosed a cause of action and there was an identifiable class of two or more persons. Neither P could be a representative P's because the circumstances under which they were denied boarding differed from potential class members bumped from flights due to deliberate overselling. A class action was not the preferable procedure for determining the issues as the proposed common issues would inevitably descend into individual inquiries and increase the time, cost and expense of proceedings.

Case

Korte v. Deloitte Haskins & Sells (1993), [*8 Alta. L.R. (3d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-FC6N-X21P-00000-00&context=), [*135 A.R. 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-FC6N-X21P-00000-00&context=), 15 C.P.C. (3d) 109 (C.A.).

Facts

Action against investment company, its principals and others involved in the company, and a firm of auditors for losses arising from certain investment contracts issued by the related, but defunct investment companies.

1. of Action

Conspiracy, breach of trust or breach of fiduciary duty. Auditors: facilitation of breach of trust or breach of fiduciary duty.

Certified?

Y

Reasons

The allegations made in P's statements of claim, if proven, were capable of amounting to fraudulent, dishonest or illegal conduct on the part of the D's. It was not essential that the words "fraudulent" or "dishonest" were used to disclose a cause of action. There were sufficient allegations in the statement of claim to make out a fiduciary duty. On the claim of conspiracy, the allegations in the statement of claim were enough to support the action. It contained allegations which if proven, might form a foundation for a finding of constructive intent to act unlawfully towards the P. The issues of fact and law were the same for all the members of the two classes. Success for one of the P's might mean success for all of them and the D's conceded that no assessment of the claims of individual P's was required.

Case

Maxwell v. MLG Ventures Ltd. [*(1995), 7 C.C.L.S. 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-JCBX-S10V-00000-00&context=) (Ont. (Gen. Div.)).

Facts

MLG made an offer in an offering circular to purchase for cash all the outstanding shares of Maple Leaf Gardens Limited. The proposed class of P's was all the former shareholders who tendered shares in response to the offer in the circular.

1. of Action

Breach of Securities Act, misrepresentation in the offering circular.

Certified?

Y

Reasons

The pleadings disclosed a cause of action. There was an identifiable class of two or more persons. The claim raised common issues in that the same offer was made to all members. A class action would be the preferable method for resolving the common issues, especially in light of the objects of the CPA of judicial economy and access to justice. The court could not conclude the applicant would not fairly and adequately represent the class interests, and thus appointed her as representative P.

Case

McDougall v. Collinson, [*[2000] B.C.J. No. 571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X0B7-00000-00&context=).

Facts

Action on behalf of 160 investors who anticipated losing a significant portion of their investments in four syndicated mortgage funds. P was not one of the investors. The P's submitted that the D's had a duty of care to the investors arising from their trust or fiduciary relationship.

1. of Action

***Negligence***, breach of trust or fiduciary duty, breach of contract.

Certified?

N

Reasons

Four of five requirements for certification had not been met. The allegations in the statement of claim were very general and few particulars had been provided. Other than bare allegations, there was insufficient evidence to disclose a cause of action. The lack of particulars, numerous conflicts between the investor groups and the predominant number of individual issues led to the conclusion that there were no identifiable common issues. The advantages of the economies of scale in certifying this action were far outweighed by the unmanageability of the action.

A class action would not be a fair resolution of the dispute for all of the parties.

Case

McKay v. CDI Career Development Institutes Ltd. Court [*(1999), 64 B.C.L.R. (3d) 386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-224Y-00000-00&context=), 30 C.P.C. (4th) 101 (S.C.).

Facts

The P claimed that through advertising and representations, CDI misled him and 454 other students as to the nature of the course, its contents, and its capacity to provide him with employment. The P alleged that CDI misrepresented a computer network program that it offered.

1. of Action

Breach of fiduciary duty, breach of contract, misrepresentation, engaged in deceptive practices as defined by the Trade Practices Act.

Certified?

N

Reasons

Given that much of the claim and the defence were to rest on issues of credibility which would best be determined at trial, and the uncertainty of the claim for educational malpractice, the court declined to strike the claim. It was not plain and obvious that the P could not succeed in his claims based on misrepresentation, breaches of fiduciary duty, contract and the Trade Practice Act. However, the case lacked the necessary commonality of issues between the proposed members of the class. The causes of action, the damages alleged, and the issues proposed by the P as common were dependent upon individual experiences of P with CDI. There were more preferable means of resolving the claims, and CDI's accreditation required the establishment of an internal dispute resolution procedure. This process was ignored by the P, although it had been pursued by other members of the proposed class.

Case

McLaughlin v. Falconbridge Ltd. [*(1999), 36 C.P.C. (4th) 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD61-F8KH-X4W3-00000-00&context=), [*100 O.T.C. 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD61-F8KH-X4W3-00000-00&context=) (Ont. S.C.J.)

Facts

Members of the KCM pension plan brought an action because the original plan had been terminated and a new plan was established with 2 options. The employees alleged that they were encouraged to elect the RSP option by the D's aggressive actuarial and economic assumptions. This resulted in a serious understatement of the liabilities of the Plan, artificially increasing the surplus. KCM withdrew surplus assets from the Plan without notice.

1. of Action

Breach of fiduciary duty, illegal withdrawal of funds, ***negligence***, breach of natural justice, negligent misrepresentation.

Certified?

Y

Reasons

The claim against the actuaries in breach of fiduciary duty was a novel claim. However, novelty was not a bar to an action. Given recent S.C.C. jurisprudence, it was apparent that the presence or absence of a fiduciary relationship could not be determined on the basis of categorizing the relationship according to the identity of the persons involved. Thus, it was not plain and obvious that the cause of action could not succeed. There was a sufficient factual basis in the pleadings to maintain the claim.

Case

Maxwell v. MLG Ventures Ltd. [*(1995), 7 C.C.L.S. 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-JCBX-S10V-00000-00&context=) (Ont. (Gen. Div.)).

Facts

MLG made an offer in an offering circular to purchase for cash all the outstanding shares of Maple Leaf Gardens Limited. The proposed class of P's was all the former shareholders who tendered shares in response to the offer in the circular.

1. of Action

Breach of Securities Act, misrepresentation in the offering circular.

Certified?

Y

Reasons

The pleadings disclosed a cause of action. There was an identifiable class of two or more persons. The claim raised common issues in that the same offer was made to all members. A class action would be the preferable method for resolving the common issues, especially in light of the objects of the CPA of judicial economy and access to justice. The court could not conclude the applicant would not fairly and adequately represent the class interests, and thus appointed her as representative P.

Case

Millard v. North George Capital Management Ltd., [*(2000), 47 C.P.C. (4th) 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-FC1F-M298-00000-00&context=) (Ont. S.C.J.).

Facts

The P's applied on behalf of a group of investors who had lost money through the "ponzi schemes" of the D companies and their principals. Included action against the lawyers, accountants and a trust company who allegedly should have been aware of the unlawful conduct.

1. of Action

Fraud, breach of securities laws, ***negligence***, breach of fiduciary duty, breach of trust

Certified?

Y

Reasons

The pleadings disclosed a cause of action. There were identifiable classes of P's. There were common issues between the P's. There would be judicial economy if the common issues were determined only once. A collective judgment would allow for further collective action to be taken in recovering the funds. The P's were without any conflict of interest and would fairly and adequately advance the class claim. When all the pros and cons of certification were weighed, on balance a class proceeding was the preferable procedure in this case.

Case

Millgate Financial Corp. v. B.F. Realty Holdings Ltd. [*(1998), 28 C.P.C. (4th) 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-244N-00000-00&context=), [*81 O.T.C. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-244N-00000-00&context=) (Ont. (Gen. Div.)).

Facts

The proposed class held 10.75% of convertible subordinated debentures of the D. During a restructuring, some of BF's assets were transferred to related companies. Alleged wrongful conveyance of assets, but the D argued that the conveyance was for fair market value and for avoiding imminent bankruptcy of BF Realty.

1. of Action

Breach of fiduciary duty, fraudulent misrepresentation, conspiracy and inducing breach of contract.

Certified?

N

Reasons

Although the pleadings disclosed a cause of action, and there was an identifiable class and common issues, a class action is not the preferable procedure for the resolution of the common issues. The issue of damages would vary depending on when a particular P purchased its debenture(s), and with or without knowledge of the conveyance. Their respective losses would depend on the date of sale. Individual discoveries would be required to determine the nature of representations made, and the reliance upon them. The issue of access to justice was not pressing since many of the proposed claimants were substantial entities with significant holdings.

Case

Mouhteros v. DeVry Canada Inc. [*(1998), 41 O.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1MM-00000-00&context=),

22 C.P.C. (4th) 396, [*70 O.T.C. 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1MM-00000-00&context=) (Ont. (Gen. Div.)).

Facts

The D operated a private, for-profit post-secondary educational institution with four Canadian campuses. The P, a former student, brought an action claiming that the D misrepresented the quality of its programs and facilities and the marketability of its graduates.

1. of Action

Negligent or fraudulent misrepresentation, breach of contract, breach of Competition Act, Business Practices Act, and Private Vocational Schools Act Regulations.

Certified?

N

Reasons

There was a cause of action disclosed. The mere fact that a group is identifiable is not sufficient to render it a class for the purposes of the CPA. There must be some connection between the class definition and the common issues. Many of the students in the proposed class might have no claim, let alone a claim with common issues. Misrepresentation is a questionable common issue in this case as the nature of the representations and the question of whether they were false and misleading will vary significantly for each different communication. The question of reliance must be determined based on the experience of each individual and would involve a large number of evidentiary issues. Even if the class was able to show reliance, then they have to show that they relied on them to their detriment. Certification would result in a multitude of individual trials, which would overwhelm any advantage to be derived from a trial of the few common issues.

Case

Nanaimo Immigrant Settlement Society v. British Columbia [*(2001), 84 B.C.L.R. (3d) 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15J-00000-00&context=), [*149 B.C.A.C. 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15J-00000-00&context=), [*2001 BCCA 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15J-00000-00&context=).

Facts

P Society and a number of other charitable, religious organizations conducted bingos and casinos. The Society commenced an action seeking declarations that the fees collected by the Province for the licences were ultra vires and sought the repayment of the fees on the basis of unjust enrichment.

1. of Action

Legislation (fees) alleged to be ultra vires the Province.

Certified?

Y

Reasons

There were arguments of principle open to the P in administrative law so it could not be said that the argument was bound to fail. Therefore there was no error in the judge's conclusion that the Society had a cause of action on the administrative law issues. The fact that the threshold questions included matters of constitutional law that could be resolved in a shorter declaratory action should not overshadow the advantages of a class proceeding which tilted the balance strongly in favour of certification. The individual issues in the restitutionary claim were simply stated and did not predominate over the common issues so as to make a class action unwieldy or counterproductive.

Case

Nantais v. Telectronics Proprietary (Canada) Ltd. Court [*(1995), 127 D.L.R. (4th) 552*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4WT-00000-00&context=), [*25 O.R. (3d) 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4WT-00000-00&context=), [*40 C.P.C. (3d) 245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4WT-00000-00&context=) (Ont. (Gen. Div.)), leave to appeal to Div. Ct. refused.

Facts

The D's manufactured and marketed leads for pacemakers. The retention wires of the leads had a fracture rate of 16-25%. Upon fracture, the wire could cut the heart. Health authorities recommended continuing monitoring of all implants. 1,125 Canadians were implanted with the leads. Certification only for determination of liability.

1. of Action

***Negligence***. Improper design, manufacture, inspection and marketing of the leads

Certified?

Y

Reasons

Requirements of CPA met. Attempting to prove liability would require extensive and expensive medical, scientific, legal work which should not be repeated. There may be a risk of inconsistent verdicts if liability had to be tried more than once. Satisfaction of the policy issues of access to justice and judicial economy could best be achieved through a class action. The fact that the wire leads of the majority of the proposed class had not yet failed did not mean that no cause of action could be asserted. The P's medical expert predicted that all of the leads would eventually fail. It was not inappropriate to include in the class persons outside Ontario. It was sensible to have the question of liability determined as far as possible, once and for all. The questionnaire sent to each class member should include an opting in provision for non-residents, to avoid any doubt as to jurisdiction.

Case

Ormrod v. Hydro-Electric Commission of the City of Etobicoke [*(2001), 53 O.R. (3d) 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1F7-00000-00&context=), [*3 C.P.C. (5th) 253*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1F7-00000-00&context=), [*8 C.C.E.L. (3d) 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1F7-00000-00&context=) (Ont. S.C.J.).

Facts

The D said that it would pay 50% of the health/dental plan premiums for retired employees. The D decided to phase out this arrangement, thus retirees responsible for 100% of premiums. The P's claimed that the Plan, and the premium arrangement was a term of their employment. Or, claimed that the D's representation of premium-sharing created a legally-binding promise.

1. of Action

Breach of contract

Certified?

Y

Reasons

The statement of claim contained all of the necessary material facts to support the claim advanced by the P's in contract. The causes of action asserted by the P's gave rise to common issues. Not only would a determination of any one of those common issues materially advance the litigation, it might ultimately determine the lawsuit. Moreover, virtually no individual issues would remain after the disposition of those common issues. The P's case rested entirely on the written representations made by the D regarding premium-sharing, and the elimination of that arrangement. The damages were liquidated damages, and although some processes might be required to determine those claims in respect of each member, it would be simple and brief. Certification would eliminate 85 individual small claims lawsuits. For 85 retired persons to pursue individual claims would be expensive, inconvenient and repetitious, particularly given the amount of damages claimed. The declaratory relief sought would not be available in Small Claims Court.

Case

Peppiatt v. Nicol [*(1993), 16 O.R. (3d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1SY-00000-00&context=), 20 C.P.C. (3d) 272 (Ont. (Gen. Div.)).

Facts

Action on behalf of equity members of a golf club who were allegedly induced to purchase memberships in the golf club as a result of representations made in the promotional material published by the individual D, Nicol. The D bank financed the development of the golf club and was aware of the promotional materials which contained certain representations.

1. of Action

***Negligence***, misrepresentation, misfeasance, breach of fiduciary duty, breach of trust, breach of contract.

Certified?

Y

Reasons

Cause of action disclosed, and not plain and obvious that the claim could not succeed. Rep P's satisfactory, having met several conditions. Without certification a large number of members would be denied access to the legal system. There is n reason why a derivative action could not be joined in a class proceeding if all the preconditions for a derivative action were satisfied.

Case

Peppiatt v. Nicol [*(1996), 27 O.R. (3d) 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B1FT-00000-00&context=) , [*44 C.P.C. (3d) 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B1FT-00000-00&context=) (Ont. (Gen. Div.)).

Facts

Application for decertification, as it became apparent that members of the class received different versions of the relevant representation, and that many members did not receive any version of the representation.

Certified?

Y

Reasons

Application for decertification dismissed, class should be divided into subclasses. If any of the conditions in s. 5(1) and (2) of the CPA are not satisfied, the court can make a decertification order. Subclasses may be ordered at stage of the proceedings. Since a significant individual issue existed with respect to reliance, it was preferable to divide the class into subclasses rather than to require each member to be discovered. Total discovery would lead to undue burden and expense to the class members.

Case

Quigley v. Braniff Airways Inc. 85 F.R.D. 7 (N.D. Texas, 1979).

Facts

Unsuccessful applicant for position as airline flight attendant with D company brought an employment discrimination suit on behalf of all unsuccessful black applicants for flight attendant positions.

1. of Action

Racial discrimination.

Certified?

Y

Reasons

At certification stage the P need only establish that common questions exist and that the D acted in a manner generally applicable to the class as a whole. The P does not need to prove that the D's policies did in fact adversely affect blacks. Typicality as a class found in "across the board" attack on unequal employment practices. Adequate representation, numerosity found. Deterred applicant class not certified because such a proposed class is subjective and indefinite.

Case

Robertson v. Thomson Corp. [*(1999), 171 D.L.R. (4th) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1V2-00000-00&context=), [*43 O.R. (3d) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1V2-00000-00&context=), [*30 C.P.C. (4th) 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1V2-00000-00&context=), [*86 O.T.C. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1V2-00000-00&context=), [*85 C.P.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1V2-00000-00&context=) (Ont. (Gen. Div.)).

Facts

Plaintiff R, a freelance writer, asserted that the D's breached her copyright in two written works by making them available to the public in electronic form. She applied for certification of a class proceeding on behalf of all writers whose works had been similarly distributed.

1. of Action

Infringement of copyright and moral rights.

Certified?

Y

Reasons

It was conceded that the statement of claim disclosed a cause of action. The statement of claim disclosed an identifiable class. The fact that it was difficult at the certification stage to list every P by name was not fatal; it is sufficient if the class is identified in objective terms that allow one to determine whether an individual fits within it. It was not fatal that the class would include some individuals whose claims would not proceed or whose claims would ultimately fail. There were common issues with respect to the liability, contractual rights, collective work copyright claimed by the D's, and P's assertion that any assignment of copyright or grant of licence must be in writing. There were common issues as to the extent to which the D's were required to obtain permissions and whether the original publisher's collective work copyright interest survives to the benefit of the D's. The need to deal with certain individual aspects does not mean that there can be no common issues. It was the preferable procedure having regard to the 3 goals of the CPA.

Case

Rosedale Motors Inc. v. Petro-Canada Inc. [*(1998), 42 O.R. (3d) 776*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1TD-00000-00&context=), [*31 C.P.C. (4th) 340*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1TD-00000-00&context=), [*87 O.T.C. 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1TD-00000-00&context=), [*86 C.P.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1TD-00000-00&context=) (Ont. (Gen. Div.)).

Facts

The P signed a Certigard franchise with the D. The P's Certigard franchise was unsuccessful and brought an action on behalf of other francisees. The P alleged that the D had falsely represented that the Certigard concept would be profitable, that the concept had been adequately researched, and would be adequately promoted, advertised, and supported. P applied for certification; D applied for summary judgment and for a stay pursuant to an arbitration clause in the franchise agreement.

1. of Action

Misrepresentation, breach of contract, unconscionability, and breach of fiduciary duty.

Certified?

N

Reasons

The action satisfied some but not all of the criteria for certification. The pleadings disclosed a cause of action, there was an identifiable class, and the representative P was satisfactory. However, the common issues criterion was not satisfied. Misrepresentation claims have been certified despite the need of individual class members to prove reliance, but, in this case, each individual claim would have to be examined. The claims of the class did not flow from a single common representation but rather upon what was said by the D's representatives to individual P's. Same considerations apply to the claims of breach of fiduciary duty, which would be dependent upon a careful review of the relationship between the class member and the D. Even if there were common issues, it was not the preferable procedure. Given the nature and formation of the franchise agreements, the basis of complex business relationships, all of the evidence of misrepresentation pertaining to each P would have to be considered in light of the dealings that the class member had with the D's representative.

Case

Rumley v. British Columbia, [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), aff'g [*(1999), 180 D.L.R. (4th) 639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22T7-00000-00&context=), [*72 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22T7-00000-00&context=), [*1999 BCCA 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22T7-00000-00&context=).

Facts

P's were students, members of their families and secondary victims who claimed to have suffered abuse resulting from the operation of a residential school for the deaf. The chambers judge refused certification because there was not sufficient commonality of issues. C.A. allowed certification in part.

1. of Action

Misrepresentation, breach of fiduciary duty, ***negligence***, educational malpractice.

Certified?

Y

Reasons

With respect to common issues, all class members share an interest in the question of whether the D breached a duty of care, as it is central to success on claims of ***negligence*** and breach of fiduciary duty. A court should avoid framing commonality in overly broad terms, as it will ultimately break down into individual proceedings, however this is not the case here. The issue is systemic ***negligence***, which can be determined without reference to the individual circumstances of one individual. The standard of care may have varied over the period of alleged abuse, but this is not a obstacle to certification and dividing the P's into subclasses may help with a determination of the common issue. Punitive damages is an appropriate common issue as the decisive facts will arise in determining the first issue. Class action is the preferable procedure because individual issues will be a minor aspect, each P retains ultimate control over the outcome of their action, the P's prefer not to proceed individually, it is more practical and efficient than individual action, and a class action may mitigate the difficulties of litigation for disabled P's.

Case

Schweyer v. Laidlaw Carriers Inc. [*(2000), 44 C.P.C. (4th) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F27X-6182-00000-00&context=), [*49 C.C.E.L. (2d) 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F27X-6182-00000-00&context=) (Ont. S.C.J.).

Facts

The value of Laidlaw's (L) pension plans was dependent upon the value of its shares. The plans contained formulae for determination of an employee's entitlement upon electing early retirement. L offered an early retirement package with a representation that a different formulae would be used. The value of L's shares fell and employees who elected early retirement in May 1988 received less than if the Plan's written formula was used. 12 employees who had accepted the package brought successful individual action against L. 30 other employees sought certification as a class action against L.

1. of Action

Misrepresentation

Certified?

Y

Reasons

The claims of the class members raised common issues. A common issue was whether L had misrepresented information to its employees. The litigation could be moved forward by a determination as to whether there was an offer by L to their employees of early retirement on the basis of the single variation date, and whether a binding contract which included the representation was a binding promise. A class proceeding was preferable for the resolution of the common issues, and the representative P fairly and adequately represented the interests of the class.

Case

Sutherland v. Canada (Attorney General) [*(1997), 15 C.P.C. (4th) 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X440-00000-00&context=) (B.C.S.C.).

Facts

The P's claimed damages for nuisance allegedly arising from the use of a new runway at the Vancouver Int'l Airport.

1. of Action

Nuisance

Certified?

N

Reasons

The success of the nuisance claim resulting from noise depended on multiple individualized evidentiary factors. As such, there were no common issues raised and a class proceeding was not appropriate. The defences of statutory authority and public nuisance involved the same individual factual inquiry in order to determine whether nuisance resulted inevitably from the D's conduct.

Case

Tiemstra v. Insurance Corp. of British Columbia [*(1996), 22 B.C.L.R. (3d) 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3MH-00000-00&context=), [*49 C.P.C. (3d) 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3MH-00000-00&context=), [*37 C.C.L.I. (2d) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3MH-00000-00&context=), aff'd [*(1997) 149 D.L.R. (4th) 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0R6-00000-00&context=), (C.A.).

Facts

The D insurance co. introduced a new program that limited insurance benefits for claimants involved in minimal/no damage car accidents. Numerous people were involved in disputes with D over the program. Chambers judge did not certify.

1. of Action

Breach of contract and breach of fiduciary duties

Certified?

N

Reasons

If certified, the action was likely to become expensive and unmanageable. It was difficult to establish a regime for determining who was entitled to be a class member. Many actions had already been started and trials had been completed. Furthermore, the potential class members had varying interests and were better served by retaining control over their own actions. It was more practical and efficient to deny the certification.

Case

Western Canadian Shopping Centres Inc. v. Dutton [*(2001), 201 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*8 C.P.C. (5th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) aff'g in part (1998), [*73 Alta. L.R. (3d) 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-F7VM-S3C9-00000-00&context=) (C.A.).

Facts

231 investors participated in the federal government's Business Immigration Program by purchasing debentures in WCSC, which was incorporated by D, its sole shareholder. After the investors' funds were deposited, WCSC purchased a Crown surface lease from CRI and agreed to commit further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that debentures be issued to some investors. D advanced more funds to CRI and more debentures were issued. CRI could not pay the interest due on the debentures. C.A. upheld chambers decision not to strike pleadings, but granted D's the right to individualized discovery.

1. of Action

Breach of fiduciary duty

Certified?

Y

Reasons

In the absence of comprehensive class proceedings legislation, the courts must use their inherent power to settle the rules of practice and procedure on a case-by-case basis in a flexible and liberal manner. Class actions should be certified where four prerequisites (set out by S.C.C.) are met. In the exercise of its discretion the court should take into account the benefits a class action offers, and any unfairness that such proceedings may cause. The need to strike a balance between efficiency and fairness suggests that a class action should be struck only where the deficiency is "plain and obvious". The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. A class action should not be foreclosed because there is uncertainty as to the resolution of common issues. If it is determined that the investors must show individual reliance to establish breach of fiduciary duty, the court may then consider whether the class action should continue. The same applies to the argument that different defences will be raised with respect to different class members. The D's should be allowed to examine the representative P's as of right, but examination of other class members should be available only by order of the court, upon the D's showing reasonable necessity.

Case

Williams v. Mutual Life Assurance Co. of Canada [*(2000), 51 O.R. (3d) 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B519-00000-00&context=), [*24 C.C.L.I. (3d) 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B519-00000-00&context=) (Ont. S.C.J.)

Facts

The P brought motions for certification on behalf of purchasers of "premium offset" ("vanishing premium") whole life insurance policies from the D insurer. Alleged misrepresentation with regards to value accumulation of policies coupled with projected future dividends being sufficient to pay future premiums as they came due.

1. of Action

Negligent misrepresentation, breach of Competition Act, breach of oral terms of contract, breach of fiduciary duty by the insurer directly and through its agents in the sale.

Certified?

N

Reasons

Claims did not raise common issues. Negligent misrepresentation is problematic in seeking certification of a common issue. Proof is generally dependent upon a multitude of individual evidentiary factors specific to each P. The result of the trial of any one alleged misrepresentation by a P cannot generally stand as proof of the cause of action of any other claimant. Other alternative causes of action were raised, although all related to the matter of "representations". No cause of action under the Competition Act unless each claimant establishes that he or she relied upon and suffered loss because of the representation at issue. No common issue raised for breach of oral terms of a contract unless parol evidence found admissible in the context of the individual circumstances. Similarly, an individual inquiry was needed with respect to a breach of fiduciary duty. The existence of any duty was dependent upon the specific relationship of that policyholder to his or her agent. An individualized analysis was necessary if the same allegations were alleged to sustain an asserted action in deceit. As well, a finding of reliance would have to be made on a case-by-case basis.

**End of Document**

[***Aune v. Canada (Attorney General), [2013] B.C.J. No. 2144***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23F8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

H. Hyslop J.

Heard: April 23-26, 2013.

Judgment: September 27, 2013.

Docket: 35393

Registry: Kamloops

**[2013] B.C.J. No. 2144** | 2013 BCSC 1783 | 234 A.C.W.S. (3d) 928 | 6 C.C.L.T. (4th) 100 | 2013 CarswellBC 2929

Between Grant Aune, Plaintiff, and Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(143 paras.)

**Case Summary**

**Government law — Crown — Servants of the Crown — Actions by and against Crown — *Negligence* by Crown — Statutory defences, immunities, and bars to action — Practice and procedure — Courts — Jurisdiction — Pleadings — Action by Aune for damages for constructive dismissal and *negligence* dismissed — Aune was discharged member of RCMP who claimed that RCMP wrongfully prevented him from being promoted by too slowly administering grievance process relating to promotion process — Court had jurisdiction — There was no contractual relationship between Crown and RCMP members — Aune's pleadings did not disclose tort-based claim against any RCMP member — They did not identify anyone who committed tort or what it was.**

**Tort law — Torts by the Crown — Actions against the Crown — When available — *Negligence* — Action by Aune for damages for constructive dismissal and *negligence* dismissed — Aune was discharged member of RCMP who claimed that RCMP wrongfully prevented him from being promoted by too slowly administering grievance process relating to promotion process — Court had jurisdiction — There was no contractual relationship between Crown and RCMP members — Aune's pleadings did not disclose tort-based claim against any RCMP member — They did not identify anyone who committed tort or what it was.**

**Tort law — Practice and procedure — Pleadings — Action by Aune for damages for constructive dismissal and *negligence* dismissed — Aune was discharged member of RCMP who claimed that RCMP wrongfully prevented him from being promoted by too slowly administering grievance process relating to promotion process — Court had jurisdiction — There was no contractual relationship between Crown and RCMP members — Aune's pleadings did not disclose tort-based claim against any RCMP member — They did not identify anyone who committed tort or what it was.**

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| --- |
| Action by Aune for damages for constructive dismissal and ***negligence***. Aune was a discharged member of the RCMP. He claimed that the RCMP wrongfully prevented him from being promoted to the rank of sergeant by too slowly administering a grievance process relating to the promotion process.  HELD: Action dismissed.  The court had jurisdiction. Aune, as a discharged RCMP member, could not continue with the grievance process and was critical of it. There was no contractual relationship between the Crown and RCMP members. Aune's pleadings did not disclose a tort-based claim against any RCMP member. They did not identify anyone who committed a tort or what it was. Aune did not provide any authority to support the view that there was a common law duty of care for the promotion of an employee or for doing so within a specific time. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

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=), s. 9, s. 10, s. 24, s. 36

Limitations Act, RSBC 1996, CHAPTER 266, s. 3(2)(a)

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 230*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0MK-00000-00&context=)

Public Service Staff Relations Act, [*R.S.C. 1985, c. P-35*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBK1-FCK4-G0TJ-00000-00&context=),

Royal Canadian Mounted Police Act, [*R.S.C. 1985, c. R-10, s. 12*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBP1-JNY7-X0HS-00000-00&context=), s. 31(5), s. 31(6)

Royal Canadian Mounted Police Regulations,

**Counsel**

Counsel for the Plaintiff: J.B. Carter, L.G. Bergerman.

Counsel for the Defendants: D. Kwan, M.L. Shea.

**Reasons for Judgment**

|  |
| --- |
| **H. HYSLOP J.** |

**INTRODUCTION**

**1**  Grant Aune was a policeman with the Royal Canadian Mounted Police (the "RCMP"). During his time with the RCMP, he considered it to be a career. As a result, he sought promotions to advance in the RCMP.

**2**  He sought a promotion to the rank of sergeant. He alleges that he was wrongfully prevented from attaining this promotion as a result of the actions of the RCMP, for which he seeks damages.

**3**  Mr. Aune's dispute is best described in his opening remarks:

It has been the Plaintiff's position throughout that had the grievance process been properly and/or reasonably administered, he would never have left the RCMP. He has maintained throughout that at the very least, he would have stayed in the RCMP until he had acquired his full 5 years as a Sergeant. This, he says, has a very significant effect on his pension.

**4**  The facts are not in dispute. What is in dispute is the law and how it is to be applied to the facts of this action.

**5**  Mr. Aune discontinued these proceedings against Her Majesty the Queen in Right of the Province of British Columbia.

**BACKGROUND**

**6**  Mr. Aune became an RCMP member in July 1976. Attached and marked Appendix A is the Engagement Document signed by Mr. Aune upon entering into the RCMP. He graduated from "Depot" (RCMP Training Centre in Regina Saskatchewan) in January 1977. While there, he met his future wife, Wendy. They married on October 1, 1977.

**7**  Mr. Aune's first posting was to Carlyle, Saskatchewan. At that time, his future wife was serving with the RCMP in Ottawa.

**8**  In order to accommodate them as a married couple, the RCMP posted the Aunes to British Columbia (E Division), in particular, to the Lower Mainland, in different detachments.

**9**  At the Burnaby detachment, Mr. Aune was assigned to municipal traffic from the fall of 1977 to the summer of 1982. He then transferred to the Maple Ridge detachment where he performed accident analysis. He remained in that position until he was transferred to Kamloops in 1989.

**10**  Mr. Aune served as a collision reconstructionist for the rural division located in Kamloops. The area that he served was extensive.

**11**  As a collision reconstructionist, he developed an expertise dealing with commercial vehicles involved in accidents. He was sent to a number of serious accidents in which there were multiple fatalities to investigate. As a result, his work was well regarded both inside and outside of the RCMP, including other police departments in Quebec and Ontario.

**12**  In about 1989, Mr. Aune was promoted to corporal.

**13**  Mrs. Aune resigned from the RCMP in 1983. In that year she was expecting the birth of their eldest child. Together, the Aunes decided that she would stay home and raise the children. They also agreed that Mr. Aune's employment with the RCMP would be their main focus.

**14**  Upon leaving the force, Mrs. Aune received a severance which included a lump sum payment representing her pension. After leaving the RCMP, Mrs. Aune worked at a number of part-time positions, but not with the RCMP.

**15**  In September 1991, Mrs. Aune rejoined the force. At that time, Mr. Aune was posted to the Kamloops detachment. At the time of leaving the force and rejoining it, her status was that of a constable. Upon rejoining the force, she arranged to buy back her pension, being the portion that she earned when she first enlisted, which was seven years, seven months.

**16**  In 2010, Mrs. Aune retired from the force. She had been working with the RCMP at the Pacific Regional Training Centre in Chilliwack, B.C. She had attained the rank of corporal in 2003.

**17**  Mr. Aune testified that he was a career policeman. His ambition was to attain the rank of staff sergeant. He and his wife agreed that when she attained the "24 year and one day" (25 years) in the RCMP, she and Mr. Aune would retire. At that time, Mr. Aune would have had 32 years of service. His pension would have been based on an average of his best five years earnings.

**18**  On May 24, 2000, Mr. Aune made an application for discharge from the RCMP. It was granted and the effective date of his discharge was July 25, 2000.

**19**  On his discharge, he received his severance pay and a pension based on 25 years service, with his best five earning years based on a base salary as a corporal and one year as a sergeant. Later on in these reasons I will review the reason why Mr. Aune sought his discharge.

**20**  Prior to seeking his discharge, Mr. Aune learned of a job with the Insurance Corporation of British Columbia ("ICBC"). He was offered a job with ICBC which he accepted. Mr. Aune worked for ICBC from 2000 to mid-October of 2001, when the department in which he worked was eliminated.

**21**  Upon leaving ICBC, Mr. Aune, and another former ICBC employee, started a business which they eventually incorporated in the fall of 2001 called Advantage Fleet Services Inc. ("Advantage"). This company operated a consulting business in the area of training and risk management with commercial trucking companies throughout Canada. Eventually Mr. Aune bought his partner out. Advantage moved from Kamloops to Surrey and then to Chilliwack, following Mrs. Aune's career.

**22**  At the time of trial, Mr. Aune was operating Advantage with the assistance of one of his sons. He and Mrs. Aune were residing in Cambridge Narrows, New Brunswick.

**ISSUES**

**23**  The following issues arise:

1. Should the court decline jurisdiction over these proceedings?
2. Is there a contract of employment between Mr. Aune and the RCMP?
3. If there is a contract of employment, did the RCMP constructively dismiss Mr. Aune from the RCMP?
4. If there is a finding that the RCMP constructively dismissed Mr. Aune, has Mr. Aune suffered damages or loss?
5. Has Mr. Aune done all that is required of him to mitigate his damages or loss?
6. Do the pleadings disclose a tort-based claim against the RCMP?
7. If there is a tort-based claim, did the RCMP owe a duty of care to Mr. Aune?
8. If a duty of care is owed to Mr. Aune, did the RCMP breach that duty of care by being negligent in the handling of Mr. Aune's grievance and by refusing the Alternate Dispute Resolution ("ADR")?
9. If the RCMP is negligent, what damages flow from that ***negligence***?
10. Is Mr. Aune's claim for ***negligence*** statute barred?
11. Did the RCMP acknowledge their tortious conduct and damages when Mr. Aune's grievance was successful and the RCMP offered ADR?

**EVALUATIONS**

**24**  Mr. Aune filed his Performance Evaluation and Review Report for the years 1992, 1993, 1994, 1995, 1996 and 1998. All of the evaluations are glowing, and Mr. Aune's leadership qualities are emphasized. The comments in these reports are based on examples from which each officer bases his opinion.

**25**  In 1992, Inspector Netherway stated:

... Cpl AUNE, regardless of his function and service to be within the top two highly rated Corporals in this Sub/Division. ... I would not hesitate for one moment to put him into a supervisory position at the Sergeant level, and I am very confident that he would perform in an exemplary manner.

**26**  In 1993, Sergeant Folk stated in reference to Mr. Aune:

... he assumed the role as patrol NCO on one of the General Duty watches. His aspirations in the Force are in the Officer Candidate Program and as such, he has taken the move back to General Duty policing in order to gain further supervisory experience.

...

Cpl. AUNE takes the leadership role in everything he does, from directing our members and the various support personnel at accident scenes, to the running of a large shift of members at our major Kamloops Commercial Vehicle Roadcheck.

...

I know that no matter what the duty or task Corporal AUNE will perform at the same exceptional level.

**27**  In 1994, Staff Sergeant Turner stated in his report:

Cpl. AUNE displayed that he was dependable and reliable. His duties were consistently performed in an above average manner. His files and written work were submitted in a timely fashion. His demeanour and professional work ethic were a positive role model for subordinates.

**28**  Inspector Netherway, in 1995, stated:

Grant is actively pursuing the Officer Candidate Program, however, he dropped one exam (Admin/Org) and plans to re-write at the first opportunity. His interest in the Officer Candidate Program remains very high. His aspirations are to attain a Commission in the RCMP and to be involved in senior management of the Force.

**29**  Inspector Tugnum, in 1996, wrote the following:

I have not observed any areas that I would suggest Grant focus on other than I see tremendous potential for advancement and I am prepared to encourage and support him should this be the career path he chooses in the future.

**30**  In 1998, Inspector Tugnum wrote:

Grant continues to display his superior communication skills in conjunction with ability to plan and organize an extremely diverse array of projects. He demonstrated this diversity when planning and organizing KAMCops, a primarily person-based undertaking while effectively managing the detachment LAN, a primarily technology-based activity, but including a significant component of teaching computer skills to groups with a wide span of expertise. Grant is still the most versatile Corporal at this detachment.

I continue to encourage Grant. I encourage Grant to seek challenges and to persist in his pursuit of promotional opportunity. His current standing in the promotion process and his performance at work causes me some significant concerns as to the overall validity and reliability of the process.

**31**  Chief Superintendent Tugnum, who gave evidence at this trial, is now a retired RCMP officer. He encouraged Mr. Aune to enter the Officer Candidate Program ("OCP"). Mr. Tugnum was the operations officer in Kamloops from 1996 to 1999 and he supervised Mr. Aune.

**32**  These comments made by Mr. Aune's superior officers confirm that Mr. Aune considered his time with the RCMP as a career and that he was actively seeking promotions.

**MR. AUNE LEAVING THE RCMP**

**33**  As mentioned earlier, Mr. Aune left the RCMP in 2000. At that time, he had filed a grievance against the RCMP pertaining to the promotions process. Mr. Aune testified that he became disillusioned with the grievance process; it was very slow. The grievance process did not meet the stated dates of the RCMP as to when the grievances would be heard and when promotions would start. Further, the next promotion cycle was about to start and Mr. Aune's grievance was not yet resolved. Mr. Aune acknowledged that he could enter the new promotion cycle, write the exam and the results would be sealed and opened when the results of the grievance came out. There was no evidence that Mr. Aune was looking for alternative employment.

**34**  In February 2000, Mr. Aune's then staff sergeant asked him to attend a conference on his behalf. The conference was sponsored by ICBC. While at this conference, someone placed an advertisement from The Province newspaper in Mr. Aune's briefcase. He discovered the advertisement when he and his wife were on a holiday in Mexico. He later learned that the advertisement was put in his briefcase as a joke.

**35**  The advertisement was seeking individuals to be employed by ICBC in accident prevention. The position was located in the Lower Mainland.

**36**  Mr. Aune and his wife discussed the advertisement and they felt that it was written for him as the job description fit his expertise. Further, while in the RCMP, he became involved in crime prevention.

**37**  In considering the position, Mr. Aune considered that his next cycle was up in March, he was not on the promotion list, and his situation and the grievance were not resolved. He decided to apply for the ICBC position for the experience. He had no intention of moving to the Lower Mainland as this would conflict with his wife's position, as she was stationed out of Kamloops.

**38**  From Mexico, Mr. Aune prepared a resume from memory and submitted his application to ICBC for the position.

**39**  In April of 2000, he had an interview. After the interview, he knew he was likely to receive a formal offer. Moving to the Lower Mainland was not an impediment to receiving an offer. Mr. Aune accepted the offer. When he accepted the ICBC offer, he knew that he would receive a 25-year pension (24 years + 12 days) from the RCMP, and he knew that he would not attain his goal of three pay increases as a sergeant which would affect the amount of his pension.

**40**  Mr. Aune started receiving his RCMP pension in July of 2000, and he was working for ICBC prior to his formal date of discharge. Upon his discharge, he received severance pay and an unreduced 25-year pension based on his best five years as a corporal.

**41**  Mr. Aune's annual salary with ICBC was $65,000.00; a little more than his RCMP salary. He started a new pension plan. ICBC paid for equipment for a home office and gave Mr. Aune full use of a brand new vehicle.

**42**  Mr. Aune's position with ICBC ended towards the end of October of 2001. By this time Mr. Aune received his grievance decision and his position at ICBC had ended.

**43**  In the early years of Advantage, Mr. Aune's income from Advantage was substantially less than his income from the RCMP and ICBC. From time to time, he took money from his registered retirement savings plans. By 2006 Advantage had increased its retained earnings and Mr. Aune was receiving dividends from Advantage. There is no evidence before me as to whether Advantage operates from Mr. Aune's home, nor is there any evidence before me of any other benefits that Mr. Aune may indirectly receive from Advantage.

**PROMOTION PROGRAM**

**44**  Mr. Tugnum was involved in the development of the OCP and the promotion process for non-commissioned officers ("NCOs") that the RCMP ultimately adopted.

**45**  In 1996, Mr. Aune entered the two-year OCP. In the second year, he did not pass one of his courses, and he was given permission to re-write the exam the next year. In 1998, he left the program as it was discontinued.

**46**  He started another promotion program known as the RCMP Cycle III program. This program consisted of three parts:

1. An exam described as a Job Simulation Exercise ("JSE");
2. A form of self-assessment called the Performance Report for Promotion ("PRP"); and
3. A review of the scored PRP by a PRP review board.

**47**  In the PRP, the member addresses eight different topics assessing him or herself in each topic and describes examples of work experience to support the member's own assessment for each topic. The purpose of setting out the experience by the member is to exemplify his or her performance. The member is required, for each experience, to name a reference - an RCMP member who can confirm the experience. The member is then given a numerical score.

**48**  The PRP score at this stage is a recommendation only. These PRP scores are sent on to a three-member board who review the scores.

**49**  Mr. Aune's PRP score was reduced by 20 points. The members on the board were senior to Mr. Aune and they did not work with him. The JSE and the PRP have a combined score. The success of the accumulated score determines whether the member is promoted and where he or she is ranked on the list for a promotion.

**50**  Despite the reduction of 20 points, Mr. Aune received passing marks, which put him on a list for promotion to the rank of sergeant. However, there was little chance of obtaining a sergeant's position within the next two cycles as he was way down in the ranking list.

**THE GRIEVANCE**

**51**  The then Inspector Tugnum encouraged Mr. Aune to grieve the decision. Mr. Tugnum testified:

In looking at the PRP and looking at the entire document that was returned to him, my sense was that the assessment done by the board was significantly lower than his actual performance, and took into account the quality of the test he submitted.

I was careful to review that to make sure there wasn't anything in there that was less than well described ...

And from that I felt that the review board had grossly underestimated his performance.

In addition to coaching Corporal Aune and reaffirming with him that I believed that his performance was that the score did not reflect the performance that I had observed over the time as his supervisor, I encouraged him at that time to take steps available to him to question the result. At that time the only step available to him was to grieve it.

**52**  Mr. Tugnum testified that he thought that the board had lost their sense of objectivity and seemed to have eliminated the input of persons who were most able to observe Mr. Aune's performance. Interestingly enough, there were no notes relating to the review of Mr. Aune's scores by the tribunal, so it was unknown how their decision was reached.

**53**  Mr. Aune was not the only one grieving his results. It turned out that there were a number of grievances from E Division. On July 23, 1998, Mr. Aune submitted his grievance. Receipt was acknowledged August 17, 1998. Inspector F.G. Macaulay sent out a memorandum, undated, (exhibit 1, tab 5) stating that the Cycle III promotion marks had opened the doors to several issues and concerns from RCMP members. He stated that the main topics of concern were grievances and promotions. He ends his memorandum by stating:

In order to best serve the members and to ensure that the procedures and lists used at the start of the cycle are valid, it was agreed to delay promotions until some of these issues are dealt with.

**54**  On July 31, 1998, Mr. Aune received a copy of the Cycle III Promotion Process - Grievance Guide.

**55**  Mr. Aune received an undated memorandum from Chief Superintendent S.R. Cameron, which among other things, dealt with the grievances. Chief Superintendent Cameron states that they had over 1,000 grievances and they were formulating a process to deal with them as expediently as possible. He stated:

The PRP grievances will then be prioritised by severity of the change from the supervisors rating to board rating, in conjunction with the movement on the promotion list. Those grievances with the most significant impact will be addressed first.

...

... grievances that involve a change of 5 points or less out of 80 may not be immediately addressed.

...

It is our intention to start promoting by mid-September to early October with first promotional opportunities being S/Sgts positions based on "cost" and "no cost" transfers, operational need and available funding.

...

It is Human Resources intention to address as many of the grievances as possible before mid-September. This will minimize the number of changes to each list after the process has started and allow for members to have confidence in [their] placement on it.

**56**  Chief Superintendent Cameron assigned Sergeant Lott to review the scores to expedite particular grievances. This was not part of the mandated grievance process. In reviewing Mr. Aune's score, Sergeant Lott made a mathematical error which was corrected.

**57**  Mr. Aune received a memorandum dated October 27, 1998, which gave him options as to how to deal with his grievance. The first option was to present the grievance directly to the Level I adjudicator, abandon the material that Mr. Aune had requested and the grievance would not be presented to the Grievance Advisory Board. The second option was that the grievance would continue in the Formal Grievance Process, which meant that Mr. Aune would receive his material and the grievance would eventually be forwarded to the Grievance Advisory Board for review. The third option was to abandon his grievance. Mr. Aune decided to continue with the full process and he advised the appropriate department.

**58**  In choosing his option he consulted with Mr. Tugnum. Mr. Tugnum testified that by choosing that option, it put Mr. Aune on a level ground leaving him to obtain as much information as possible to mount his grievance.

**59**  Mr. Tugnum testified that while Mr. Aune was waiting for his grievance to be resolved, other candidates entered into Cycle IV of the promotion process and were promoted, while Mr. Aune waited on the sidelines.

**60**  From the time Mr. Aune submitted his grievance on July 23, 1998, he pursued his grievance by seeking further information and data. The material was provided or he was advised that there was no such material. Mr. Aune pursued his grievance by staying on top of his requests for information to complete his submissions. Mr. Aune received some raw data that he had sought on June 30, 1999 and, by July 28, 1999, his grievance was submitted.

**61**  On August 24, 1999, administration services sent Mr. Aune's grievance submission to staffing and personnel and required them to provide a written response to Mr. Aune's submission within 90 days. On November 24, 1999, Mr. Aune sent an email requesting an update on his grievance. On November 22, 2000, the staffing and personnel section of E Division filed their response to Mr. Aune's grievance submission.

**62**  A memorandum dated November 27, 2000 from the Non-Commissioned Officer ("NCO") in charge of the general administration section ordered that the divisional grievance units:

... stop processing the remaining Cycle III PRP grievances and forward all outstanding Cycle III PRP Grievances to the Labour Relations Office of the Central Region in Ottawa for further processing.

**63**  On June 18, 2001, Mr. Aune's Grievance Level I - PRP decision was released. The decision ordered that a new PRP board be created to review Mr. Aune's scores. The results of that review would stand on their own.

**64**  Mr. Aune received a new PRP board and a new score. His new aggregate score, which I assume to mean the other portions of the test, was increased by 8 points. The end result was that Mr. Aune's first promotional opportunity, for which he would have been eligible, was the Prince Rupert Operations Support NCO position. Mr. Aune's promotion to sergeant was effective April 29, 2000.

**65**  After a review, it was determined that his effective promotion date was April 29, 1999. Mr. Aune's entire grievance was resolved, as well as his effective promotion date by May 17, 2002. By this time, Mr. Aune was discharged from the RCMP, worked for and had been terminated by ICBC and he had started a new business.

**DISCUSSION**

**Jurisdiction**

***Positions***

**66**  The defendant, the Attorney General (the "Crown"), argues that the court should decline jurisdiction because Mr. Aune had an administrative law remedy available to him. Mr. Aune participated in an available grievance process to grieve an exam involved in the promotion process with the RCMP. The defendant argues that when an individual has such recourse, the court ought to decline jurisdiction, except in exceptional cases.

**67**  In response, Mr. Aune argues that there is nothing further to grieve. He argues that even if there was, he can no longer avail himself of such a procedure as he is no longer a member of the RCMP. Further, there is no statutory scheme that provides a remedy to him.

***Analysis***

**68**  In *Vaughan v. Canada*, [*2005 SCC 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13C-00000-00&context=), the issue of jurisdiction arose as a result of an application brought by the respondent Crown to strike the appellant, Vaughan's pleadings. The appellant was a federal government employee whose dispute fell under the *Public Service Staff Relations Act*, [*R.S.C. 1985, c. P-35*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBK1-FCK4-G0TJ-00000-00&context=) [*PSSRA* ]. There had been a number of grievances relating to his employment. The appellant commenced an action in ***negligence*** against the respondent which it sought to strike. *Vaughan* raises this question at para. 15:

... whether the doctrine of judicial restraint (or deference) preached in the *Weber*, [*[1995] 2 S.C.R. 929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3JV-00000-00&context=), line of authorities applies to the statutory labour relations scheme set out in the *PSSRA* which does not in its relevant aspects provide for independent adjudication. As stated, the dispute here is over a benefit unilaterally conferred by the employer, in respect of which Parliament has vested the final decision in the Deputy Minister or his or her designate without recourse to independent adjudication. If such restraint is not mandatory (as it was in *Weber*), is restraint nevertheless necessary to avoid undermining Parliament's intent as expressed in the labour relations statute?

**69**  In Vaughan, Justice Binnie stated that despite a comprehensive scheme pursuant to the *PSSRA*, the court can retain "residual jurisdiction". In retaining "residual jurisdiction", the fact that there is no "recourse to independent adjudication" is not in itself a sufficient reason for the court to get involved (at paras. 16-17).

**70**  The courts have retained jurisdiction in whistleblower cases when the internal grieving process is in the hands of the department on which the employee blew the whistle, concluding that the complaint should be dealt with by an independent adjudicator.

**71**  In *Vaughan*, the court concluded:

[42] The appellant ought to have proceeded with the remedies granted by Parliament under the *PSSRA*. It was not open to him to ignore the PSSRA scheme and litigate his claim to ERI benefits in the courts by dressing it up as a "***negligence***" action. I would dismiss the appeal with costs.

**72**  The principles in *Vaughan* have been applied in claims brought by RCMP officers: *Lebrasseur v. Canada*, [*2007 FCA 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4C1-JKHB-64GC-00000-00&context=) and *Prentice v. Canada (Royal Canadian Mounted Police*), [*2005 FCA 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FD4T-B04G-00000-00&context=). Both cases were applications to strike. In *Lebrasseur*, the claim consisted of harassment and wrongful acts of a senior RCMP officer for which Ms. Lebrasseur and her husband sought several heads of damages.

**73**  Pursuant to the Veterans Review and Appeal Board of Canada, Ms. Lebrasseur received a full disability pension. The court below found that her action was barred by s. 9 of the *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=) [*CLPA* ] as the claims were based on the same factual allegations as the award of Ms. Lebrasseur's pension (para. 9). The court allowed Ms. Lebrasseur and her husband to amend their statement of claim in the event that there may be claims not barred by s. 9 of the *CLPA*. Mr. Justice Sharlow stated:

[18] As I read *Vaughan*, it stands for the proposition that, where an individual has recourse to a statutory grievance scheme such as Part III of the *Royal Canadian Mounted Police Act* to seek a remedy for a complaint arising from a workplace event, the Courts generally should decline to deal with claims for damages arising out of the same event, even if the statutory grievance scheme does not expressly oust the jurisdiction of the courts. Although the courts retain the discretion to hear such claims, they should exercise that discretion only in exceptional cases. The scope of the exception remains undefined, although it is suggested that an exception might be found if the integrity of the grievance procedure has been compromised (which may occur, for example, in certain cases where a whistleblower is alleging employer retaliation). The claims in issue in *Vaughan* were held not to be within the exception. A similar conclusion was reached by this Court in *Prentice*.

**74**  *Prentice* pre-dates *Lebrasseur*. Mr. Prentice's action against the Crown is a claim for damages for violation of his s. 7 *Charter* rights. In *Prentice*, the court found that the claim made by Mr. Prentice was:

[70] ...a disguised action in civil liability against the Crown, it is prohibited by sections 8 and 9 of the *Crown Liability and Proceedings Act.*

[71] Given that this action is a disguised claim based on an accident in the course of employment, it is prohibited by section 12 of the *Government Employees Compensation Act*, which provides that an employee is entitled only to compensation under that Act.

**75**  In *Prentice*, the court concluded that a plaintiff who wishes to bring an action against the Crown must first look to administrative law for his or her remedies (para. 76).

**76**  Mr. Aune submits that the arguments advanced by the Crown are similar to those advanced in *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=). In dismissing the Attorney General's arguments, Mr. Justice Lamperson stated:

[91] ...Because these proceedings are now the plaintiff's only opportunity to seek redress, it would be wrong for this court to decline jurisdiction and deny the plaintiff an appropriate remedy if she can successful meet the legal tests required to establish the alleged torts and breach of contract.

**77**  The Court of Appeal affirmed *Sulz* (S.C.) in *Sulz v. British Columbia (Minister of Public Safety and Solicitor General)*, [*2006 BCCA 582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61HH-00000-00&context=) and reviewed the jurisdiction argument made by the appellant by concluding:

[31] In *Vaughan*, Binnie J. did not criticize Cromwell J.A.'s analysis in *Pleau*, [*[1999] N.S.J. No. 448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1WF-M2N6-00000-00&context=), of the factors the court considers in determining whether it should exercise jurisdiction in a workplace dispute. He found them inapplicable to the ***PSSRA***, on the facts in *Vaughan*. Mr. Justice Binnie was explicit in his reasons for judgment that he was considering the scheme of the *PSSRA* as it applied to employment benefits provided to federal government employees by regulation. He expressly excluded "whistle-blower" cases from his conclusion that the lack of independent adjudication did not justify court intervention. *Vaughan* did not consider jurisdiction in the context of the tort of negligent infliction of mental distress by a superior officer in the R.C.M.P., not governed by the *PSSRA* but the *R.C.M.P. Act*.

[32] This case is more like *Pleau* and *Phillipps*, [*[2000] M.J. No. 606*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-F30T-B3H7-00000-00&context=), than *Vaughan*. The obvious difference from *Vaughan* is the factual difference: it does not involve a dispute over employment benefits, but a real tort claim for injuries suffered as a result of the conduct of a manager. Furthermore, most of the respondent's loss for which she was compensated in damages, her past and future loss of income, was not suffered during the course of the respondent's employment. Her income loss occurred after she was discharged, when she was no longer governed by, or could claim any benefit from, the grievance process under the *R.C.M.P. Act*. The respondent's formal complaint resulted in a determination that Smith had harassed her. The internal process was then spent: there was nothing more to grieve. Nor could the internal process provide compensation for her loss. In that respect, the statutory scheme did not provide effective redress. [Emphasis added]

**78**  In the case before me, Mr. Aune is seeking damages for constructive dismissal from his employment. In addition, he seeks damages based on the alleged ***negligence*** of the RCMP in dealing with his grievance and refusing ADR. Similar to Ms. Sulz, Mr. Aune was a discharged RCMP member who could not continue with the grievance process. Further, he is critical of the grievance process, which he states relates to his constructive dismissal from the RCMP and relates to his tort claim.

**79**  For the reasons set out above, I conclude that I have jurisdiction.

**Is There a Contract of Employment Between Mr. Aune and the Royal Canadian Mounted Police?**

***Positions***

**80**  Mr. Aune argues that s. 31(5) of the *Royal Canadian Mounted Police Act,* [*R.S.C. 1985, c. R-10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9W1-FBFS-S4XY-00000-00&context=) [*RCMPA* ] characterizes a member's employment as:

1. 31(5) No member shall be disciplined or otherwise penalized in relation to employment or any term of employment in the Force for exercising the right under this Part to present a grievance.

**81**  Mr. Aune acknowledges that:

1. It is commonly held at that the relationship between a member and the RCMP is governed by the *RCMP Act*, regulations, the Administrative Manuals as amended from time to time and the Commissioner's Standing Orders [submissions of the plaintiff]

**82**  Despite that, Mr. Aune argues that "there are unquestionably contractual terms to the relationship between the RCMP and the Plaintiff [submissions of the plaintiff].

**83**  The Crown argues that as a member of the RCMP, the Crown does not have a contract of employment such that Mr. Aune can make a claim for constructive dismissal. Further, that an RCMP officer is appointed and discharged pursuant to s. 12 of the *RCMPA* which was in effect from April 1, 1999 to March 31, 2003:

Tenure of officers

12.(1) Officers of the Force hold office during the pleasure of the Governor in Council.

Other members

1. No member other than an officer may be dismissed or discharged from the Force except as provided in this Act, the regulations or the Commissioner's standing orders.

12.1 Every member who has contravened, is found contravening or is suspected of contravening the Code of Conduct or an Act of Parliament or of the legislature of a province may be suspended from duty by the Commissioner.

**84**  The *RCMPA* has been amended. However, no changes have been made to those sections in the current *RCMPA*.

**85**  There is no other legislation which regulates the appointment of and the termination of an RCMP member.

***Analysis***

**86**  In *McLean v. Canada,* [*[1999] F.C.J. No. 400*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M461-JTGH-B1PY-00000-00&context=), Ms. McLean commenced an action for wrongful dismissal after she was discharged from the RCMP for her physical disability pursuant to the *Royal Canadian Mounted Police Regulations.* In disposing of Ms. McLean's claim, Mr. Justice Lufty stated at para. 22:

[22] In summary, an action in wrongful dismissal applies where the employer fails to provide reasonable notice of the termination. This principle does not extend to a member of the Royal Canadian Mounted Police who is appointed to serve during pleasure. No special conditions of employment have been alleged or established in this proceeding. The statutory and regulatory regime concerning the grievance of a member who has been administratively discharged on account of a physical disability is the plaintiff's sole remedy. Subsection 12(2) of the Act requires that the plaintiff could not be administratively discharged from the Force except as provided in the legislation, the regulations or the Commissioner's standing orders. There is no provision that requires the Commissioner to provide the member with reasonable notice. In this case, the appropriate remedy for the plaintiff was to pursue the Force's refusal of her request for an extension of the time period for the filing of her grievance presentation either to level II of the grievance process or, if she considered it appropriate, to seek judicial review immediately. This is consistent with the privative clause in subsection 32(2) of the Act. The plaintiff's action for wrongful dismissal is precluded by the grievance procedure, provided for in the Royal Canadian Mountain Police Act, concerning her administrative discharge for reasons of physical disability.

**87**  In *Gingras v. Canada (C.A.),* [*[1994] 2 F.C. 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-F873-B0H4-00000-00&context=), Mr. Gingras was a retired member of the RCMP when he commenced this action. For a period of time, as an RCMP officer, he was a member of the non-civilian Canadian Security Intelligence Service. He sought to receive pay under the Bilingualism Bonus Plan (the "bonus plan") which had been denied him, despite meeting and passing all the exams and holding bilingual positions. The bonus plan applied, with a few exceptions, to all employees of the federal civil service. In *Gingras*, the court concluded that under the terms of the bonus plan the eligibility expression "to all eligible employees for whom the Treasury Board is the employer" (para. 22) was not correct because the treasury board is not the employer of anyone. Rather, "the Plan should apply to those eligible employees of the federal public service of whom Her Majesty, represented by the Treasury Board, is the employer." (para. 23) The argument was whether Mr. Gingras was an employee as defined by the bonus plan, and whether he should have been included in the bonus plan. In allowing his claim for a bonus for a limited period, Mr. Justice Décary concluded:

[41] In the ordinary law public servants form a special category of employees and by a long tradition the ordinary rules of contract are not applicable to them. The members of the police forces fall even more clearly outside these rules, as Viscount Simonds noted in Attorney-General for New South Wales v. Perpetual Trustee Co. (Ld.), [1955] A.C. 457:

There appears to their Lordships to be ample justification for saying, as was said in the High Court, that the service of a constable is "different in nature" or "on a different plane" from the domestic relation, that it is "different both in its nature and its incidents, and that, even if some of the incidents which the law implies in the ordinary contract of service are present also in the relation of the constable to the Crown, there is a fundamental difference which makes it necessary to approach with caution the question whether a form of action available in the one case is available in the other also.

...

[45] I am not saying that members of the RCMP are employees like any others. It is clear that both in the ordinary law and in Canadian statutory law, as a consequence of their method of appointment, their oath and their code of discipline, they form a class apart. I am simply saying that this special status does not deprive them of their status as employees for the purposes of statutes relating to the organization of the federal Government:

**88**  *Clark v. Canada (T.D.),* [*[1994] 3 F.C. 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-F873-B0HP-00000-00&context=) is similar to Mr. Aune's claim in that Ms. Clark and Mr. Aune advanced claims for constructive dismissal after leaving the RCMP. In *Clark*, Mr. Justice Dubé refers to Mr. Justice Décary's comments regarding the characterization of RCMP members in *Gingras*. Mr. Justice Dubé concluded:

[44] ... in the particular circumstances of this case, and given the weight of existing authority, the admittedly ambiguous status of RCMP members, such as the plaintiff, does not enable her to maintain a cause of action for wrongful dismissal in this Court, despite the fact that she may not be dismissed at pleasure.

**89**  In a recent case of this court, *Flanagan v. Canada (Attorney General)*, [*2013 BCSC 1205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M120-00000-00&context=), Mr. Flanagan commenced an action against the Crown for wrongful constructive dismissal from his employment as an RCMP member.

**90**  The Crown argued that the court had no jurisdiction because Mr. Flanagan had not gone through the grievance procedure as mandated by the RCMP. The Crown further argued that Mr. Flanagan's relationship with the RCMP was not pursuant to a contract of employment.

**91**  Mr. Flanagan came into conflict with the RCMP due to his alcohol drinking habits. His superiors attempted to have this resolved by medical and residential treatment, which was met with resistance. A code of conduct notice was served on Mr. Flanagan, but it was not pursued. Mr. Flanagan did not file a grievance. He left the RCMP.

**92**  Within days of leaving the RCMP, a medical doctor with the RCMP, Dr. MacDonald, reported Mr. Flanagan under s. 230 of *the Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, as having an untreated alcohol dependency. This information resulted in the loss of Mr. Flanagan's driver's license.

**93**  Mr. Justice Melnick reviewed the same cases cited to me by Mr. Aune and the Crown. Mr. Justice Melnick found:

[68] ...it is not open to Flanagan to bring an action for breach of contract of employment against the defendants.

**94**  In reaching this conclusion he stated:

[64] I conclude that the weight of authority is against the existence of a contract law-based employment relationship between the RCMP and its members. The Crown has chosen to define that relationship in statute through the *RCMP Act.* It has, within the body of the legislative administrative scheme applicable to members of the RCMP, provided procedures for the resolution of employment disputes by grievance or discipline.

**95**  Mr. Justice Melnick recognized, in dealing with the matter of jurisdiction, that the courts retain residual discretion in cases where resorting to the grievance process has been demonstrated to be ineffective or inappropriate.

**96**  Mr. Aune relied on the trial decision of *Sulz* (S.C.). by Lamperson J. Mr. Justice Lamperson addressed whether Ms. Sulz had a claim against the RCMP for breach of contract. After reviewing some case law, Lamperson J. stated:

[127] It may well be that the traditional relationship of police officers to the Crown has changed with the time. However, that question was not addressed either in the evidence or in the legal arguments to the extent that this court can formulate a proper opinion in that respect.

[128] In any event, because s. 111 of the Pension Act, referred to in detail at [paragraph] 107 - 109 of these reasons, acts as a bar to the plaintiff's contract claim as well as to the tort claims against the Attorney General of Canada and Staff Sergeant Smith, it is unnecessary to decide the general point in the circumstances of this case.

**97**  Based on these comments, the only matter before the Court of Appeal was the tort claim and not a claim for breach of contract.

**98**  There is no contractual relationship between the Crown and members of the RCMP, which founds an action against the Crown for damages caused by constructive dismissal. I cannot find that Mr. Aune was constructively dismissed by the Crown. As a result, this disposes of issues numbered 3, 4 and 5 raised at this trial.

**The Tort Claim**

**99**  Mr. Aune's tort claim is set out in his amended notice of civil claim:

35. The defendant negligently breached their duty of care to the Plaintiff in the grievance process and or breached the terms and conditions of the contract and as a result of their breach the Plaintiff has suffered loss and damage and continues so to suffer.

**Part 2: RELIEF SOUGHT**

1. Damages for breach of contract;
2. General damages;
3. Special damages;
4. Aggravated damages; and
5. Court Order interest pursuant to the *Court Order Interest Act*.

**Part 3: LEGAL BASIS**

1. The grievance procedure provided in the Act and administrative policies of the R.C.M.P. is a benefit to the Plaintiff and a term in condition of his "employment" with or "holding of office" with the R.C.M. P. The Plaintiff pleads and relies upon the provisions of the *R.C.M.P. Act*.

2. It is an expressed or implied term of the entitlement to the grievance procedure that all grievances be handled expeditiously and reasonably under all the circumstances and with notice to the Plaintiff failing which the grievance procedure is meaningless and has been breached

3. The Defendant breached the terms and conditions of the grievance procedures, and the provisions of the *R.C.M.P. Act*.

4. As a result of the breach and terms and conditions as alleged herein, the Plaintiff has suffered loss of damage and will continue so to suffer in the future.

5. In the alternative, the Defendant has a duty of care to the Plaintiff to proceed with his grievance expeditiously and reasonably and to keep the Plaintiff properly informed of the process of his grievance.

6. As a result of the Defendants' breach of contract of employment, for constructive dismissal and/or failure to abide by the terms of a grievance procedure and subsequent award and/or the Defendants' failure to submit the issue of the grievance award to Alternate Dispute Resolution, the Plaintiff is entitled to be compensated for his loss and damages.

[Emphasis in the original]

**100**  The Crown's position is that Mr. Aune's case is advanced in breach of contract and constructive dismissal, but not in tort. The Crown states in its submissions:

To the extent a tort based loss is being advanced, both the Crown Liability and Proceeding Act and the Limitations Act would come into play.

**101**  Mr. Aune argues that there is duty of care owed to him by the RCMP to ensure they comply, not only with the *RCMPA* and policies, but also:

1. ... as set out in the Administrative Manuals as well as policies communicated to the plaintiff throughout the lengthy grievance process.

...

1. The facts that establish a breach of the contractual obligation of the RCMP also establish a breach of the duty of care owed to the Plaintiff.

[Plaintiff's submissions]

**Is Mr. Aune's Claim for *Negligence* Statute Barred?**

**102**  The Crown argues that Mr. Aune's amended notice of claim is statute barred. The writ of summons was issued on December 3, 2003. The Crown argues that the limitation period started to run in the spring of 2000. The basis of the Crown's position is that Mr. Aune's amended notice of civil claim states:

1. By Spring, 2000, the Plaintiff started having serious thoughts and considerations about remaining a member of the R.C.M.P. He had by then, 24 years service with the R.C.M.P. He knew he had been wrongfully denied a promotion to Sergeant. His grievance was still outstanding after two years. He had received no response or information from the Defendant other [than] when he specifically requested the same in November, 1999. He had lost his faith in the R.C.M.P. as a career and had to provide for his future. As a result of all these considerations, he resigned from the R.C.M.P. effective June, 2000 and thereafter immediately ceased to be a member of the R.C.M.P.

**103**  The limitation period is set out in s. 3(2)(a) of the *Limitations Act*, [*R.S.B.C 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=):

1. 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:
2. 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;

**104**  Although Mr. Aune made this statement in his pleadings, he did not know that he had been wrongfully denied his promotion to sergeant in the spring of 2000. He could not have known as his grievance was not complete and he did not know the outcome. The earliest date that the limitation period could have started to run is June 15, 2001; that is when he knew his grievance was successful and that he was entitled to a re-scoring before a new PRP board. The results of the re-scoring were not known until December 3, 2001. On that date, his score was increased making him promotable.

**105**  I conclude that Mr. Aune could not have brought this action without knowing the results of the grievance, and that was on December 3, 2001. Therefore, the limitation period started to run on December 3, 2001 and expired after December 3, 2003.

**106**  I find that this action was brought within the time limitation.

**Do the Pleadings Disclose a Tort Based Claim Against the RCMP?**

**107**  Sections 3, 10, 24 and 36 of the *CLPA* state:

1. The Crown is liable for the damages for which, if it were a person, it would be liable

*(a)* in the Province of Quebec, ...

...

*(b)* in any other province, in respect of

1. a tort committed by a servant of the Crown, or
2. a breach of duty attaching to the ownership, occupation, possession or control of property.

...

1. No proceedings lie against the Crown by virtue of subparagraph 3*(a)* (i) or *(b)* (i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

...

1. In any proceedings against the Crown, the Crown may raise

*(a)* any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and

*(b)* any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

1. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.

**108**  The current version has not changed these sections.

**109**  These sections permit Mr. Aune to sue the Crown directly in tort for the acts and omissions of RCMP officers. There must be a cause of action for the Crown to meet and any defenses that exist between two people are available to the Crown. This does not change the common law.

**110**  Mr. Justice Voith in *Brandreth-Gibbs v. Canada (Attorney General)*, [*2011 BCSC 806*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-2298-00000-00&context=), concludes that the effect of ss. 3, 10, 24 of the *CLPA* is:

[60] These provisions establish (i) that the Attorney General is only liable for wrongful conduct in circumstances where a Crown servant would have been liable and (ii) that the Crown can avail itself of any defence, including a limitation defence, that would have been available to its servant. Thus s. 106 of the *Customs Act* also bars the plaintiff's claim against the Attorney General of Canada. The interaction of ss. 3 and 10 of the *Crown Liability and Proceedings Act* and of s. 106 of the *Customs Act* was explained by the court in Ingredia S.A., [*[2010] F.C.J. No. 893*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4D1-F8D9-M4GM-00000-00&context=), at paras. 35-38.

**111**  *Brandreth-Gibbs* and the trial decision of *Sulz* demonstrate that in order to find the Crown vicariously liable for Crown servants, or for the acts of RCMP members, they must be named and identified, and the plaintiff must state how it was that the RCMP officer was negligent. Mr. Aune's pleadings do not identify such a person, nor do they particularize the negligent behavior in which Mr. Aune's claim is based. In the amended notice of claim it states:

35. The Defendant negligently breached their duty of care to the Plaintiff in the grievance process and or breached the terms and conditions of the contract and as a result of their breach the Plaintiff has suffered loss and damage and continues so to suffer.

...

1. As a result of the Defendants' breach of contract of employment, for constructive dismissal and/or failure to abide by the terms of a grievance procedure and subsequent award and/or the Defendants' failure to submit the issue of the grievance award to Alternate Dispute Resolution, the Plaintiff is entitled to be compensated for his loss and damages.

**112**  At para. 145 of the *Sulz* (S.C.), Lamperson J. stated:

[145] The defendant Smith, as the officer in charge of the Merritt detachment and the plaintiff's commanding officer, owed a duty of care to the plaintiff. It was his duty to ensure that she could work in a harassment-free environment, as is required by various anti-harassment policies that the RCMP has in place.

**113**  Mr. Aune's argument is that the grievance took too long. He argues that in pursuing a grievance the member must adhere to the strict timelines set out, and that s. 31(6) of the *RCMPA* requires "the grievance procedure to be expeditious" [plaintiff's submissions, paragraph 7].

**114**  Mr. Justice Lamperson identified who owed Ms. Sulz the duty of care and what that duty of care was. He found that Ms. Sulz's commanding officer owed her a duty of care and then demonstrated in detail the behavior which led Lamperson J. to conclude that Ms. Sulz's commanding officer's actions breached the duty of care. None of these findings were disturbed by the Court of Appeal.

**115**  In *Flanagan*, Mr. Flanagan specified and named Dr. MacDonald as the individual who committed the tort, which was the unlawful interference by Dr. MacDonald in Mr. Flanagan's economic interests.

**116**  Mr. Aune's pleadings do not identify any individual who committed a tortious action, nor do the pleadings identify what tort may have been committed. At best, they identify a process that appears slow, which he alleges is due to ***negligence***.

**117**  Mr. Aune's complaints relate to representations made by Inspector Macaulay dealing with the various grievances, particularly those relating to the large disparity of PRP scores. Although there is no date attached to these representations, they are likely to have been made shortly after Mr. Aune filed his grievance which was on July 23, 1998. Mr. Aune's grievance submission was filed in June of 1999. The response to Mr. Aune's grievance was filed in November of 2000. The Level I grievance decision was made June 15, 2001. Within six months, Mr. Aune received his new PRP score.

**118**  Mr. Aune had to know that upon electing a formal grievance on October 27, 1998 that Inspector Macaulay's timetable would not be met.

**119**  I concur with the Crown that Mr. Aune has not provided any authority:

... that there exists a common law of duty of care for promotion of an employee or for doing so within a specific time frame. The same is true with respect to any requirement for ADR [Crown's submission].

**120**  Nor has Mr. Aune provided any authority in which a court found delay to be a tort. Just because there is a delay does not mean that a Crown servant caused the delay.

**121**  Mr. Aune cannot merely state that the RCMP, at large, generally owed him a duty of care and were generally, at large, negligent. The *CLPA* does not contemplate the RCMP being negligent as a body, rather, it relates to individual members.

**122**  I find the pleadings do not disclose a tort-based claim against any member of the RCMP before, during, or after the grievance process. As a result, I do not need to deal with issues numbered 7 and 8.

**FINDINGS OF FACT**

**123**  I find that Mr. Aune was a career RCMP officer. He had no other adult employment other than the RCMP until he left the RCMP. The evidence supports that his aspirations were to engage in the processes in which he could seek promotions. His goal was to become a staff sergeant and to retire at a time when his wife could retire with an unreduced pension.

**124**  After Mr. Aune filed his grievance submission, he made one inquiry as to where his grievance stood, which was in November of 1999. At this time, the Level I response had not been filed and was not filed until a full year later. The delay in the grievance process did not stand in the way of Mr. Aune joining the next cycle of promotions.

**125**  I find that Mr. Aune's reduced PRP score was very disappointing to him. However, he sought a discharge from the RCMP in the spring of 2000. This is one year and five months before he knew that not only was his grievance successful, but his promotion to sergeant was backdated to 1999.

**126**  Mr. Aune was not looking for alternate employment in February of 2000. It was only by chance that he learned of the ICBC position. In consultation with his wife, Mr. Aune considered the pros and cons of leaving the RCMP and accepting a position with ICBC. He decided to apply for the position. He initially applied with the idea that it would give him experience; that is in applying for employment. The position was in the Lower Mainland and he had no intention of leaving Kamloops. He was interviewed by several people employed by ICBC. He obviously made a favorable impression because not living in the Lower Mainland was not an impediment to his employment with ICBC. During the interview process, those who interviewed him conveyed to him that the position was likely to be offered to him. Mr. Aune acknowledged that he was flattered by the reception he received from ICBC.

**127**  From Mr. Aune's point of view, the position was interesting and he and the other members of the team were breaking new ground at ICBC. Further, it was a position in which he could be proactive in identifying problem truck fleets for ICBC and reducing insurance claims. This proactive behaviour was similar to the time he spent with the RCMP in the Community Policing Program. As Mr. Aune said, the position with ICBC was "as if it was written for me".

**128**  What is troubling is that Mr. Aune made no further inquiries as to where his grievance stood. He did not consult with anyone in the RCMP other than his friend, Superintendent Folk. Superintendent Folk advised Mr. Aune to be patient, but by then Mr. Aune had already made up his mind. He did not speak to Mr. Tugnum who testified that he had not spoken to Mr. Aune since he left Kamloops in 1999.

**129**  I conclude that Mr. Aune left the RCMP because the ICBC position responded to the skills that he learned in the RCMP. Further, he had a good reputation as it related to those skills. Further, the position with ICBC permitted him to work out of his home, he received an automobile for his use, there were no longer any night shifts, and he could earn a new pension. The ICBC position paid about the same as the rank of corporal with the RCMP but it also permitted him to draw upon his RCMP pension. I find, but for ICBC terminating his employment, Mr. Aune would not have started this action.

**Whether the RCMP Acknowledged their Tortious Conduct and Damages When Mr. Aune's Grievance was Successful and the RCMP offered a ADR**

**130**  Mr. Aune argues that:

1. The RCMP themselves recognized their obligations and duty of care to the Plaintiff. They carried on with the grievance process after they knew he had retired. They promoted him retroactively and offered him ADR to address the 'redress'.

**131**  I do not accept this argument as there is no evidence that the RCMP could have ended the grievance process upon the resignation of Mr. Aune. I can only conclude that the grievance continued because there is an obligation to do so if for no other reason than Mr. Aune receiving an appropriate pension.

**132**  I conclude that Mr. Aune has not established that any member or members of the RCMP were negligent. Nor has he established that he left the RCMP because of the slow pace of his grievance. Rather, he left the RCMP because there was a position with ICBC that suited him. I, therefore, dismiss Mr. Aune's claims against the Crown.

**DAMAGES**

**133**  In the event that I am wrong and Mr. Aune was owed a duty of care, and that duty of care was breached by negligent behaviour, I am prepared to assess the damage that Mr. Aune alleged he suffered.

**134**  In doing so, I conclude that Mr. Aune would have retired when his wife served in the RCMP 24 years and one day; that would have been in 2008. In fact, Mrs. Aune retired in 2010. However, the calculation of the damages should end on April 29, 2008; that is the date when the Aunes initially made plans to retire.

**135**  Mr. Aune argues that he would have become a staff sergeant in 2004, resulting in a loss of income for a period of four years and a loss of pension benefits of a staff sergeant for four years. Based on the evidence, I find this speculative given the time periods that Mr. Aune rose between the ranks of constable to corporal and corporal to sergeant. As a result, I base Mr. Aune's damages on that of a sergeant.

**136**  Mr. Aune argues that there are two components to his loss; first, a past income loss and second, future pension benefits.

**137**  Mr. Robert Carson, an economist, has provided two reports; one dated January 28, 2013 and the other dated May 9, 2013. The latter report was produced to calculate Mr. Aune's loss of pension benefits assuming Mr. Aune retired in 2008. The January 28, 2013 report assumes that Mr. Aune would have worked five more years; that is from April 29, 1999 to April 28, 2004, and that Mr. Aune would have been promoted to staff sergeant by April 29, 2004, and then would have retired after 35 years of service.

**138**  The Crown cross-examined Mr. Carson on matters relating to his calculations. Mr. Carson made it clear that his instructions were to determine the value of rates of pay and pension benefits. He also made it clear that he was not to determine Mr. Aune's alleged losses.

**139**  The Crown cross-examined Mr. Carson on a hypothetical situation of Mr. Aune remaining with ICBC and accumulating a new pension while receiving an RCMP pension. All of this is speculation, as Mr. Aune's employment with ICBC was short-lived. Mr. Aune received from ICBC a lump sum amount which represented his pension contributions, as well as severance pay. These two items were taken into consideration when Mr. Aune calculated his loss.

**140**  The Crown provided no evidence, nor did they demonstrate in cross-examination, that Mr. Carson's figures were inaccurate. Mr. Carson corrected his January 28, 2013 report at page 8 by changing the valuation of his current pension from $365,400.00 to $475,600.00, and the value of a sergeant's pension had Mr. Aune retired in 2004 to $642,800.00.

**141**  Mr. Aune's income from April 28, 1999 to April 28, 2008 is $532,308.00. This amount was arrived at by adjusting Mr. Aune's 1999 earnings for two-thirds of the year; deducting his severance pay, which he would have received in any event, deducting his RRSP withdrawals, and for the year 2008 adjusting his income to one-third. According to Mr. Carson, Mr. Aune would have earned, as a sergeant, the sum of $723,461.00 from April 29, 1999 to July 24, 2008. (The latter is the month and day in 2000 of Mr. Aune's retirement). This is determined by adding Table II (base and service pay) of the January 28, 2013 Carson report, which is $361,370.00, and Table I of the May 9, 2013 Carson report (base and service pay) which is $362,091.00. The difference between Mr. Carson's projected earnings and what Mr. Aune actually earned during that period is $191,153.00. Advantage had retained earnings of $124,697.00 for the year ending March 31, 2008. These monies would have been available to Mr. Aune to be paid as dividends or salary. By deducting this amount, Mr. Aune's loss of earnings as a sergeant up to the end of April 2008 is $66,456.00.

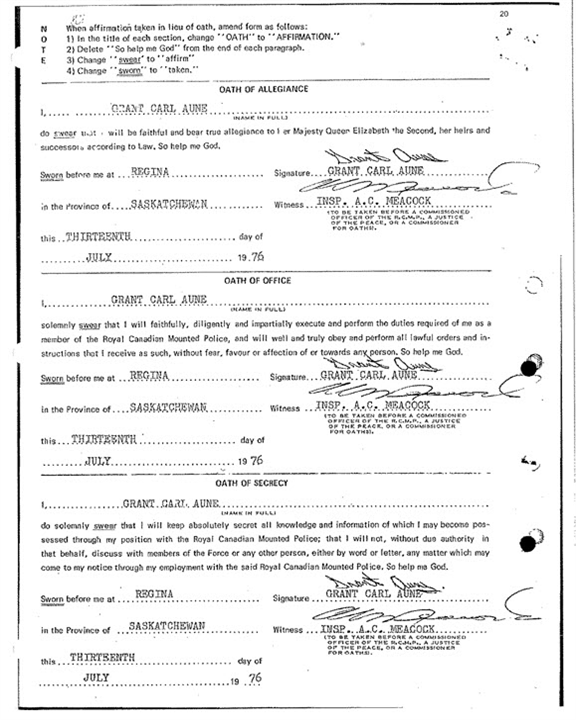
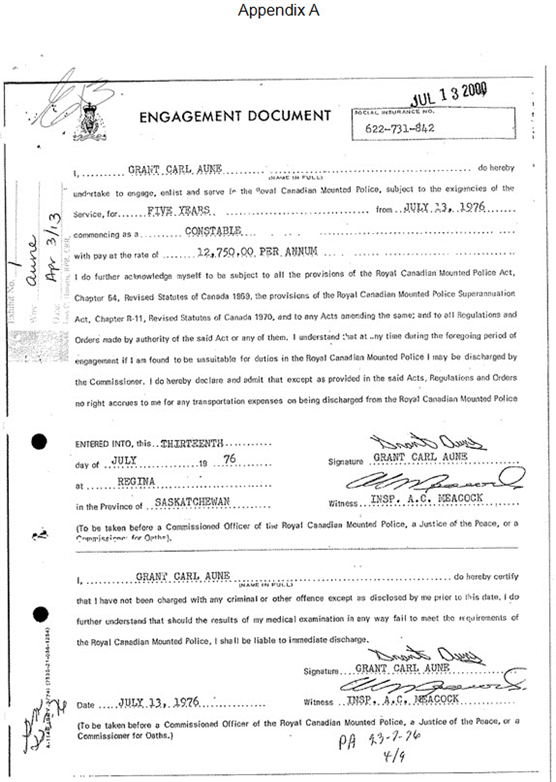
**142**  Mr. Aune's loss and the value of his pension was calculated as follows, based on Mr. Aune retiring in 2004, Mr. Aune's pension loss would have been $167,200.00, less pension contributions of $15,414.00, for a loss of $151,786.00. Based on Mr. Aune's evidence that he would have retired July 24, 2008, Mr. Carson's May 9, 2013 report values a sergeant's pension at $811,000.00, making a loss of $335,400.00. Had Mr. Aune been successful in this action, his pension loss and his loss of income would have been $401,856.00 had he remained in the RCMP as a sergeant up to and including July 24, 2008.

**143**  I dismiss Mr. Aune's claims against the Crown. The Crown will have their party/party costs at Scale B.

H. HYSLOP J.

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Appendix A



**End of Document**

[***Brodeur (Litigation guardian of) v. Provincial Health Services Authority (c.o.b. British Columbia Women's Hospital and Health Center), [2016] B.C.J. No. 1103***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JXC-X5T1-F8SS-6176-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Sharma J.

Heard: September 23, 25, 28-30, October 1, 2, 5, 7, 9 and

16, 2015.

Judgment: May 31, 2016.

Docket: S118818

Registry: Vancouver

**[2016] B.C.J. No. 1103** | 2016 BCSC 968 | 267 A.C.W.S. (3d) 219 | 30 C.C.L.T. (4th) 51 | 2016 CarswellBC 1484

Between Tianna Layne Brodeur, an infant by her Litigation Guardian, Beverly Hicks, and the said Beverly Hicks, Plaintiffs, and Provincial Health Services Authority operating a public hospital under the name of British Columbia Women's Hospital and Health Center, Dr. Delisle, Dr. Freedman, Nurse Marsh and Nurse Jane Doe, Defendants

(375 paras.)

**Case Summary**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Action by child brain injured at birth dismissed against mother's pre-natal physician, allowed against attendant nurse and medical resident — Child left developmentally delayed, unable to ever live independently — Attendant care costs, counselling, physiotherapy, occupational therapy and transportation costs for life expectancy of over 70 years included in total award of $5,201,848.**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Duty of care — Failure to inform — Particular professions — Doctors — Nurses — Action by child brain injured at birth dismissed against mother's pre-natal physician, allowed against attendant nurse and medical resident — Child left developmentally delayed, unable to ever live independently — Doctor providing pre-natal care adequately informed mother of risks associated with VBAC delivery including uterine rupture — Attendant nurse fell below standard of care in failing to take immediate steps to address risk of rupture upon noting mother's pain and inadequate fetal monitoring — Resident fell below standard of care in conducting two ultrasounds and vaginal exam prior to undertaking emergency C-section — Delays caused injury due to oxygen deprivation.**

**Professional responsibility — Self-governing professions — Duties — Duty of care — Standard of care — Duty to inform — Professions — Health care — Doctors — Nurses — Action by child brain injured at birth dismissed against mother's pre-natal physician, allowed against attendant nurse and medical resident — Child left developmentally delayed, unable to ever live independently — Doctor providing pre-natal care adequately informed mother of risks associated with VBAC delivery including uterine rupture — Attendant nurse fell below standard of care in failing to take immediate steps to address risk of rupture upon noting mother's pain and inadequate fetal monitoring — Resident fell below standard of care in conducting two ultrasounds and vaginal exam prior to undertaking emergency C-section — Delays caused injury due to oxygen deprivation.**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Causation — Action by child brain injured at birth dismissed against mother's pre-natal physician, allowed against attendant nurse and medical resident — Child left developmentally delayed, unable to ever live independently — Doctor providing pre-natal care adequately informed mother of risks associated with VBAC delivery including uterine rupture — Attendant nurse fell below standard of care in failing to take immediate steps to address risk of rupture upon noting mother's pain and inadequate fetal monitoring — Resident fell below standard of care in conducting two ultrasounds and vaginal exam prior to undertaking emergency C-section — Delays caused injury due to oxygen deprivation.**

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| Action by Tianna Brodeur and her family for damages for medical malpractice. Tianna was born to Amanda by emergency caesarean section because Amanda experienced a uterine rupture during labour. Tianna was brain injured because of being deprived of oxygen during delivery. A uterine rupture was a rare risk in cases where a mother has had a previous caesarian section delivery, but a vaginal birth after caesarean section (VBAC) delivery is attempted. It was a true medical emergency that put the lives of both the mother and baby at risk, in dealing with which time was of the essence. Dr. Delisle provided Amanda's pre-natal care. Brodeur claimed Delisle never gave her the option of delivering Tianna via caesarian section. Amanda and her husband claimed that at each pre-natal visit, she asked for a C-section and was ignored. Delisle claimed she discussed the risks associated with C-sections and VBAC deliveries with Amanda. All parties acknowledged that despite being advised against it by Delisle based on her hypertension, Amanda continued to work. At a subsequent appointment, a decision was made to induce labour based on Amanda's hypertension and a reduction in fetal movements. Delisle monitored Amanda's labour for several hours before handing off her care to another physician and leaving the hospital at the end of her shift. After admission to the hospital, Amanda had little recollection of the events other than that she experienced pain that did not subside with contractions, a warning sign of a possible uterine rupture. Nurse Marsh, attending on Amanda throughout labour, noted that Amanda was in pain, even after an epidural, and found that there was improper monitoring of fetal heart rate and that it fell drastically before notifying Dr. Freedman, the resident on duty. Freedman conducted a vaginal exam and two ultrasounds before calling another doctor, who diagnosed uterine rupture and ordered the emergency C-section. It was performed in an appropriate and timely manner. Tianna was 17 years old. She had problems with fine motor skills, impulse control and socialization. Her family could not leave her alone. She was unable to make friends with her peers and took a reduced workload at school. She had problems maintaining hygiene.  HELD: Action against Delisle dismissed; action against Marsh and Freedman allowed, and damages of $5,201,848 awarded.  Delisle gave the more credible evidence about informing Amanda about the risks associated with a VBAC, specifically, the risk of a uterine rupture. Amanda demonstrated an ability to go against medical advice in not ceasing to work when instructed of the risks associated with continuing. Her mother confirmed Delisle's claim that Amanda was made aware of the risks associated with a c-section and a VBAC. Amanda and her husband were less reliable given their admitted inability to recall all details of each visit with Delisle and the emotional toll their situation had on them. Marsh fell below the standard of care in failing to immediately deal with Amanda's pain in circumstances where Marsh knew that fetal monitoring might be compromised. Freedman should have accepted Marsh's observation that two signs of uterine rupture were present instead of confirming them with two ultrasounds and a vaginal exam. The delays in conducting the emergency C-section were the cause of Tianna's injury, given that her brain could have developed normally had she been delivered minutes earlier. Tianna's psychological problems could not be attributed to her birth. Her physical and cognitive limitations meant she would need care for the rest of her life, but not 24-hour care. Given a life expectancy of over 70 years, Tianna was entitled to $3 million for attendant care. Amounts were awarded for specific counselling, physiotherapy and occupational therapy, and transportation. |

**Statutes, Regulations and Rules Cited:**

Health Care Costs Recovery Act, *S.B.C. 2008, c. 27*,

**Counsel**

Counsel for Plaintiffs: P.T. McGivern, S. Raab, B. Osmond, L. McGivern, N. Ivolgina and A. Donaldson.

Counsel for Defendants, Dr. Delisle and Dr. Freedman: G.P. Brown, QC and K. Jakeman.

Counsel for Defendants, Nurse Marsh and Provincial Health Services Authority: C.L. Woods, QC and J. Groenewold.

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| **N. SHARMA J.A.** |

**I. INTRODUCTION**

**1**  Amanda Brodeur gave birth to a baby girl on September 21, 1999. Instead of an occasion filled with joy and happiness, it was a traumatic event which left her daughter with life-long cognitive and physical disabilities. Her daughter, the plaintiff Tianna Brodeur, was delivered by emergency caesarean section because Amanda Brodeur experienced a uterine rupture during her labour. Uterine rupture is a rare complication associated with the type of delivery that was being attempted.

**2**  Tianna Brodeur sues, via her Litigation Guardian Beverly Hicks (her grandmother, Amanda Brodeur's mother), the hospital and some of the nurses and doctors involved in her mother's care during pregnancy and delivery.

**3**  Three doctors had direct care of Ms. Brodeur at different stages of her pregnancy (many documents refer to her having the surname Dionne but for convenience I will use Brodeur). The defendant, Dr. Marie-France Delisle, provided pre-natal care to Ms. Brodeur and admitted her to the hospital, but was not present for the events in question.

**4**  The plaintiffs allege Dr. Delisle did not receive informed consent from Ms. Brodeur for attempting a course of vaginal delivery instead of an elective caesarean section delivery.

**5**  Dr. Khalida Mujaibel was on call and completing her fellowship in maternal-fetal medicine. She performed the caesarean section on Ms. Brodeur. Dr. France Galerneau was the supervising physician on call at the time. Neither of them testified. Both were released from the litigation. The parties agreed that the entire transcript of the examination for discovery of Dr. Mujaibel would constitute evidence at trial. Portions of Dr. Galerneau's discovery evidence were read in.

**6**  The defendant, Dr. Dayna Freedman, was a resident in her fourth year of training for a speciality in obstetrics and gynecology and she assessed Ms. Brodeur during the critical time period. The defendant, Nurse Heidi Marsh, provided nursing care to Ms. Brodeur during the critical moments before the uterine rupture. Nurse Margge Speets was the charge nurse that night, but she was released from this litigation. Some of her discovery evidence was also read in.

**7**  The plaintiffs allege Nurse Marsh and Dr. Freedman failed to meet the standard of care applicable to them during Tianna's birth, and they also allege that ***negligence*** was the cause of Tianna's injuries. If it is necessary to distinguish amongst the defendants, I may refer to Dr. Freedman and Dr. Delisle as the "defendant doctors".

**8**  As explained in this decision, I conclude that Dr. Delisle was not negligent and the claim against her is dismissed. However, I find both Dr. Freedman and Nurse Marsh negligent, and I conclude their ***negligence*** was the cause of Tianna's injuries.

**9**  The defendant doctors submitted I am obliged to consider apportionment of liability. I agree, but the parties have not had an opportunity to provide submissions on what that apportionment should be. If they cannot agree, they are each at liberty to provide to the Registry no more than 5 pages of written submissions about that issue so long as all of those submissions are delivered no later than June 15, 2016. If that deadline cannot be met, the parties are required to seek an extension from me no later than June 5, 2016 by way of letter.

**II. ISSUES**

**10**  There are four issues in this case:

1. Did Dr. Delisle receive informed consent from Amanda Brodeur to undergo a trial of vaginal delivery?
2. Did either Nurse Marsh's or Dr. Freedman's actions during their care of Amanda Brodeur fall below the applicable standard of care?
3. If the answer to "b" is yes, was that ***negligence*** a cause of Tianna Brodeur's injuries?
4. If the answer to "c" is yes, to what damages is Tianna Brodeur entitled?

**III. BACKGROUND MEDICAL FACTS**

**11**  Uterine rupture is what happens when the scar from a previous caesarean section opens during a vaginal birth. A healed incision from a caesarean section leaves a fibrous scar and that tissue is weaker than the surrounding uterine tissue. In a normal delivery, as the uterus contracts during labour, the fetus is forced towards the pelvis; it will follow the path of least resistance. With an intact uterus, that path leads to the birth canal. If the birth canal is obstructed for any reason, the fetus gets "stuck" and other interventions may be necessary to successfully deliver the fetus.

**12**  However, where there has been a previous caesarean section, and there is an obstruction, the contractions will force the fetus against the uterine scar. Because the scar tissue is weaker, the scar may thin causing a partial separation (called a dehiscence). This separation causes the mother pain which is continuous and distinct from the pain caused by contractions. If the cervix is already fully dilated when the scar separates and if that separation is small, vaginal delivery may still occur without disrupting the supply of oxygen to the fetus.

**13**  But if the cervix is not fully dilated and the scar completely opens, the fetus is extruded into the abdominal cavity along with amniotic fluid, membranes and placenta. If the placenta is separated from the uterus, the fetus's supply of oxygen, fluid and nutrients ceases, putting the fetus's life in danger. The site of the placental implantation will bleed which endangers the mother's health.

**14**  Upon uterine rupture, the fetal heart rate ("FHR") has an immediate and profound drop. The uterus, now empty, begins to contract, shifting the fetus upward in the maternal abdomen; thus the location of previous detection of the FHR has changed, and the fetus is no longer presenting against the cervix.

**15**  At one time delivering a baby by caesarean section guaranteed that any subsequent delivery would always be by caesarean section. However, beginning in the early 1980's the medical profession embraced a trial of vaginal birth after caesarean section, referred to as "VBAC".

**16**  This was preferred in order to reduce the risks associated with caesarean section deliveries which included possible infection, a prolonged delivery interval, total operative time, blood loss, multiple epidural placement failures, postoperative endometritis and prolonged hospitalization. In general, vaginal birth was viewed as less risky for the mother.

**17**  It was known that VBAC also carried some risk. Uterine rupture is the most significant risk associated with VBAC delivery, and the only response is to conduct an emergency caesarean section. Uterine rupture is a true obstetric emergency which can result in the death of the mother and baby, or, even without death, catastrophic consequences. Because the fetus is deprived of oxygen and the mother could be bleeding, time is of the essence; even seconds make a difference to fetal and maternal survival and outcome. Response time and an awareness of the potential symptoms of uterine rupture are therefore of critical importance.

**ISSUE ONE:**

**IV. DID DR. DELISLE RECEIVE INFORMED CONSENT FROM MS. BRODEUR?**

**18**  The plaintiffs allege that Ms. Brodeur was not adequately informed of the risk of uterine rupture associated with VBAC, and if she had been, she would have insisted on proceeding with a caesarean section. Dr. Delisle provided pre-natal care to Ms. Brodeur and says she did inform Ms. Brodeur of the risks.

**A. Legal Principles Applicable to Informed Consent**

**19**  The parties did not disagree on the applicable legal principles. Those principles recognize that the relationship between a physician and a patient has evolved into a participatory exchange between the parties. Physicians have an obligation to inform a patient of the nature of her condition, as well as the risks and benefits of the proposed treatment and alternatives. The landmark decisions in this area all connect liability with a failure to ensure informed consent based on the tort of ***negligence***: *Hopp v. Lepp*, [*[1980] 2 S.C.R. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1WB-00000-00&context=) and *Reibl v. Hughes*, [*[1980] 2 S.C.R. 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1Y2-00000-00&context=). Consequently, a determination of the issue of informed consent requires consideration of the standard elements of ***negligence***: the existence of a duty of care; the failure to meet the requisite standard of care; and a causative connection between that failure and the injuries alleged.

**20**  More specifically, a physician has a duty of care to answer any specific questions asked, and to volunteer, without being asked, information about a patient's treatment options and to disclose any material, special, or unusual risks. The scope of this duty is determined on a case-by-case basis, and is assessed via an application of the standard of care: *Hopp* at 210.

**21**  In *Reibl*, the Supreme Court of Canada specifically rejects the professional standard of disclosure, finding that it is not for the physician to decide what should and should not be disclosed to a particular patient. The Court further notes (at 894) that while expert medical evidence is relevant, it is not determinative. Whether the non-disclosure of certain risks undermines informed consent is a matter for the trier of fact. In making an assessment, the trier relies on medical evidence, but also on evidence from the patient and from members of the patient's family (at 895).

**22**  Adequate disclosure requires the disclosure of all material risks, which the Supreme Court of Canada in *Hopp* (at 208) defines as those which "a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to... in deciding whether or not to undergo the proposed therapy". In addition, the Court notes that "special and unusual" risks could be those that are probable, but also include those that are mere possibilities if the risk could result in serious consequences (at 209-10).

**23**  The Ontario Court of Appeal comments on what constitutes a material risk in *Videto v. Kennedy* [*(1981), 33 O.R. (2d) 497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M50B-00000-00&context=) (C.A.), stating that "[a] risk which is a mere possibility ordinarily does not have to be disclosed, but if its occurrence may result in serious consequences, such as paralysis or even death, then it should be treated as a material risk and should be disclosed" [see also Justice McLachlin's comments in *Rawlings v. Lindsay*, [*[1982] B.C.J. No. 209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G0R2-00000-00&context=) (S.C.)(at para. 10)].

**24**  Justice Cory comments that the standard of disclosure required by *Reibl* is such that it would "often be more than that which the medical profession might consider appropriate to divulge": *Ciarlariello v. Schacter*, [*[1993] 2 S.C.R. 119*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60C2-00000-00&context=) at 133; see also *Hollis v. Dow Corning Corp.*, [*[1995] 4 S.C.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3MF-00000-00&context=) per La Forest J. at para. 24. This affirms the importance of recognizing the participatory relationship between patient and physician.

**25**  The standard of disclosure also requires that a physician considers what he or she knows, or should know, about the patient: *Reibl* at 894. A physician must take reasonable steps to ensure that the patient understands the information presented. The B.C. Court of Appeal finds that failing to take simple steps to confirm the patient's comprehension equates to ***negligence*** with respect to informed consent: *Smith v. Tweedale*, [*[1995] B.C.J. No. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M204-00000-00&context=) at paras. 6, 10 (C.A.). But as Kelleher J. states in *Kern v. Forest*, [*2010 BCSC 938*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22J0-00000-00&context=) at para. 76, a physician is obligated to take reasonable, but not exhaustive, steps to ascertain whether a patient has understood the discussion of the treatment and risks.

**26**  The standard of care also requires presenting the patient with alternative treatments, including the option of foregoing treatment. In *Van Mol v. Ashmore*, [*1999 BCCA 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2XB-00000-00&context=), Huddart J.A., writing for the majority, notes that while *Reibl* specifically requires discussion of any material, special, or unusual risks of the proposed treatment, various other cases have considered expanding this requirement to include discussion of alternative treatments as well (at paras. 96-101). She concludes that this is the appropriate standard, and that a patient is entitled to know about all alternatives, and the risks and advantages associated with each (at para. 102).

**27**  A plaintiff must not only prove that informed consent was not obtained, but also that the patient would not have given consent if she had been adequately apprised of the material risks. Causation is not proven if the patient would have made the same decision in any event. Further, it must be established that the material risk that was not adequately disclosed is, in fact, the cause of injury: *Hopp* at 204. The latter issue is not contested in this case.

**28**  In *Reibl*, the Supreme Court of Canada articulates a modified objective test as the test for causation. This requires assessment of what the reasonable person in the plaintiff's particular circumstances would do, on a balance of probabilities (at 928). Despite some problems with consistent application, a majority of the Supreme Court of Canada reaffirms the test in *Arndt v. Smith*, [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=). At para. 9, Justice Cory expounds on the factors to be considered in applying the modified objective test:

Some of the criticisms directed at the *Reibl* test may stem from confusion as to what Laskin C.J. intended in his adoption of a modified objective test. The uncertainty surrounds the basic premise that the test depends upon the actions of a reasonable person in the plaintiff's circumstances. Which aspects of the plaintiff's personal circumstances should be attributed to the reasonable person? There is no doubt that objectively ascertainable circumstances, such as a plaintiff's age, income, marital status, and other factors, should be taken into consideration. However, Laskin C.J. didn't stop there. He went on and stated that "special considerations" affecting the particular patient should be considered, as should any "specific questions" asked of the physician by the patient. In my view this means that the "reasonable person" who sets the standard for the objective test must be taken to possess the patient's reasonable beliefs, fears, desires and expectations. Further, the patient's expectations and concerns will usually be revealed by the questions posed. Certainly, they will indicate the specific concerns of the particular patient at the time consent was given to a proposed course of treatment. The questions, by revealing the patient's concerns, will provide an indication of the patient's state of mind, which can be relevant in considering and applying the modified objective test.

[Emphasis in original.]

**29**  The modified objective test has recently been applied by this court in *Chen v. Ross*, [*2014 BCSC 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61R3-00000-00&context=), aff'd [*2015 BCCA 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GFR-6WX1-JW5H-X1K0-00000-00&context=). Justice Ballance synthesizes the test at para. 307:

The causation test in this context is a modified objective one comprised of a combination of subjective and objective elements. The question is not whether Mr. Chen would have elected to proceed had he been sufficiently informed of the material risks and information relative to the Membrane Surgery. Rather, the test asks whether the reasonable person in Mr. Chen's shoes, being the average prudent person who possesses Mr. Chen's reasonable beliefs, fears, desires, and expectations, would have declined the Membrane Surgery at the particular time had the risk that ultimately came about (i.e. becoming legally blind in his left eye) been fully disclosed: *Arndt v. Smith*, [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=). If the properly informed, reasonable person in Mr. Chen's position would have consented to the Membrane Surgery in any event, Dr. Ross's ***negligence*** cannot be said to have been the cause of his injury.

**30**  The only subjective beliefs that the test eliminates from consideration are those idiosyncratic or irrational fears that a patient may possess: *Arndt* at para. 14. Cory J. states that this makes the test fairer than the subjective test advocated for by the minority in that case (at para. 17).

**B. The State of Medical Knowledge about VBAC in 1999**

**31**  The Society of Obstetricians and Gynecologists of Canada ("SOGC") issued a policy statement regarding VBAC in 1997 which was in effect at the time of Tianna's birth. This policy was adopted word for word by the British Columbia Reproductive Care Program, which was run out of the British Columbia Children's and Women's Health Centre ("BCW"). VBAC was addressed in "Obstetric Guideline 8" (the "Guideline"). All parties agreed the Guideline is important to any determination of the applicable standard of care required of Dr. Freedman and Nurse Marsh, although it is not determinative.

**32**  The Guideline noted the incidence of scar dehiscence "without maternal or fetal consequence" was 0.5%. The risk of uterine rupture with hemorrhaging and fetal compromise or even death was pegged at 0.1%. The Guideline recommended that women with one previous caesarean section (with a transverse low segment scar) undergo a trial of labour, but also stated that "[r]espect for the woman's autonomy, her participation and the participation of her partner in decision making is of paramount importance." The Guideline listed five contraindications for VBAC, but it is not disputed that none applied to Ms. Brodeur.

**33**  The Guideline confirmed that induction of labour with oxytocin raised the risk of scar dehiscence to about 1.8% and uterine rupture to something less than 0.5%. It stated that the safety of prostaglandin gel use "has not been established and further research is needed." The Guideline also stated that if prostaglandin gel is used for a woman undergoing VBAC who has a low segment scar, that woman "must understand the limitation of knowledge in this area."

**34**  Both Nurse Marsh and Dr. Freedman agreed they had been instructed to be and were familiar with the Guideline, including Appendix A, which is reproduced in its entirety here:

*SIGNS THAT MAY OCCUR WITH A COMPLETE OR PARTIAL UTERINE RUPTURE*

1. Sudden non-reassuring fetal heart pattern
2. Unusual abdominal/uterine pain
3. Cessation of contractions or incoordinate uterine activity
4. Unexplained vaginal bleeding
5. A sudden onset of maternal tachycardia and hypotension
6. Excessive fetal movement
7. Fetal parts palpated through the abdominal wall
8. Presenting part higher than found previously

*SIGNS THAT MAY OCCUR WITH IMPENDING UTERINE RUPTURE*

1. Inadequate labour progress (cervical dilation, fetal descent) despite good contractions
2. Incoordinate uterine activity
3. Restlessness and anxiety
4. Lower abdominal pain between contractions

**35**  In 1999, FHR's were classified as either "reassuring" or "non-reassuring" (terms not used now). A reassuring FHR generally meant a baseline rate between 110 to 160 beats per minute (bpm), with variability of between 6 and 25 bpm, acceleration of at least 15 bpm for at least 15 seconds and an absence of decelerations. A non-reassuring FHR generally had a baseline below 110 bpm or above 160 bpm, decreased variability and an absence of accelerations. All medical witnesses acknowledged the importance of continuous electronic FHR monitoring, especially when labour is induced or oxytocin is administered.

**36**  The SOGC also issued a memo titled "Advances in Labour and Risk Management" (the "Memo") which accompanied a course in the same topic. Dr. Delisle took this course in May 1999, and taught the course in later years. The Memo stated that the success rate for VBAC (meaning the percentage of women who do deliver vaginally) is in the "60-80% range when patients are properly selected and labour is managed appropriately." The obvious implication was that between 20-40% of women who attempt VBAC ultimately deliver by caesarean section, or with some other intervention, but that was not explicitly stated. The Memo also stated:

Some recent evidence helps predict which women will achieve a vaginal delivery after a trial of labour. The chance of a successful vaginal delivery remains about 70% regardless of what the indication was for the previous caesarean section. However if the indication was dystocia or failure of progress in labour and the patient had reached full dilation with failure of descent of the fetal head, then the chance of achieving a vaginal delivery appears to be reduced to approximately 30%. A trial of labour is not precluded but the likelihood of success is reduced in these patients.

**37**  There is no dispute that in her previous delivery, Ms. Brodeur's caesarean section was ordered because of dystocia; following an extended trial of labour, her cervix was only 3 centimetres dilated.

**38**  With regard to hospital requirements, the Memo noted personnel should be able to recognize the signs and symptoms of uterine rupture which were listed as "non-reassuring fetal monitoring, ease of fetal palpation, cessation of contractions, elevation of presenting part, and scar pain (poor sensitivity and specificity, seldom masked by epidural)."

**C. Facts Relating to Informed Consent**

**39**  Dr. Delisle completed her fellowship in obstetrics and gynecology in Quebec City. Between 1997 and 2000 she was a fellow in the subspecialty of perinatology at BCW and she provided prenatal care to Ms. Brodeur with regard to Tianna's birth. Dr. Delisle was also involved in the caesarean section birth of Ms. Brodeur's first child. She testified about her memory of events and interactions with Ms. Brodeur during the relevant times.

***1. The July 23 Consultation***

**40**  At about 24 weeks of her second pregnancy, Ms. Brodeur's family physician referred her to an obstetrician in Abbotsford who in turn consulted Dr. Ballem (an internist at BCW) because of Ms. Brodeur's hypertension. Dr. Ballem recommended adjustments to Ms. Brodeur's blood pressure medication and rest. She also recommended a consultation and follow up visits at BCW with a maternal-fetal specialist; that is how Dr. Delisle came to provide care for Ms. Brodeur.

**41**  Dr. Delisle and Dr. Ballem first met with Ms. Brodeur on July 23, 1999, when Ms. Brodeur was 30 weeks pregnant. Dr. Delisle had a specific recollection about that meeting. She was struck by the fact that at that late stage of pregnancy, Ms. Brodeur held the mistaken belief that once a person has had a caesarean section, they must always deliver that way.

**42**  Dr. Delisle produced the antenatal record for Ms. Brodeur (the "Record"). An antenatal record is a document that contains a summary of important information about the patient during her pregnancy including medical history, features of any previous pregnancy and social factors. Dr. Delisle recorded pertinent information from her patient visits with Ms. Brodeur on the Record. Each box next to the words "VBAC", "C-section", and "birth plan" had all been checked. Dr. Delisle testified that she would only mark those boxes once the topics and associated risks had been discussed with the patient.

**43**  The Record also documented other concerns about the pregnancy discussed at the time. A primary concern was Ms. Brodeur's severe hypertension and the resulting increased risk of pregnancy-induced hypertension, fetal growth problems, and intrauterine fetal death. Other concerns noted on the Record included Ms. Brodeur's previous caesarean section for failure to progress, her obesity, the need for surveillance and close monitoring of her blood pressure, her resistance to leave work despite it being recommended by the medical team, her reluctance to attend at BCW for prenatal appointments and her preference for delivering in Abbotsford.

**44**  In addition to the information on the Record, Dr. Delisle prepared a consultation report which she dictated on July 29, 1999. The information in that report is consistent with the Record but it also has more detailed information. It noted Ms. Brodeur's resistance to following the recommendation to leave work was because her job was her only "assured income". Dr. Delisle reviewed the situation with Dr. Ballem. The doctors wanted to optimize Ms. Brodeur's compliance and the monitoring of her pregnancy because of the associated risks. In addition to the risks noted on the Record as discussed earlier, the July consultation report stated the doctors discussed the increased risks of her pregnancy for placental abruption, as well as the long-term maternal risk associated with high blood pressure. It also noted that Ms. Brodeur expressed preference for a repeat caesarean section and at that point, the associated "increased risk[s] of hemorrhage, infection and wound dehiscence" related to that procedure were discussed.

**45**  Dr. Delisle was asked to demonstrate in court what her typical risk discussion would involve when explaining the choice between VBAC and repeat caesarean section to a patient. Obviously, this was somewhat artificial given the context. She testified she would have discussed the following points with Ms. Brodeur:

1. The myth of "once a C-section, always a C-section".
2. The benefits of a successful vaginal birth, which included a quicker recovery, initiation and long-term continuation of breastfeeding, and more ability to attend to the demands of a new baby.
3. The benefits to the baby in terms of an easier transition from their fetal lives, and a decreased risk of common lung issues.
4. The risks of C-section, and the compounding nature of the risks of repeat C-section, where the impact of previous scars and organ movement are somewhat unpredictable, as well as specific risks of infection, extended hospitalization, and complications and delayed healing related to obesity, which would increase recovery and postpartum time. Other C-section risks, exacerbated by obesity, included bleeding requiring transfusions and the risk of blood clots.
5. The significance of an existing caesarean section scar, and its characterization as a weak point that could potentially split open, resulting in a uterine rupture. If this was to happen, Dr. Delisle said it would be a "catastrophe", and she described the resulting emergency during which both the mother and the baby's lives would be at risk.
6. The likelihood of a uterine rupture was about 0.8 to 1 percent, and it would result in an emergency caesarean section. In such a circumstance, the baby can suffer severe damage, and be handicapped in terms of both motor and mental function.
7. Despite this risk, national guidelines concluded that VBAC was preferable based on the success rate and the ability to avoid the risks of repeat caesarean section.

**46**  After that discussion, Dr. Delisle testified she would have asked the patient if she had any questions and would have recommended that the patient, and in this case, her partner, go home to think about their options and inform the doctors of their choice on the next visit. She emphasized that unlike her testimony in court, the conversation would have been dynamic with the patient able to ask questions throughout.

**47**  Ms. Brodeur recalled meeting with Dr. Delisle several times prior to being admitted to hospital, but, not surprisingly, she was unable to distinguish what happened at each visit. She remembered the content of their conversations globally. But Ms. Brodeur testified that she was never given the option of having a caesarean section, and that Dr. Delisle was very adamant about pursuing VBAC. Ms. Brodeur said that her main concern at each patient visit was requesting a caesarean section, and that each visit began with that request. She testified that she wanted to deliver by caesarean section because she did not want to have to go through the pain of labour, only to have the baby delivered by caesarean section as she did with her first pregnancy. She said medical staff dismissed the request each time, telling her that there was no reason for her not to deliver naturally.

**48**  Mr. Brodeur accompanied Ms. Brodeur at her patient visits. His testimony was much the same as his wife's. He also testified that caesarean section was never presented as an option. He attended every visit at BCW with her and testified that on each visit he and Ms. Brodeur expressed their preference for repeat caesarean section. He had several relatives who had had caesarean sections in the past, and he understood that the rule was "once a C-section, always a C-section". Each time they were told that the rule no longer stood, and there was no reason not to attempt VBAC.

**49**  Dr. Delisle testified that after the initial conversation on July 23, to her knowledge, neither Ms. Brodeur nor her husband expressed a desire to deliver by repeat caesarean section. Likewise, she said they did not express a preference for caesarean section after admission to hospital, and there is no documentation of such a request. Dr. Delisle denied that she insisted that Ms. Brodeur attempt a trial of labour and maintained that she offered a choice to Ms. Brodeur.

**50**  Ms. Brodeur testified about her understanding of the risks associated with caesarean section. She had the impression that the possibility of infection was the physician's main concern. Likewise, Mr. Brodeur does not recall a discussion of risks related to obesity and he testified that the only risk associated with another caesarean section discussed with them was the high risk of infection.

**51**  Ms. Brodeur and Mr. Brodeur both testified that no risks associated with vaginal delivery were ever discussed. They said they had never heard the term "ruptured uterus" and had never heard of a uterine scar opening. Ms. Brodeur testified she did not recall being told to take time to think about her options, and that they would be discussed again at a later date. She denied that Dr. Delisle told her that her baby could be injured, disabled, or handicapped with a vaginal delivery, and testified that Dr. Delisle did not use words such as "handicapped" or "brain damaged". Although Ms. Brodeur acknowledged that she does not recall all of the details of her visits with Dr. Delisle, she is sure that these topics were never addressed. Mr. Brodeur testified that although they were not aware of any risks associated with VBAC, their preference was still for caesarean section because Ms. Brodeur's attempt at vaginal delivery with her first pregnancy had been such an ordeal and resulted in a caesarean section being performed in any event.

**52**  Ms. Brodeur's mother (Ms. Hicks) attended an examination for discovery and excerpts from that were read into the record. Ms. Hicks stated that she believed Ms. Brodeur had been told of the different risks associated with both VBAC and caesarean section, and that the physicians thought, considering Ms. Brodeur's weight and hypertension, that VBAC was the better option. Ms. Brodeur denied telling her mother this.

**53**  Dr. Delisle testified that it would be "impossible" for her to fail to mention the risk of uterine rupture associated with VBAC, because it is the only significant risk related to that procedure. When comparing the two options, there would be nothing to say with respect to VBAC if uterine rupture was not discussed. She was very confident that she would have used words like "catastrophe" and "handicapped" in the context of the risk discussion.

**54**  When presented with the Record and specifically pointed to the concerns written by Dr. Delisle, Ms. Brodeur did recall hypertension and pregnancy-induced hypertension being discussed, but did not recall mention of increased risk of fetal growth problems or intrauterine death. Ms. Brodeur also then recalled that obesity was discussed as a risk.

***2. The August 20 Consultation***

**55**  At Ms. Brodeur's next visit, on August 20, 1999, Drs. Ballem and Delisle recommended to Ms. Brodeur that she be hospitalized immediately in order to monitor her blood pressure. The physicians attempted to impress upon Ms. Brodeur the seriousness of her situation. Ms. Brodeur insisted on continuing to work, so Dr. Delisle contacted Ms. Brodeur's family doctor in Abbotsford in an effort to arrange additional follow up. Dr. Delisle testified that she had a vivid recollection of this visit, because it was unusual that a patient, after having such serious concerns presented to her, would reject the medical team's recommendations and insist on continuing to work.

**56**  Ms. Brodeur recalled the physicians' recommendation that she stop working and go on bedrest, and acknowledged that she did not accept this advice. She testified that she could not afford to stop working, and that her job was not stressful. Ms. Brodeur admitted that with respect to these conversations about her stopping work, she was able to assert herself, negotiate with physicians, and maintain a situation that suited her.

**57**  Dr. Delisle testified that the choice between VBAC and caesarean section was not the central topic of discussion during the August 20 visit, and she had no specific recollection of it coming up; the physicians were primarily concerned with convincing Ms. Brodeur to be admitted to hospital.

***3. September Consultations***

**58**  Ms. Brodeur attended at BCW again on September 3 and September 17, 1999. The decision was made at the September 17 appointment to induce labour based on Ms. Brodeur's hypertension, limited feeling of fetal movement, and difficulty with compliance respecting medication and fetal monitoring. Induction represented a change in the birth plan so Dr. Delisle testified she had the second of two informed consent discussions. This discussion was intended to review the earlier conversation, and consider the other developments that had taken place in the meantime, including putting the risks and benefits of VBAC and caesarean section within the context of induced labour. She testified she would have explained that induction does not preclude VBAC, and that she would have confirmed whether the patient was still agreeable to that procedure. The Record is consistent with Dr. Delisle's testimony on these points. Ms. Brodeur stated again that she did not recall the risks of VBAC ever being discussed.

***4. Admission and Induction***

**59**  Ms. Brodeur was admitted to hospital for induction of labour on September 20, 1999. She was examined and the final birth plan was discussed. Mr. Brodeur testified that even at the time of being admitted to hospital, they asked about the possibility of a caesarean section instead of VBAC. He stated that everyone provided the same answer: there was no reason not to attempt vaginal delivery.

**60**  Dr. Delisle testified that Ms. Brodeur indicated no reluctance about induction. If she had, Dr. Delisle stated she would not have proceeded with gel insertion, and she would have brought her supervisor to discuss the situation with Ms. Brodeur and to provide a second opinion.

**61**  Dr. Delisle stopped in several times throughout the day to monitor Ms. Brodeur's progress. At approximately 5:00 p.m. she handed over all of the information relevant to Ms. Brodeur to the incoming physician, and reviewed the situation. Dr. Delisle was not present at the hospital during the emergency caesarean section and the events leading up to it.

**62**  Ms. Brodeur had limited memory of what occurred following her admission to hospital. She remembered being in considerable discomfort and experiencing pain that did not subside with her contractions. She remembered a nurse checking some things and making a phone call, being assessed by a doctor, and then being wheeled to the operating room.

***5. The Impact of Induction on the Risk of Uterine Rupture***

**63**  Dr. Delisle testified that in 1999 there was no contraindication for the use of prostaglandin when inducing labour in VBAC patients. Her understanding was consistent with what was contained in the Guideline and the Memo, and although there was some indication in those that the use of oxytocin may increase the risk of uterine rupture, both oxytocin and Foley catheters were approved of and regularly used when inducing labour in VBAC patients.

**64**  As noted above, Dr. Delisle testified that she did specifically review the risks of induction in her second risk discussion with Ms. Brodeur. In her assessment, the fact that Ms. Brodeur experienced no complications from her first caesarean section did not affect the risk assessment of a subsequent surgery. Ms. Brodeur was not being informed of the baseline risk of caesarean section, but the risk of repeat caesarean section coupled with her obesity, hypertension, and possible gestational diabetes. Under cross-examination, Dr. Delisle acknowledged that the risks associated with emergency caesarean section were greater than with a planned, repeat caesarean section, although she stated that increase was not necessarily significant.

**D. Expert Evidence about Informed Consent**

**65**  Two doctors provided expert evidence on the standard of care with regard to informed consent for VBAC deliveries that would have been applicable in 1999: Dr. Oppenheimer and Dr. Doersam.

**66**  Dr. Oppenheimer is an obstetrician and gynecologist and is also a maternal-fetal medicine specialist. He prepared a report dated November 24, 2014. He was asked whether the care provided by Dr. Delisle was in keeping with what would be expected of an average and prudent fellow in maternal-fetal medicine with specific attention to several different questions.

**67**  I summarize from his report the most relevant opinions about the first informed consent discussion. In his opinion, Dr. Delisle's discussion of risks was appropriate for 1999:

1. Dr. Oppenheimer discussed the impact Ms. Brodeur's previous caesarean section, hypertension, gestational diabetes and the fetal size had on the decision to proceed with VBAC. In his view, none of those factors were contraindications for VBAC and it was appropriate to recommend VBAC to Ms. Brodeur.
2. With regard to the impact of Ms. Brodeur's obesity, he opined that it would not "commonly have been discussed as a risk factor [for VBAC] in 1999". But the available data in 1999 suggested an increased risk of complications with caesarean section delivery given Ms. Brodeur's obesity. In his opinion "Dr. Delisle's explanation ... that vaginal birth would probably be associated with less morbidity than a repeat caesarean section, was a fair reflection of the understanding of the risks at that time."
3. With regard to a patient in similar circumstances to Ms. Brodeur, Dr. Oppenheimer stated there was no "absolute standard" with regard to obtaining consent for VBAC in 1999, but in his view the risk of uterine rupture and possibility of a caesarean section would be discussed.

**68**  Dr. Oppenheimer also commented on the state of knowledge regarding the use of prostaglandin gel in the induction of labour for VBAC patients. While *Williams*, the leading text on obstetrics at that time, made no mention of concerns regarding induction for VBAC patients, the Guideline stated "[t]he safety of prostaglandin gel ... has not been established and further research is needed. ... the woman must understand the limitation of knowledge in this area.*"* Dr. Oppenheimer questioned whether there were sufficient studies in 1999 to suggest an increased risk. He also noted that prior to 1999, "the product monograph for [prostaglandin] gel cited previous [caesarean] as a contraindication for its use" but that despite this, many physicians used it "off label". Health Canada identified this contraindication in 1995, but Dr. Oppenheimer opined this did not have an impact on the profession. He then reviewed literature available at the time and concluded that "[t]he general perception in 1999 ... was that prostaglandin ... induction of labour in VBAC was not associated with a significant increase in risk [of] rupture."

**69**  In his opinion induction with prostaglandin gel and oxytocin was considered appropriate in 1999 for VBAC patients. Dr. Oppenheimer noted both the Guideline and the Memo allowed for induction "with close patient monitoring". The Guideline did state that while the use of gel appeared to be safe "there are occasional reports of uterine rupture." It was his opinion that the increased risk associated with oxytocin and prostaglandin induction would not have been specifically addressed in 1999.

**70**  Dr. Doersam is a specialist in obstetrics and gynecology. He prepared three reports dated June 5, 2015, one of which addressed the issue of informed consent. Dr. Doersam's opinions assumed that Dr. Delisle was aware in 1999 that the possibility of successful vaginal delivery during VBAC was reduced when the reason for the prior caesarean section was a failure to progress. Dr. Doersam was asked to opine on two possibilities. First, that it was Dr. Delisle's practice in 1999 to inform VBAC patients about the percentage risk of uterine rupture and that she would have used the words "damage", "handicap" or "brain damage". Second, that the risk of uterine rupture was not mentioned.

**71**  The summary of the most relevant of Dr. Doersam's opinions with regard to Dr. Delisle's first informed consent discussion included:

1. If the court finds Dr. Delisle did discuss the risk of uterine rupture, his opinion was that she "did not adequately portray the lifetime of disability and dependence" that could result. He noted that based on the assumption Dr. Delisle quoted the risk of rupture at 0.8 to 1%, "she did not supply a similar numerical estimate of the risk of major maternal complication of a planned repeat Caesarean delivery." He noted that Dr. Delisle stated the goal was to avoid a second operation, but that she "did not provide any substantial support for her contention that a planned repeat operation was more hazardous than a trial of labour, either in numerical or in descriptive terms." This resulted in an unbalanced view of the relative risks of the two modes of delivery. He concluded this failed to meet the standard of care.
2. Dr. Doersam opined that Dr. Delisle should have outlined factors that distinguished Ms. Brodeur's personal circumstances from those of the average patient, which he listed as a much larger baby, "a pelvis lined with more fat than at her previous failed labour", an unripe cervix, a presenting part above the pelvic inlet, the limited ability to conduct fetal monitoring because of obesity and the "contraindication of rupturing membranes to apply internal electronic monitoring". In his view this meant Dr. Delisle failed to provide Ms. Brodeur with individualized risk estimation.
3. Dr. Doersam said that Dr. Delisle's stated goal (to avoid surgery) was not responsive to Ms. Brodeur's wishes and this fell below the standard of care.
4. In Dr. Doersam's opinion, Ms. Brodeur was a poor

candidate for VBAC and the failure to explain that

to her fell below the standard of care.

Dr. Doersam's conclusion was based on his assessment

that Ms. Brodeur's chances of success of delivering

vaginally were low for the reasons discussed above

at paragraph "b". But he also relied on his own

assessment of the failure to progress with the first

pregnancy, noting that Dr. Delisle ought to have

known that "[a]ny soft tissue dystocia" Ms. Brodeur

had in 1998 would be "replicated or exceed[ed]"

since Ms. Brodeur weighed more than she did during

the first pregnancy. In his view this would have led

an "average obstetrician to deduce that the risk of

uterine scar separation was elevated" above the

average.

**72**  With regard to the standard of care for disclosure of risks associated with induction in VBAC, he opined that any obstetrician of average competence in 1999 would have advised against the use of induction by prostaglandin gel given Ms. Brodeur's "low probability of successful VBAC, a greater than average risk of uterine rupture and markedly limited monitoring capability." He also faulted Dr. Delisle for not stating there was an "unknown risk" attached to prostaglandin. In his opinion, once the prostaglandin gel "failed to achieve cervical change", administering oxytocin was ill advised given the factors mentioned above with regard to her being a poor candidate and the elevated risk of rupture.

**E. Analysis**

***1. What risks regarding VBAC did the Standard of Care require to be disclosed?***

**73**  There is no dispute that VBAC procedure carried a statistically small, but sufficiently serious risk so as to be considered a material risk. Although the prevalent medical practice at the time was to encourage VBAC, it was incumbent upon physicians to discuss all material risks and alternatives. I find that the standard of care in 1999 clearly required patients to be informed of the specific risk of uterine rupture and its potential consequences when VBAC was discussed as a possibility. The parties do not disagree; their dispute centres on the sufficiency of the information given to Ms. Brodeur regarding the risks of VBAC and subsequent emergency caesarean section, as well as VBAC with induction.

**74**  Dr. Doersam opined that Dr. Delisle's description of the risks associated with VBAC was deficient because she failed to individualize her analysis and discussion of risks to Ms. Brodeur's personal situation; as described earlier in my summary of his opinion, Dr. Doersam noted the significant factors which ought to have informed that discussion. However, there was no evidence those factors were mentioned in any authoritative literature or applicable policies or guidelines as being contraindications for VBAC. Accordingly, there is no medical-based evidence to support Dr. Doersam's opinion on this point, and therefore I do not find it reliable.

**75**  In Dr. Doersam's opinion, the discussion about the risks of uterine rupture as contrasted to a repeat caesarean section was not further attenuated by a comparison of the risks of a planned repeat caesarean section, and a caesarean section required because of a failure of the labour to progress. Dr. Delisle acknowledged there could be a difference, but not one significant enough to discuss. On top of that, Dr. Doersam said Ms. Brodeur's obesity ought to have played a more significant role in the assessment and discussion of risks.

**76**  Although there is an initial logical appeal to Dr. Doersam's analysis, I do not find it alters the standard of care required at the time. The Memo discussed a decreased rate of success for vaginal birth when a previous caesarean section delivery was necessary because of a failure to progress with a fully dilated cervix. Ms. Brodeur did not fit that description because she never achieved full dilation with her first delivery. Furthermore, there was no evidence presented at trial that it was known in 1999 that there was a significant difference amongst the risks of an non-urgent caesarean section after failed attempt at VBAC, a planned caesarean section, and an urgent caesarean section after failed VBAC. Therefore, I disagree with Dr. Doersam that a discussion that failed to include those risks was inadequate.

**77**  Ms. Brodeur's obesity was clearly a complicating factor in what happened, but other than Dr. Doersam's statement, there was no evidence that in 1999 obesity was a contraindication to VBAC. In fact, Dr. Oppenheimer noted that in 1999 obesity tended to be associated only with increased surgical risks. In my view, the evidence established that the risks from obesity were related to the quality of care and monitoring that could be provided. This is not the type of medical risk that must be disclosed in order to meet the standard of care for informed consent.

**78**  With regard to induction and VBAC, Dr. Oppenheimer concluded that it was not necessary in 1999 to discuss the relationship between induction and an increase in uterine rupture. Dr. Doersam does not address whether the possibility of an increased risk of uterine rupture should have been part of any informed consent discussion; rather he concludes that given Ms. Brodeur's circumstances, induction ought not to have been recommended at all. Basically, Dr. Doersam criticizes the decision to induce. An error in diagnosis or treatment does not necessarily lead to ***negligence***: *Scrimgeour v. Singer*, [*[1988] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60XY-00000-00&context=) at para. 11.

**79**  The difficulty is that I find Dr. Doersam's views to be based, to a large degree, on his experience in the United States, which is not applicable to my determination of what the standard of care in British Columbia was at the time. I find more compelling Dr. Oppenheimer's evidence (which is most consistent with the medical literature), that it was after 1999 that the medical profession began recognizing an increased risk of uterine rupture associated with induction.

**80**  More generally, Dr. Doersam's analysis is not limited to the applicable standard of care for informed consent; he wades into an analysis about the decision to recommend VBAC, and induction. I am not convinced the opinions he expressed about those are relevant to the issue before me. Even if they are, however, I am cognizant of the court's recognition that hindsight may play too great a role when judging care given by medical professionals : *Croutch (Guardian ad litem of) v. B.C. Women's Hospital & Health Centre*, [*2001 BCSC 995*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23PW-00000-00&context=) at para. 32 and *Smith (Guardian ad litem of) v. Grace*, [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=) at paras. 5-6. In my view, Dr. Doersam intermingled his analysis of the standard of care for informed consent with his opinion about treatment decisions. I find this approach does suffer from a degree of hindsight analysis which further diminishes the reliability of his opinions.

**81**  I conclude that in 1999 it was not known that induction in VBAC significantly increased the risk of uterine rupture such that it was a material risk that had to be disclosed to patients. Thus, the standard of care in 1999 required a physician to disclose the risk of uterine rupture and its potential consequences, but not to discuss the then unknown risks associated with induction.

***2. Did Dr. Delisle's risk discussions meet the standard of care?***

**82**  The parties' positions are diametrically opposed as to what Dr. Delisle said to Ms. Brodeur about the second pregnancy. The plaintiffs allege that Dr. Delisle never mentioned the possibility of uterine rupture, or the consequent effect this might have on their child. In the alternative, they submit if I were to find the risk discussion did take place, their position is that it was not presented in an understandable manner. They say that based on Dr. Delisle's testimony describing what such a conversation would entail, the information was presented rapidly, with a pronounced accent, and not in a way as to obviously compare and contrast the two options available to Ms. Brodeur.

**83**  Dr. Delisle, on the other hand, testified that there was a detailed conversation about the risks of both VBAC and repeat elective caesarean section. She submits that as uterine rupture is the only serious risk associated with VBAC, any conversation of the risks would necessarily have included a discussion of this particular possibility. Her position is that Ms. Brodeur gave no indication that she failed to understand the conversation about risks.

**84**  The plaintiffs submit that Dr. Delisle did not understand the difference between what she actually said to Ms. Brodeur, versus what she believed she would have told her based on her usual practice. I do not agree Dr. Delisle was confused about this. She was able to identify instances when she had a specific recollection of a conversation and she could identify why it stood out for her. I also find it significant that Dr. Delisle's consultation report is consistent with the antenatal report in terms of the information conveyed. In my view, these factors enhance her credibility and reliability.

**85**  Moreover, it is acceptable to accept evidence about one's usual practice to be evidence of what happened. In *Belknap v. Meakes*, [*[1989] B.C.J. No. 2187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=), [*1 C.C.L.T. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=) (C.A.), the Court of Appeal held that "[i]f a person can say of something he regularly does in his professional life that he invariably does it in a certain way, that surely is evidence and possibly convincing evidence that he did it in that way on the day in question."

**86**  I dismiss the plaintiffs' suggestion that Dr. Delisle had a "pronounced accent". She has a francophone accent, but I find as a fact this did not make her difficult to understand; nor do I agree with the plaintiffs that she spoke in an overly rapid fashion. Neither Ms. Brodeur nor Mr. Brodeur testified that they found Dr. Delisle difficult to understand and certainly did not mention difficulty with her accent or the rapidity of her speech.

**87**  On the other hand, while I find that both Mr. and Ms. Brodeur are credible witnesses, I have concerns about the reliability of their evidence. In particular, Ms. Brodeur admitted she did not have a recollection of any specific conversation and tended to blur the information from all of her appointments together. Furthermore, in her testimony in chief she stated she was only told about one risk related to repeat caesarean section (infection) but she agreed in cross-examination that she was told about other risks.

**88**  I also find it significant that Ms. Hicks remembers being told by Ms. Brodeur about the reason why VBAC was recommended. Ms. Brodeur's denial of this follows from her denial that those risks were discussed with Dr. Delisle. Given that I have found Dr. Delisle did identify those risks, I find Ms. Brodeur's statement that she never told her mother that advice has minimal reliability.

**89**  It is also difficult to accept a witness who is adamant about what was not said when they admittedly have a poor recollection generally of the relevant conversations. While Mr. Brodeur claimed to have better recollection, I do not think that was demonstrated by his testimony. Also, it was clear during his testimony that his emotions about these events are still strong, and in my view, that diminishes the reliability of his evidence.

**90**  The plaintiffs say I should place little weight on Dr. Delisle's demonstration of risk conversations at trial because it had inconsistencies with the same demonstration she gave during her examination for discovery. At her discovery, however, it was clear Dr. Delisle was giving an abbreviated version of the discussion given the awkwardness of the situation. The plaintiffs also say Dr. Delisle was unclear about when conversations took place: on a summary of events written after Tianna's birth, Dr. Delisle appears to have identified the date of the second discussion about risks to be different than the date given in her testimony. I accept Dr. Delisle's testimony that she was focussing on what happened and not on specific dates. In other words, this was simply an error. I do not find the inconsistencies identified by the plaintiff to have an appreciable impact on the reliability of her evidence.

**91**  I find it highly unlikely that Mr. and Ms. Brodeur started every visit with hospital staff by requesting a repeat caesarean section. Dr. Delisle noted in her July 29 consultation report that Ms. Brodeur had a preference for a caesarean section; there is no reason why she would not continue to document that request if it was said to her again, especially if it was consistently brought up as claimed by the plaintiffs.

**92**  In order for me to accept the plaintiffs' position that Dr. Delisle failed to mention the risk of uterine rupture at any appointment, I would have to find Dr. Delisle lacks credibility because she was firm in her testimony that it was "impossible" for her not to have spoken about that risk. I would also have to find that she falsified the antenatal report in two places, and that her consultation report was partly fictional. I would also have to reject Ms. Hick's testimony that Ms. Brodeur explained to her the associated risks. I find none of these possibilities to be compelling. I find Dr. Delisle to be credible and reliable.

**93**  Moreover, it is difficult to accept that Ms. Brodeur would not have been successful in insisting on having a caesarean section if that was truly what she wanted at that time. Although I accept that she felt she could not stop working for financial reasons even though that was the medical advice. I find at least part of her refusal was her belief in her own well-being. She did not convey any sense of stress or worry attached to her determination that she had to continue working, despite the great risk this posed to her baby and herself. This is consistent with her simply believing she would be fine. In her testimony, she stated her belief that her job was not that stressful and that she could manage the risks by introducing enough rest breaks. This is consistent with her refusal being tied to her own opinion about her health, which demonstrates a confidence in disagreeing with medical advice.

**94**  I find Ms. Brodeur clearly had the confidence to refuse medical recommendations. I note that the plaintiffs suggest her confidence in rejecting medical advice enhances the credibility of the claim that she was not told about the risks of VBAC. While that has some logic, weighing all the evidence presented, I find on a balance of probabilities that Dr. Delisle did adequately inform Ms. Brodeur of the risks.

***3. Conclusion on Informed Consent Issue***

**95**  Based on the foregoing, I conclude that Dr. Delisle did provide adequate and sufficient information to Ms. Brodeur regarding the specific incidence and consequent risks of uterine rupture from VBAC on two occasions. She therefore met the standard of care with regard to informed consent. Accordingly, I do not need to analyze causation.

**ISSUE TWO:**

**V. THE STANDARD OF CARE FOR PROVIDING MEDICAL CARE TO VBAC PATIENTS**

**96**  The defendants did not dispute they owed Ms. Brodeur a duty of care, or that the uterine rupture injured Tianna. There is also little disagreement on the legal principles to be followed when determining the standard of care. The parties do dispute the standards of care applicable in this case, and whether Nurse Marsh and Dr. Freedman met those standards.

**A. Legal Principles**

**97**  The standard of care for medical malpractice has been settled for many years. A leading case from the Supreme Court of Canada outlines the basic principles with regard to the standard of care owed by a physician to her patient. In *Wilson v. Swanson*, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) at 811-12 Justice Rand stated:

... What the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some may differ from others in their exercise, depending on the significance they attribute to the different factors in the light of their own experience. ...

There is here only the question of judgment; what of that? The test can be no more than this: was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure. ...

An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge. Although universally-accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation a decision must be made without delay based on limited known and unknown factors; and the honest and intelligent exercise of judgement has long been recognized as satisfying the professional obligation.

**98**  Nurses are bound by a similar standard of care. Nurse Marsh had a duty to exercise her professional skill and knowledge to make appropriate assessments and accurately communicate those to the doctors. The standard is determined with reference to what is reasonably expected of a prudent and careful nurse in similar circumstances: *Durnin et al. v. Victoria Hospital*, [*2012 ONSC 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFM1-F4GK-M3FR-00000-00&context=) at para. 18.

**99**  Nurses do not diagnose, but they are responsible for bringing to the doctor's attention any signs or symptoms of a potentially developing problem so that it can be diagnosed and addressed before it becomes a crisis: *Tekano (Guardian ad litem of) v. Lions Gate Hospital*, [*[1999] B.C.J. No. 1763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0WP-00000-00&context=), [*90 A.C.W.S. (3d) 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0WP-00000-00&context=) at paras. 109-10. This has been described as nurses being the "eyes and ears" of the physicians.

**100**  Although not determinative, a treating doctor's expectations are "highly relevant and probative in determining whether the nurses' standard of care has been met", especially in the context of obstetric care where "the physicians and nurses work together as a close team": *Guerineau v. Seger,* [*2001 BCSC 291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1G1-00000-00&context=) at para. 59. The importance of this team approach is described by Justice Cunningham in *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=) at paras. 32-34, 97 and *Bauer v. Seager et al.,* [*2000 MBQB 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22W3-00000-00&context=) at para. 43.

**101**  A specialist is held to a higher standard, as explained 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 para 33:

... 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.

**102**  A resident's standard of care is addressed by the Supreme Court of Canada in *Vancouver General Hospital v. Fraser*, [*[1952] 2 S.C.R. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0NW-00000-00&context=) at 46:

... [the resident] must use the undertaken degree of skill, and that cannot be less than the ordinary skill of a junior doctor in appreciation of the indications and symptoms of injury before him, as well as an appreciation of his own limitations and of the necessity for caution in anything he does.

**103**  The appreciation of one's own limitations reflects another aspect of the duty of care: there is an obligation to call for help in an obstetric emergency: *Skeels (Estate of) v. Iwashkiw*, [*2006 ABQB 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-2247-00000-00&context=) at paras. 182-83:

[182] There is a key thread flowing through the obstetrical opinion of Dr. Steinberg, Dr. Birch and Dr. Iglesias and was acknowledged by both Dr. Iwashkiw and Ms. Tutt as being an important first step. What is that step? The step is to **call for help**.

[183] *Williams Obstetrics*, makes it the first item in the recommended emergency intervention checklist, as does the Hope study.

[Emphasis in original.]

**104**  The law does not require perfection, and medical practitioners are not meant to be insurers. Mere errors of judgment in diagnosis or treatment are not necessarily negligent: *Scrimgeour v. Singer* at para. 11. On the other hand, just because the error involves an exercise of judgment will not preclude the possibility of a finding of ***negligence***. The determinative factor is whether the doctor exercises the knowledge, skill and judgment of the careful and prudent doctor in the same circumstances: *Whitehouse v. Jordan,* [1981] 1 ALL E.R. 267 at 281 (H.L.).

**105**  It is important to assess the impugned actions in light of the state of scientific knowledge at the time, and that requires expert evidence: *ter Neuzen v. Korn* at paras. 38, 44. Where the state of knowledge is in flux, or where a reputable body of medical opinion supports more than one course of action, adherence to one over another is not sufficient to prove ***negligence***: *Belknap v. Meakes* at 220; *Brimacombe v. Mathews*, [*2001 BCCA 206*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2N3-00000-00&context=). Seaton J.A. in *Belknap* (at 220) relies on Lord Scarman's reasons in *Maynard v. West Midlands Regional Health Authority*, [1985] 1 All E.R. 635:

In *Maynard v. West Midlands Regional Health Authority*, [citations omitted] the House of Lords dealt with a case in which the evidence of the medical experts disagreed as to the wisdom of the steps taken by the defendants. Lord Scarman, with whom all of the Lordships agreed, said (at p. 638 [W.L.R.]):

I do not think that the words of Lord President Clyde in *Hunter v. Hanley*, 1955 S.L.T. 213, 217 can be bettered:

"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 ...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..."

**106**  It is also important to judge a professional's actions according to what was known by the medical professional at the precise time of her actions. This is explained in *Child v. Vancouver General Hospital et al.*, [*[1970] S.C.R. 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-231W-00000-00&context=) at 493:

I think it desirable to stress the fact that the question of liability in the present case is to be determined in light of the circumstances as they existed immediately before Miss Tennessy left the room to go for her coffee break. After an accident it is all too easy to approach the question of fault in light of the event which has happened, ...

**107**  The standard of care must also be sensitive to the degree of risk. Where a doctor has, or ought to have, knowledge of a particular risk, that standard of care is greater. Justice Holmes explains this in *Ediger v. Johnston*, [*2009 BCSC 386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S42J-00000-00&context=) at para. 49, aff'd [*2013 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X22V-00000-00&context=):

The standard of care that a physician must provide will take into account all the factors affecting or potentially affecting the life and health of the patient. Thus, the degree of care required is commensurate with the potential danger to the patient: *Badger v. Surkan* [*(1970), 16 D.L.R. (3d) 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6T1-FG12-62JM-00000-00&context=) (Sask. Q.B.) at 153, aff'd [*[1973] 1 W.W.R. 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-F361-M0RV-00000-00&context=) (C.A.). In short, the greater the risk, the higher the standard of care: see Picard & Robertson, at 237.

**108**  A main issue in this case is whether medical staff ought to have recognized and responded sooner to the signs and symptoms of uterine rupture than they did. To answer this, I must integrate the discussion earlier in these reasons about the state of medical knowledge into the legal analysis. In doing so, it is important to analyze the practitioners' actions "in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of ***negligence***" and not, "with the benefit of hindsight, judg[ing] too harshly doctors who act in accordance with prevailing standards of professional knowledge": *ter Neuzen v. Korn* at para. 34. I am also mindful that the tragic outcome in this case must not drive the analysis. As Justice Satanove notes in *Smith et al. v. Grace et al.*, [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=) at para. 5, "just because a baby is born with brain damage, it does not mean that the medical professionals involved in [the baby's] birth were negligent."

**109**  Keeping those concepts in mind, I turn to the facts relevant to the claims in ***negligence***.

**B. Facts Relevant to the Standard of Care for VBAC Patients**

**110**  Nurse Marsh started her career as a surgical nurse before taking training at BCIT to receive her perinatal nurse's certificate. This included further courses in both low and high risk pregnancies. She was hired by BCW and following a six to eight week orientation in place of a practicum, and less than a year on the low risk side of the labour unit, she was transferred to the high risk unit where Tianna was born.

**111**  When she started her shift with Ms. Brodeur, Nurse Marsh was aware of the factors that made Ms. Brodeur a high risk patient, which included hypertension, gestational diabetes, non-compliance with doctor's treatment recommendations to address those conditions, a risk of preeclampsia seizure and the fact that she weighed over 300 pounds. Nurse Marsh was aware of the specific risk of uterine rupture attached to VBAC and that timely intervention was critical. Because of this, she understood that monitoring the strength of contractions and FHR were very important for VBAC patients.

**112**  Nurse Marsh felt there were inadequate parameters in place to monitor Ms. Brodeur. She knew the reliability of the electronic monitoring of the FHR and contractions would be compromised because of Ms. Brodeur's obesity, but she also knew the obesity made manual palpations of contractions challenging. This was because the girth of the abdomen makes it very difficult to sense the uterine contractions. If Ms. Brodeur was supine, the fatty tissue over the abdomen would have fallen to the side somewhat, allowing closer access to the uterus. But a supine position was not a safe position as it could interfere with blood flow to the fetus.

**113**  Dr. Freedman had a poor recollection of what practices and protocols were in place in 1999 as distinct from those that exist today, because she has been practicing as an obstetrician and gynecologist since 2001. Nevertheless, she agreed that in 1999 she knew the potential signs of a possible rupture included a drop in the FHR, abdominal pain and a change in the contraction pattern.

**114**  Dr. Freedman's evidence about what happened during Tianna's birth was drawn from what she believed she would have done on the basis of reviewing documents, including medical records, because she had little recollection of the events surrounding Tianna's birth. She did have two clear memories about Tianna's birth: (i) performing the vaginal exam on Ms. Brodeur, realizing the fetus had not descended into the birth canal meaning something was wrong, and wondering where the other team members were; and (ii) witnessing the caesarean section and seeing that the baby had been expelled into the abdominal cavity.

**115**  She did not, however, remember what she was told when she first walked into Ms. Brodeur's room. She believed she would have looked at the electronic monitoring information. She testified that she "must have been" concerned by what she saw although during her discovery, her evidence was slightly different. At discovery she agreed that between 21:40 and the time she arrived in the room, the data was "very concerning" and possibly indicative of fetal compromise. The significance of this evidence is discussed later in these reasons.

***1. The Partogram and the Strip***

**116**  The partogram is a record of data, observations and actions completed by nurses caring for a labour patient. It is the nurse's responsibility to complete the partogram contemporaneous with events. One side of the partogram has charts and tables designed to record at specific times the baseline FHR, cervical dilation and station, details about contractions including frequency, strength and duration, any medications administered, details about urine analysis and information about the mother's blood pressure, pulse, temperature and respiration rate. On the other side of the partogram, nurses write a narrative of observations and actions.

**117**  The fetal monitoring strip was also entered into evidence. This is the strip of graph paper upon which information from the electronic fetal monitor is recorded (the "strip"). Monitoring of the FHR is done by an ultrasound transducer that is placed on the mother's abdomen with a belt and it provides a graphic display as well as an auditory output. Another monitor, the tocodynamometer (the "TOCO"), provides graphic information about the duration and frequency of uterine contractions, but it cannot measure the strength of those contractions. Information from both monitors is drawn on the strip by needles as the paper is fed through the machine at a rate of 2 cm (represented by two squares on the graph) per minute. The time is stamped on the strip at ten minute intervals, but there is also a sequential five digit number stamped every five minutes on the graph. In addition to the electronic record, nurses typically write down important events on the strip itself while it is recording.

**118**  Because for the most part the information on the partogram was recorded contemporaneously, it is, in my view, reliable evidence of what happened and when it happened in relation to the events in question. Similarly, the nurses' notations on the strip are reliable.

**119**  The strip provides important data, although that data was subject to interpretation. In particular, experts disagreed on whether the FHR was reassuring at different points, and how the pattern of contractions should have been characterized. The accuracy of the data on the strip was dependent upon the correct placement of the monitors, and anything else that might have interfered with the ability of the TOCO or heart monitor to have picked up a signal. It was acknowledged that Ms. Brodeur's obesity may have impacted the accuracy of the TOCO recording. This means the accuracy of the electronic record on the strip may not be absolute, thus diminishing that evidence's reliability.

***2. The Timeline***

**120**  I have constructed the timeline below based on information from several sources. Entries that begin with a time contain only information which I have deciphered from the partogram, and is a word for word reproduction if in quotation marks. I have also drawn on data from the strip. The testimony of witnesses who attended to Ms. Brodeur, where helpful and relevant, is interspersed amongst these other facts. I also include comments based on my review of the documents.

**121**  Unless specifically identified, the events on the time line constitute my findings of fact about what happened:

1. **18:30** - Ms. Brodeur was nauseated and vomiting. Medication ordered to treat.
2. **19:10** - Ms. Brodeur was sitting upright, uncomfortable with contractions and retching. There was difficulty picking up the FHR on the electronic monitor. She was receiving oxytocin at 9 mu/minute. Dr. Freedman and Dr. Mujaibel assessed Ms. Brodeur. Dr. Freedman did a vaginal exam but could not reach the cervix, meaning the fetus was still high in the pelvis.
3. **19:40** - The anesthetist, Dr. Kamani, arrived and prepared Ms. Brodeur for the epidural while she was sitting upright.
4. **20:00** - Contractions were 4-5 per 10 minutes, 45-60 seconds in length and of fair strength. This is the last notation on the chart portion of the partogram about the contractions. Subsequent references are drawn from the narrative on the reverse of the partogram.
5. **20:01** - Dr. Kamani administered an epidural to Ms. Brodeur without difficulty.
6. **20:15 -** The baseline FHR was 145-150 bpm with decreased variability, and contractions were 4-5 every 10 minutes. Ms. Brodeur was comfortable and resting.
7. **21:05 -** Dr. Mujaibel did a vaginal exam. The cervix was dilated 1 cm and 2 cm long.
8. There is uncertainty about whether Dr. Mujaibel authorized an increase in oxytocin at this point. The partogram has a note consistent with that: "continue [up arrow drawn] oxytocin". At her examination for discovery however Dr. Mujaibel stated she does not remember ordering an increase. Based on the fact she did not record making that order at that time, and the context of the questioning which assumed there was coupling of contractions at that point, her evidence became more firm that she would not have ordered an increase. But earlier in her evidence she confirmed she was not concerned about the contraction pattern at that point. The significance, if any, of this lack of clarity will be addressed later in this decision.
9. **21:20 -** (this is the first entry by Nurse Marsh) Nurse Marsh assessed the contractions as irregular and coupling. Oxytocin was increased to 11 mu/minute from 10 mu/minute. Ms. Brodeur was "slightly uncomfortable" and sensory levels indicated uneven effectiveness of the epidural.
10. Nurse Marsh testified that because the cervix was only dilated to 1 cm, she concluded Ms. Brodeur was not in active labour. She regarded the FHR to be reassuring. She increased the oxytocin to encourage Ms. Brodeur into active labour. With regard to the incoordinate uterine activity and coupling of contractions, Nurse Marsh did not conclude that was an indication one way or another of a change in the strength of contractions - she simply could not say.
11. **21:30** - Ms. Brodeur was more uncomfortable and having to breathe through contractions. Dr. Kamani attended again and was not concerned; he concluded the epidural was effective. He suggested the pain may be due to a distended bladder. He recommended emptying Ms. Brodeur's bladder. The baseline FHR was 150 bpm.
12. **21:35** - A Foley catheter was inserted to drain the bladder.
13. **21:45** - Ms. Brodeur complained of "constant left lower uterine pain" and she was "wretching [sic] from pain".
14. The partogram records that the FHR had variable decelerations to 120 with recovery to 140 or 150 bpm but there is a dispute which I address later about the correct characterization of the FHR at this point.
15. In response to the vomiting, Nurse Marsh lowered the head of the bed. She wanted to position Ms. Brodeur into the recovery position (lying on her left side). Because she viewed the FHR as reassuring at this point, she did not believe she needed to act urgently on the report of pain. She testified once she had the vomiting managed she would have informed the doctor of the pain.
16. Under cross-examination, Nurse Marsh did not agree that the FHR between 21:45 and 21:54 represented a non-reassuring heart beat because even if the strip does not record the FHR, there is an audible component to the monitor and she could hear the rate and considered it reassuring until 21:54 when she called for help.
17. **21:54** - the FHR was 60 bpm and help was called.
18. Nurse Marsh auscultated the FHR at 60 bpm and called for the charge nurse and Dr. Freedman. She knew this was an emergency and activated the call bell. She was unsure if she knew in 1999 whether the resident could call a caesarean section but she relied on the doctor to understand what to do.
19. **21:56** (this note was written by Nurse Marsh on September 25, 1999) - oxytocin was shut off and Dr. Freedman and Nurse Speets were in the room to help.
20. A notation on the strip by Nurse Speets shows the oxytocin was shut off just after 21:57.
21. Nurse Marsh told Dr. Freedman that the FHR was 60 bpm and about the new, continuous pain and the vomiting. She recalled showing Dr. Freedman the strip at numerical marker 08260 (just before 21:56). According to Nurse Marsh, Dr. Freedman replied that it would not have been possible to detect FHR of 60 bpm because of the patient's obesity. Nurse Marsh testified she felt Dr. Freedman did not believe her.
22. Nurse Marsh was very upset that Dr. Freedman insisted on doing her own assessment of the FHR because Nurse Marsh felt the situation was urgent.
23. **21:58** (this note was written by Nurse Marsh on September 25, 1999) - the fetal monitor shut off as Dr. Freedman was checking FHR with ultrasound. The timing of these events is disputed as discussed below.
24. Notations on the strip suggest Dr. Freedman performed a vaginal exam at 22:01, and an ultrasound at 22:06. Ms. Brodeur was moved to the operating room at 22:08.
25. Nurse Marsh wrote on the strip that an ultrasound check was being done and the fetal monitoring shutoff but no time is written beside either note. Instead, there is an arrow pointing to the left (implying earlier in time). That is followed (in order from left to right) by the following notes: "VE 2201" "ultrasound 2206" and "OR 2208". There is another, larger arrow beside "VE 2201" that points as far back as about 21:57:30 (the big arrow). I discuss that arrow later in these reasons. The interpretation of these notes on the timing of events is disputed and discussed later in this decision.
26. Turning off the electronic monitoring resulted in the section of the strip between 21:50 and 22:00, which under normal circumstances would represent a 10 minute period, represented 14 minutes.
27. At some point after 21:58 and before 22:06, Dr. Freedman called and spoke on the phone with Dr. Mujaibel. Dr. Freedman said she could not find the FHR. Dr. Mujaibel started hyperventilating and told Dr. Freedman that it was most likely uterine rupture. She ran to Ms. Brodeur's room.
28. Dr. Mujaibel was in the room by 20:06 but no one has a clear recollection of the exact time she arrived. Dr. Mujaibel "really ran" to get there. It was "definitely" obvious to her when she walked into Ms. Brodeur's room that they were dealing with a uterine rupture. She did not even look at the chart; she looked at Ms. Brodeur and made the decision to perform the caesarean section on the basis of the constant pain Ms. Brodeur was in. Dr. Mujaibel was aware that Ms. Brodeur had an epidural which would not mask pain from a ruptured uterus. She quickly did a vaginal examination which confirmed her diagnosis.
29. According to Dr. Mujaibel, Dr. Freedman was doing an ultrasound when she arrived. This timing in relation to other events is disputed.

***3. Did Dr. Freedman perform the vaginal exam before or after the first ultrasound?***

**122**  The plaintiffs submit I should find that Dr. Freedman conducted the vaginal exam before she did the first ultrasound exam, but she waited until that first ultrasound was done before calling Dr. Mujaibel. The plaintiffs say I should find the fact that the big arrow next to the "VE 2201" notation points back on the strip to a place before the words "ultra sound check", is an indication that the vaginal exam was done before the ultrasound (see subparagraph "y" above).

**123**  The complicating factor is the period of time (about four minutes) when the electronic monitoring was turned off. It is plausible that Nurse Marsh's arrow is misleading and she simply did not notice the end point of the arrow landed before the first notation of the ultrasound. This is logical because if one counts forward from 21:50, the "VE 2201" note is at the right time had the strip been continuously running. It is possible that when she wrote "ultrasound 22:06", she noticed the fact that events that occurred at 22:01 and 22:06 were too close together on the strip. She drew the arrow, estimating as best she could where 22:01 might be on the strip, not realizing it landed before the ultrasound note. I also take into account that by this point, Nurse Marsh felt Dr. Freedman had not believed her that Ms. Brodeur was in an emergency situation. The stress and tension in the room would have been high. In my view, these are logical, reasonable and common sense explanations that were possible.

**124**  The only testimony that supported the plaintiffs' theory was Nurse Marsh's honest, but equivocal statement when confronted with the arrow in cross examination, that she "guess[ed] by my arrow, yes, [the vaginal exam] might have been done just before the ultrasound check." I do not find that sufficient to outweigh all the other evidence that suggests the vaginal exam was done after the first ultrasound exam (as noted in the timeline above, among other places). Therefore, I find that Dr. Freedman performed the first ultrasound exam before the vaginal exam.

**C. Expert Evidence about The Standard Of Care for Nursing Care**

**125**  Chris Rokosh is a registered nurse in Alberta who provided opinion evidence on behalf of the plaintiffs. She provided a report dated June 19, 2015 and an addendum dated July 30, 2015 that responded to Ms. King's and Dr. Farquharson's reports. Ms. Rokosh's opinions focussed on nursing care between 21:20 and 22:08. She concluded Nurse Marsh's conduct did not meet the standard of care in the following ways:

1. Nurse Marsh felt the situation was unsafe because she believed Ms. Brodeur had too many risks and was not being adequately monitored. Nurse Marsh should have contacted the attending physician to report on the unsafe situation, or refused to provide care until the situation was improved.
2. At 21:20, Nurse Marsh increased the rate of oxytocin to 11mu/min which heightened the existing risk to Ms. Brodeur and the fetus. Nurse Marsh should have decreased or discontinued oxytocin, provided resuscitative measures and requested a physician assess the situation.
3. At 21:30, Ms. Rokosh said the contraction pattern changed from coupling to minimal uterine activity and Ms. Brodeur was complaining of increased pain. Ms. Rokosh was asked to assume two things about that uterine pattern: (i) Nurse Marsh was not aware that a decrease in uterine contractions is consistent with potential uterine rupture; and (ii) Nurse Marsh concluded the change in uterine activity represented a problem with the fetal tracing. Ms. Rokosh said that lack of knowledge about the relationship between decreased uterine activity and uterine rupture fell below the standard of care. She also concluded that Nurse Marsh should have treated the change in uterine contraction more seriously by discontinuing the oxytocin until she was assured there was reliable fetal monitoring, which may have also required other interventions.
4. Once Dr. Kamani reported the epidural was effective and the bladder had been drained, Nurse Marsh ought to have recognized the constant pain Ms. Brodeur reported at 21:45 was a sign of possible uterine rupture. She should have stopped oxytocin, taken resuscitative measures and asked for the obstetrician to attend immediately.
5. Nurse Marsh should not have taken the time to deal with the vomiting at 21:45 without first, or simultaneously, seeking assistance by pressing the call bell. She also criticized Nurse Marsh for the measures she took to deal with the vomiting, but I agree with the defendants that her conclusion was based on a misapprehension about the position of the bed at the time; I therefore disregard her opinion on that point.

**126**  Angela King is a registered nurse in Ontario who testified on behalf of Nurse Marsh. She provided a report dated June 14, 2015. Ms. King concluded that Nurse Marsh's actions met the applicable standards in the following manner:

1. The administration of oxytocin was according to physician orders and vital signs were monitored.
2. Because "Ms. [Brodeur] was monitored continuously with the electronic fetal monitor", that was documented every 15 minutes and those actions were in compliance with hospital policy, the Guideline and physician orders.
3. Uterine contractions were adequately monitored by assessing (and presumably recording, although she did not specifically mention that) the frequency, duration and intensity of the contractions.
4. At 21:45, Ms. Brodeur's pain and vomiting were appropriately managed by her being positioned to left lateral.
5. When Nurse Marsh assessed the FHR at 60 bpm at 21:54, she called Dr. Freedman and the charge nurse, which was in compliance with hospital policies.

**127**  Nurse Marsh submitted that Ms. King's current clinical experience made her evidence more reliable than Ms. Rokosh, who has not been involved in clinical practice for many years. I do not find that to be as significant a factor relating to the reliability of their evidence as proposed by Nurse Marsh. Both nurses presented evidence and analysis about the nursing standards that were applicable in 1999, a point in time when they were both involved in clinical practice.

**128**  Moreover, it could be said that daily contact with clinicians unconsciously influences an expert to more easily justify dubitable clinical behaviour, whereas someone removed from the practice may have a more objective viewpoint. In any event, I find neither maxim applies in this case. In my view, both nurses were qualified to give the opinions they did.

**129**  However, I agree with Nurse Marsh that Ms. Rokosh's report contains an error that does diminish the weight I can place on some of her opinions. Ms. Rokosh was asked to assume Nurse Marsh did not trust the information obtained by the electronic fetal monitoring with regard to the contraction pattern at 21:30. In Ms. Rokosh's opinion, the uterine activity was minimal at that point. Ms. Rokosh said in view of Nurse Marsh's suspicion, she should have discontinued oxytocin until more reliable monitoring could be established. Ms. Rokosh suggested Nurse Marsh should have requested the insertion of an intrauterine pressure catheter (IUPC).

**130**  But Ms. King pointed out that such intervention was not possible at 21:30 because Ms. Brodeur's cervix was only dilated at 1 cm and her membranes had not ruptured. Rather than admit the error, in her rebuttal report Ms. Rokosh commented that the request for an IUPC ought to have been made before induction. This placed blame on Nurse Marsh for a decision not only beyond her authority, but well outside the short period of time she was caring for the patient. I find this reduces the weight I place on some of Ms. Rokosh's opinions.

**131**  I have another concern with Ms. Rokosh's report. Ms. Rokosh identified several occasions when, in her opinion, Nurse Marsh ought to have discontinued the current treatment and sought assistance from the physician. The only time Ms. Rokosh does not fault Nurse Marsh is when she called Dr. Kamani and Dr. Freedman.

**132**  I find the tenor of her opinions and her report is akin to asking Nurse Marsh to exercise little nursing skill or judgment and, in effect, delegate the care of her patient to the physicians. In my view, her report relied too heavily on detailed scrutiny of individual decisions that amounted to almost a search for error instead of a contextual examination of Nurse Marsh's care for Ms. Brodeur during the relevant time period. For those reasons, I approach her evidence with caution.

**133**  But I also have concerns about Ms. King's report. The structure of Ms. King's report is to identify discrete policies and comment on whether Nurse Marsh's actions fell within parameters identified. Obviously those policies and guidelines are relevant to the standard of care, but they are not determinative: *Ediger v. Johnston* at para. 59; *Downey v. St. Paul's Hospital*, [*2007 BCSC 478*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2429-00000-00&context=) at para. 88. I find her lack of analysis troubling.

**134**  Ms. King opined that the standard of care for induced labour required the continuous electronic fetal monitoring of contractions was to be documented every 15 minutes. Ms. King concluded the standard of care was met, in large part, because the monitoring and documentation were done. She failed to point out, however, that there was no documentation of Ms. Brodeur's contractions on the partogram after 21:00. This oversight and lack of explanation is concerning.

**135**  I found Ms. King's opinion about Nurse Marsh's response to Ms. Brodeur's reports of pain to be unhelpful. She simply noted that Ms. Brodeur's "discomforts of labour were managed in accordance with the standard of care and as per [hospital policy] and physician orders." But the allegation of ***negligence*** is not about the management of Ms. Brodeur's pain. The allegation is that medical staff failed to recognize it as a symptom of uterine rupture.

**136**  Ms. King concluded the standard of care was met because Nurse Marsh appropriately called the physician once the FHR was 60 bpm at 21:54. Her report lacks an analysis of whether the constellation of facts that Nurse Marsh faced required her to suspect uterine rupture, or at least seek physician help earlier than 21:54. Given all these factors, Ms. King's opinions are of minimal assistance to the issues I must decide.

**137**  Dr. Doersam also provided an opinion about Nurse Marsh's actions. One of his reports, dated June 5, 2015, addressed Nurse Marsh's actions during Tianna's delivery. Dr. Doersam concluded Nurse Marsh did not meet the standard of care in several respects, the most relevant of which are summarized below:

1. He was asked to assume that Nurse Marsh concluded there were inadequate monitoring parameters in place for Ms. Brodeur and she felt she could not safely provide care. In his view, by failing to call for additional help as soon as she began caring for Ms. Brodeur, she failed to meet the standard of care.
2. Once the anesthetist pronounced the epidural to be effective and the bladder was empty, the escalation in Ms. Brodeur's pain was a "hallmark symptom of uterine rupture". The change in pain at 21:45 combined with the characteristics of the FHR created an urgent situation and Nurse Marsh ought to have taken action on an assumption of a possible uterine rupture.
3. Nurse Marsh should have manually palpated for contractions. She either did not do so, or failed to record that she did; both were deficient in Dr. Doersam's view. She should not have attempted to reposition an obese patient on her own when she already had evidence that something was seriously amiss.
4. Nurse Marsh should have called a more senior physician rather than Dr. Freedman.
5. At four points during Dr. Freedman's assessment, Nurse Marsh should have initiated a stat call to the supervising physician: (1) at Dr. Freedman's initial failure to accept Nurse Marsh's assessment that the FHR was 60 bpm; (2) at Dr. Freedman's request to bring in the ultrasound machine; (3) when Dr. Freedman failed to locate the FHR upon the first ultrasound exam; and (4) when Dr. Freedman started to conduct a second ultrasound.

**138**  Nurse Marsh pointed out that Ms. Rokosh's opinion differed from Dr. Doersam's on certain facts, including whether the FHR was reassuring and what the character of contractions was at different points of time. She submits because of this discrepancy the plaintiffs' own evidence falls short of establishing on a balance of probabilities that Nurse Marsh failed to meet the standard of care based on the "two schools of thought" doctrine.

**139**  In *Fairley v. Waterman et al.*, [*2002 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-6198-00000-00&context=), Justice Wong describes this doctrine by noting (at para. 42) that the "law is clear that an error in clinical judgment cannot be seen as ***negligence*** when there are two separate schools of thought." He continues by stating that "adherence to one of those schools is not ***negligence***, even if, in retrospect, adherence to that school of thought is erroneous." This principle is drawn from *Maynard v. West Midlands Regional Health Authority*, as quoted by Seaton J.A. in *Belknap v. Meakes* at 220. In *Maynard* at 639, Lord Scarman stated that "in the realm of diagnosis and treatment, ***negligence*** is not established by preferring one respectable body of professional opinion to another." The gravamen of these principles is that the exercise of clinical judgment is based on a number of factors and reasonable practitioners acting reasonably may exercise their clinical judgment differently.

**140**  The interpretation of data on the strip and how to respond to it does implicate clinical judgment. I do not agree, however, that the differences between Ms. Rokosh and Dr. Doersam rise to the level of different "schools of thought". It is more accurate to say they disagreed on facts. I address the implications of these differences later in these reasons.

**141**  Nurse Marsh and the doctor defendants also submit I should not rely on Dr. Doersam's evidence about nursing care because he is "far removed from nursing". He no longer has exposure to obstetric nursing staff or obstetric practice on a daily basis. They also point out he has not been a practicing obstetrician since 2008. Dr. Doersam was engaged in obstetrical practice at the relevant time for the events in this case. In my view, these points go more towards his qualification to offer an opinion, which was not challenged. I do not discount his reliability on this basis.

**142**  However, I do consider the fact that Dr. Doersam lacks certification in maternal-fetal medicine to be relevant to the weight I place on his opinion. A subspecialty in maternal-fetal medicine requires two years training in addition to the four years of obstetrics and gynecology training. It primarily deals with high-risk pregnancy and overlaps into areas of genetics, prenatal diagnosis, ultrasound, fetal treatment and adverse maternal conditions. I also note a significant amount of his clinical experience was outside of Canada, a point that he referred to when discussing the history of the medical profession's attitude towards VBAC deliveries. For those reasons, I conclude that his opinions must be approached with some caution.

**143**  I qualified Dr. Farquharson as an expert to give opinion evidence in obstetrics and maternal-fetal medicine. He has over 30 years of practice in obstetrics and gynecology and he provided evidence on behalf of all defendants. He prepared a report dated June 24, 2015 which addressed the standard of prenatal and intrapartum care received by Ms. Brodeur.

**144**  Dr. Farquharson's opinion with respect to nursing care is wholly contained in the following paragraph:

The very first warning of any difficulties began at 21:45 with the onset of pain and vomiting. Nursing action at that time was appropriate. The patient was turned to her left side so as not to aspirate and at 21:54 when the fetal heart rate was discovered to be bradycardic at 60 beats per minute call for help went out which was answered promptly by both Dr. Freedman and Dr. Mujaibel. By the time of Dr. Mujaibel's arrival the persistent bradycardia made the likely diagnosis of uterine rupture and called for urgent caesarean section to take place which was subsequently handled in as rapid a fashion as possible given the difficult circumstances. ... Literature reviews of the subject often refer to abnormalities in fetal heart rate in association with persistent pain over the lower uterine segment where the old scar was to be the most consistent patterns of presentation ...

**145**  The defendants claim Dr. Farquharson's opinion was never challenged on cross-examination. They say only broad general propositions were put to him but those were not linked back to the facts in this case and his conclusion that the nursing and medical staff met the standard of care was "not touched". I do not agree that is an accurate description of the cross-examination.

**146**  I have concerns about Dr. Farquharson's expert report. Despite his eminent qualifications, the opinions in his report are primarily conclusions that are not accompanied by thorough or helpful analysis. The portion of Dr. Farquharson's report devoted to his opinion on the standard of prenatal and intrapartum care is two and a half pages long, but about a page and a half of that is a recitation of the history of Ms. Brodeur's prenatal condition and the events on September 21, 1999. Accordingly, over half of the "opinion" section in his report is not opinion at all but a reiteration of events.

**147**  It may be his conclusions are sound, but his explanations are cursory. Relying heavily on his report would amount to Dr. Farquharson usurping the role of the court. An expert's role is to assist the court, not overtake the fact-finding function.

**148**  More importantly, Dr. Farquharson's opinion was in two places based on facts not in evidence. During cross-examination, Dr. Farquharson was asked about the significance of Ms. Brodeur's report of pain at 21:45. He seemed to attach little or no significance to the difference between the description of pain at 21:30 ("more uncomfortable through contractions having to breathe through") and 21:45 ("[patient] complaining of constant left lower uterine pain; [patient] retching from pain") [emphasis added]. Not only was the character of the pain different, so was its intensity. Nurse Marsh agreed that she recognized the pain at 21:45 to be "new". In my view, he minimized the significance of the pain report based on an erroneous assumption that the pain was not new and apparently attributing the pain to a "patchy epidural". Because his opinion was based on an assumption not in the evidence, I do not rely on his opinion about Nurse Marsh's reaction to the report of pain at 21:45.

**149**  Dr. Farquharson also proceeded on a misunderstanding of the facts about the FHR. Dr. Farquharson said he assumed Nurse Marsh called for help at 21:54 because "she had heard a deceleration prior to that and then lost the fetal heart." He also noted that there were gaps in the FHR. Within those parameters, the "lost FHR" to him was most likely not due to a true "lost" FHR but difficulty in recording it because of Ms. Brodeur's obesity.

**150**  Nurse Marsh was clear that she called for help because she auscultated the FHR at 60 bpm, not because she "lost" the FHR. I accept her testimony. Dr. Farquharson's opinion about the response to the drop in the FHR at 21:54 is not reliable because it is not based on the facts of this case and I disregard it.

**151**  Lastly, I found Dr. Farquharson's evidence on one point was inconsistent. Dr. Farquharson testified that a drop to 60 bpm was not a bradycardia unless it lasted for ten minutes; it should have been seen only as a deceleration. This conflicts with his report where he opined that at 21:54 "the fetal heart rate was discovered to be bradycardic at 60 beats per minute" [emphasis added]. He also writes Dr. Freedman's second ultrasound "confirmed the [FHR] persisting in a bradycardia at 60 beats per minute" [emphasis added]. This inconsistency reduces the reliability of his opinion.

**152**  In my view, the declaratory nature of Dr. Farquharson's opinions combined with the dissonance between his assumptions and the facts diminish to a very significant degree, the weight I place on his evidence.

**D. Expert Evidence about The Standard Of Care For Physician Care**

**153**  Both Dr. Doersam and Dr. Farquharson provided opinion evidence regarding Dr. Freedman's actions. My concerns regarding Dr. Farquharson's report regarding Nurse Marsh's actions apply equally to his opinions about Dr. Freedman. Dr. Farquharson concluded that when the FHR was discovered to be 60 bpm, the call for help went out and Dr. Mujaibel's diagnosis of likely uterine rupture was in "as rapid a fashion as possible given the difficult circumstances." He also commented that the "[i]ntrapartum care ... appeared entirely appropriate and well documented." These are declaratory opinions. He failed to comment on whether Dr. Freedman ought to have attempted two ultrasound exams to find the FHR notwithstanding Nurse Marsh auscultated the rate to be 60 bpm. His opinion is of little assistance to me for these reasons.

**154**  Dr. Doersam's opinion about Dr. Freedman is encapsulated in the penultimate paragraph of his June 5, 2015 report:

In summary, Dr. Freedman was presented with a patient known to be at elevated risk of uterine rupture during a VBAC labour, whose clinical condition had deteriorated abruptly, whose fetal status had deteriorated sharply and whose fetus was no longer located where it had been. Dr. Freedman chose to consume immeasurably valuable minutes in laboriously proving a bradycardia that was already known and was consistent with other obvious maternal and fetal signs of uterine rupture. In doing so, she delayed taking any useful action in a desperate emergency situation for which the only solution was a stat Caesarean section.

**155**  I note that when Dr. Freedman entered Ms. Brodeur's room, there was no indication Dr. Freedman could have relied upon to indicate that the fetus was no longer located where it had been. That only became clear when Dr. Freedman conducted the vaginal exam.

**156**  Dr. Doersam's opinion depends upon his theory that "no condition in clinical obstetrics ... mimics the signs and symptoms of uterine rupture." For him, this meant that every VBAC patient must be viewed with a "high index of suspicion of uterine scar separation" and that response is required at the "first sign consistent with scar separation." In his opinion, medical personnel needed to act within the time frame required to extract the fetus unharmed with the appearance of any of the following clinical features of uterine rupture: alteration of the FHR, new maternal abdominal pain, especially non-periodic pain, and change in either the location of the FHR or the fetal presenting part.

**157**  Dr. Doersam then identified four ways in which he concluded Dr. Freedman failed to meet the standard of care:

1. Dr. Freedman should have immediately recognized when she walked into the room that "Ms. [Brodeur's] pain .. was altered in both pattern and severity" meaning there was a "the high probability" of uterine rupture. If Dr. Freedman did not realize that the patient's constant pain was a "red flag" for uterine rupture, then the state of her knowledge fell below standard of care.
2. Once advised of bradycardia in a labouring VBAC patient, any reasonably competent physician would "recognize that uterine rupture was the probable cause" and would notify the physician responsible.
3. Dr. Freedman's insistence on attempting to confirm Nurse Marsh's report of bradycardia from 21:56 to 22:06 was an inappropriate delay; she should have immediately called Dr. Mujaibel or Dr. Galerneau. In his testimony, however, he qualified this opinion by saying he does not fault her for performing the ultrasound, but said that ought to have occurred after the call for help, or at least at the same time.
4. Lastly, with regard to each of the above scenarios, Dr. Freedman ought to have immediately started the process for transferring Ms. Brodeur to the operating room.

**158**  Dr. Oppenheimer also provided expert evidence with regard to Dr. Freedman's actions. He prepared two reports: one, dated November 24, 2014, contained his opinion about Dr. Freedman's actions; the second is dated July 28, 2015 and is a rebuttal report to Dr. Doersam's report.

**159**  Dr. Oppenheimer concluded that Dr. Freedman should not be faulted for failing to recognize signs of a possible uterine rupture before she called Dr. Mujaibel. The following four premises underlie his conclusion:

1. He opined that the change in variability of the fetal heart rate was not significant "compared to the prior tracing, and the variable decelerations seen prior to the loss of recording [were] not concerning for a patient in labour and have a rapid recovery";
2. When Dr. Freedman arrived in the room, the FHR tracing was "no longer reliably recording";
3. The diagnosis of persistent FHR bradycardia, both by the FHR transducer and with the ultrasound machine, was more challenging because of Ms. Brodeur's obesity;
4. In his view, "[e]ven in a VBAC patient, while uterine rupture must be considered, these other causes [to bradycardia] are . . . more frequent and are usually amenable to interventions" that would not require a stat caesarean section. The other causes he referenced are belt misplacement, descent of the fetus from rapid progress of labour, and sudden onset of prolonged bradycardia from uterine hyper stimulation or cord compression.

**160**  Based on his description of other more likely causes, Dr. Oppenheimer concluded that expecting Dr. Freedman to have suspected uterine rupture based on a "phone call" (presumably Nurse Marsh's call for help at 21:54) was unreasonable. In his view, "training staff to institute immediate action in the face of potential warning signs of rupture ... was not the standard of care in 1999."

**161**  Dr. Oppenheimer also concluded that it was reasonable for Dr. Freedman to utilize the ultrasound to verify Nurse Marsh's report of FHR at 60 bpm for three reasons: (i) Ms. Brodeur was obese making signal detection difficult; (ii) her position had recently been changed because of her vomiting; and (iii) "uterine rupture was the least likely cause of the loss of signal in labour." However, Dr. Oppenheimer added this qualification: "[h]ad the fetal bradycardia been clearly recorded, confirmation [by Dr. Freedman] would not have been necessary."

**E. Did the standard of care require a "Worst First" approach?**

**162**  The most fundamental difference between the parties' expert evidence and their positions in this case is the proper medical approach to possible signs of uterine rupture. The plaintiffs say medical care must be delivered on the basis of "the worst first" assumption. They say to maximize patient safety, medical staff must first rule out the most dangerous complications before accepting a benign explanation for any symptoms observed. They say this is particularly important in high risk VBAC patients because the window of time for intervention to avoid catastrophe is so small.

**163**  It is not appropriate for me to make a finding -- in general -- about the wisdom of a diagnostic approach. But the evidence and case law about this approach is relevant to my determination about standard of care. Ultimately, I must determine with specific reference to the facts in evidence, what the standard of care required of Dr. Freedman and Nurse Marsh in 1999 with regard to Ms. Brodeur's care.

**164**  In terms of the expert evidence on "worst first", Dr. Doersam agreed with this maxim. He testified that doctors should assume the worst outcome and act without hesitation to the point where it is ruled out or appropriately treated. He would say a doctor is not obliged to "prove uterine rupture" before responding on the assumption that is what is happening.

**165**  Dr. Farquharson was outspoken in his criticism of the worst first principle. He stated "worst first seems terribly flawed to me." He testified that most physicians work on the basis of probable causes. In his view, the very rare possibility of uterine rupture had to be weighed against unnecessarily operating on a patient because surgery also brings risks. This was explained in the following exchange from his cross-examination (T, Day 11, p. 15, l. 25-42) :

Q: You agree with me that if it is -- if this -- if the drop in the fetal heart rate was the first sign -- let's assume it was -- the first sign of a uterine rupture, then you have a very narrow window within which to deal with the problem or the baby is going to be brain damaged or the baby is going to die, and the mother may very well die at the same time; right?

A: To answer that question properly would require review of the fetal heart records. When I carefully reviewed these records there were several variable decelerations noted well in advance of this patient's eventual problem, so that functionally, if I would have raced her to the operating room on the basis of seeing variable decelerations, I would have been inappropriately operating on a patient whose attendant risks of surgery were huge.

**166**  I explain earlier in this decision why I do not rely on some of Dr. Farquharson's opinions in his report. I also place little weight to his testimony on this issue.

**167**  The plaintiffs say adhering to the "worst first" doctrine does not result in a reckless rush to surgery as described above by Dr. Farquharson because there is always a "pause" in the operating room. The evidence was that a pause is when the surgeon steps back to re-evaluate the situation to ensure the surgery is necessary, while the preparations for surgery continue. The plaintiffs also point out that in this case, the surgery proceeded in the absence of a firm "diagnosis" of uterine rupture. Dr. Farquharson disagreed. He said there can be no "diagnosis" of uterine rupture until the surgery is underway. Although this could be seen merely as a quarrel over semantics, it aptly demonstrates how important it is to be precise about the evidence. In my view Dr. Farquharson has exaggerated the implications of "worst first" in a way not consistent with the plaintiffs' theory, or the other evidence. On that basis, I find Dr. Doersam's opinion to be more helpful than Dr. Farquharson's.

**168**  There was other evidence pertinent to the "worst first" theory. In her testimony, Nurse Marsh explicitly disagreed with the worst first principle because in her mind, a non-reassuring FHR was a necessary symptom of uterine rupture; without it, there was no cause to suspect uterine rupture. Thus, even though she recognized the contraction pattern as incoordinate and the pain at 21:45 as "new", because she assessed the FHR as reassuring, she did not think the situation was urgent. This focus on a single symptom of possible uterine rupture is inconsistent with the Guideline and the Memo. Therefore, her rejection of "worst first" is unpersuasive.

**169**  Both Nurse Marsh and Dr. Freedman were aware that Ms. Brodeur's labour was high risk for a number of additional reasons unrelated to the risk of uterine rupture. They also testified that Ms. Brodeur's obesity made assessing the FHR and contractions more challenging. Careful and constant monitoring were explicitly required in the Guideline. The evidence is clear that fetal monitoring was compromised at the time of Ms. Brodeur's "new" pain. Regardless of whether the report of pain itself signalled a possible emergency, the combination of factors heightened the degree of caution the staff ought to have used in assessing her condition. I find that required a response from the medical team that did not occur. In that way, it is not determinative to the issues I have to decide whether the medical team accepted the "worst first" approach.

**170**  Nevertheless, there is case law that is consistent with the plaintiffs' position. In *Paniccia Estate v. Toal*, [*2011 ABQB 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JNS1-M22T-00000-00&context=), the court held that ''[c]hoosing a diagnostic process based on probability rather than severity is fundamentally flawed and negligent": at para. 40. The court continues: "[f]ailing to consider the worst first principle and then failing to carry out appropriate tests to confirm or eliminate the worst of the potential diagnoses is not a mere error of judgment but, rather, a breach in the standard of care."

**171**  That case did not involve the type of urgently emerging crisis as in the facts before me. The deceased's stomach cancer was misdiagnosed as gastritis for over one and a half years, and by the time the appropriate diagnosis was made, it was too late for adequate treatment. Justice Shelley found (at para. 106) that the standard of care had been breached when the treating physician concluded there was no possibility of cancer, despite a radiologist's report to the contrary, and when he failed to advise the deceased of the possibility of cancer, and, in fact, misinformed the deceased, despite specifically being asked whether cancer was a possibility.

**172**  But in *Guerineau v. Seger,* Justice Boyd adopts the same approach in a case with the identical clinical condition before me: a woman attempting VBAC who suffered a uterine rupture. The child in that case was born in 1998, so the state of medical knowledge would have been the same. While the defendants correctly point out the particular facts in that case are different, the issues for the court were the same. The plaintiffs in that case alleged "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 contact [the doctor or obstetrician]" (at para. 3).

**173**  Justice Boyd concludes negligent conduct continued throughout a time period of almost two hours. One finding central to her conclusion of ***negligence*** is the nurses' misinterpretation of the fetal heart strip. The nurses argued this was a matter of differing clinical judgment and not indicative of ***negligence***. Justice Boyd disagreed, noting at para. 84:

... 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 [the nurse] ... 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. ... In effect both nurses short-circuited the process of differential diagnosis, immediately accepting the simplest explanation of the decreased variability (i.e. 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***.

**174**  The defendants seek to distinguish this case because of the factual differences: the medical staff did not respond to the complaint of unusual pain for 40 minutes, a nurse failed to recognize the FHR as non-reassuring, and a nurse erroneously called the family physician for consultation rather than an obstetrician.

**175**  I do not agree the case can be easily distinguished. Justice Boyd's description of what the nurses ought to have done is not based on those factual differences. She notes that at the onset of unusual pain, one of the nurses admitted the strip reflected reduced variability, but that nurse discounted the changes in FHR by assuming it was a side-effect of pain medication. The pain itself was also assumed to have been caused by the administration of the prostaglandin gel. In other words, the nurses assigned benign causes to what the trial judge found to be a symptom that ought to have signaled them to call for assistance (unusual pain).

**176**  In *Strachan v. Reynolds et al.*, [*2004 BCSC 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X053-00000-00&context=), Justice Hood also faced a claim in ***negligence*** for VBAC delivery in 1999 that resulted in caesarean section because of uterine rupture. He agreed with the plaintiffs' position that unusual abdominal pain, particularly occurring between contractions, "must be taken as a sign of womb separation ... unless and until the physician is able to exclude a developing uterine rupture as the cause of the pain" (at para. 466).

**177**  Justice Hood addresses the significance of fetal heart strips. It was acknowledged that the experts did not necessarily differ to a great degree on the interpretation of the strips. The question was whether the strips should be viewed independently, or in the context of "a VBAC patient experiencing severe constant abdominal pain" (at para. 473). Justice Hood preferred the second, contextual approach advocated by the plaintiffs' experts.

**178**  He further noted that the location of the pain is irrelevant; it is the constancy of abdominal pain that must be taken as a sign of womb separation until the physician is able to exclude it (at para. 466). He agreed with the plaintiffs' expert that once the nurse became concerned about the complaint of constant pain, a medical emergency arose (para. 494). Justice Hood specifically commented on the approach advocated in this case by Drs. Oppenheimer and Farquharson at para. 540:

This appears to be another distinguishing feature of the position taken by the defence experts to the effect that there are a number of benign causes of abdominal pain, and they should be considered when the patient is medically assessed. Again, it ignores the time element. The fact that there are many causes for abdominal pain in pregnancy, should bring no comfort to the defence. That patient was a VBAC patient. The patient was experiencing constant abdominal pain for over 40 minutes. Constant abdominal pain is a known sign of uterine rupture. The circumstances required Dr. Reynolds to deal with the situation immediately by bringing in a specialist, an obstetrician. ... It would be pointless, and very dangerous, to start considering benign causes. ...The causes are irrelevant unless in the short timeframe available for any kind of medical assessment, it is found that one of the benign causes is in fact the cause, thus excluding developing uterine rupture as the cause.

**179**  Unusual abdominal pain was also identified as a sign that may signal uterine rupture or dehiscence in *Strachan* (at para. 466).

**180**  Nurse Marsh submits a better case for guidance is *Tekano (Guardian ad litem of) v. Lions Gate Hospital*. In that case, the plaintiff presented at the hospital in the early stages of labour and the nurse's review of her prenatal record described a normal pregnancy. The trial judge dismissed the claims, finding that earlier signs were not predictive of prolonged bradycardia, and that to expect otherwise would have amounted to creating a standard of perfection (at paras. 112-13). Justice Macauley summarized his findings at para. 103:

... Although [the baby] was small for his age at the time of his birth, nothing occurred during the pregnancy that ought to have alerted Dr. Clark to anticipate anything other than a normal vaginal delivery. After Mrs. Tekano went into early labour, and while she was being assessed and monitored at the hospital, the FHR decelerated on several occasions and did not consistently recover to baseline with good variability in spite of appropriate nursing interventions. When it was apparent that nursing interventions were not resolving the difficulties, Nurse Burniston called Dr. Clark and communicated the seriousness of the situation adequately. Dr. Clark then responded appropriately by going immediately to the hospital and assessing the patient. She then arranged an obstetrical consultation and placed an operating room on standby for a likely caesarean section. There was no need for an urgent, or stat caesarean section, until the unpredictable deep and continuing bradycardia at 2306 hours.

**181**  That case is distinguishable on its facts. Unlike Ms. Tekano, Ms. Brodeur was a high risk patient attempting VBAC, which all experts in this case agreed required vigilant monitoring. Ms. Tekano was not identified as a high risk patient in her prenatal care, and did not demonstrate any high risk factors when she attended at the hospital. Whether a patient is high risk has a direct impact on the standard of care, especially with regard to monitoring and vigilance for potential signs of urgent situations.

**182**  The clinical conditions in *Strachan* and *Guerineau* were very similar to the facts in this case, and in both those cases, the trial judge found the standard of care for the medical staff was to respond to the unusual pain as a symptom of uterine rupture unless it could be ruled out.

**183**  Because the applicable standard of care is a question of fact, none of these cases are binding on me, but the similarity in the clinical situations means I cannot ignore them either. In my view, they provide relevant and helpful guidance on what was the norm in medical practice for VBAC patients in 1999. However, I must conduct my analysis based on the evidence in this case. It is against that backdrop that I assess whether the defendants were negligent.

**VI. DID NURSE MARSH MEET THE STANDARD OF CARE?**

**184**  I analyze this issue in the categories addressed by the experts.

**A. Response to Report of Pain**

**185**  Both Dr. Doersam and Ms. Rokosh were of the opinion that once Dr. Kamani reported the epidural was effective and the bladder was drained, Nurse Marsh ought to have viewed the increased pain Ms. Brodeur indicated at 21:45 as a sign of possible uterine rupture and treated it as urgent. They opined failing to do so fell below the standard of care.

**186**  I am mindful that I have expressed reservations on the weight I can place on Ms. Rokosh's opinion regarding Nurse Marsh's actions, and that I have some reservations with regard to Dr. Doersam. But I have also concluded that I cannot rely on Dr. Farquharson's opinion on this point, and Ms. King's opinions were not helpful. That leaves me with some, albeit slight, expert evidence consistent with a conclusion that Nurse Marsh failed to meet the standard of nursing care.

**187**  However, Dr. Mujaibel's evidence was consistent with the plaintiffs' theory of the case. She was not an expert, but as a physician involved in the actions being scrutinized, her evidence carries significant weight. In her view, by 21:45 the pain was constant and everyone should have recognized that it was a situation of a uterine rupture, and Ms. Brodeur needed to be transferred to surgery right away. It is tempting to view her evidence with skepticism based on it being "in hindsight". But there was no dispute about her actions. Regardless of her testimony about what she thought at the time, she immediately called for a caesarean section when she entered Ms. Brodeur's room. In my view, that provides strong support for the plaintiffs' position.

**188**  The defendants point to Dr. Oppenheimer's opinion. He was asked to comment whether Ms. Brodeur was taken to the operating room in a timely manner and in that context, his opinion is relevant to the determination of whether unusual pain required a more rapid response by the medical team.

**189**  He referred to two studies, but only one was relevant to the issue of pain as a signal of possible uterine rupture. That study only included six cases of uterine rupture leading to complete extrusion into the abdomen. Based on an analysis of only 23 cases, the authors of that study concluded that "abdominal pain was a poor indicator of uterine rupture" because it was only reported in four patients and there was no association of it with extrusion of the fetus. Based partly on that, Dr. Oppenheimer concludes that "[c]onstant pain ... is not diagnostic of uterine rupture." He concluded that the speed of the response of the team was "within the expected range, based on my personal experience and peer review of similar cases, as well as the literature."

**190**  That study is clearly inadequate to provide guidance since it involved only 23 subjects. Even if the sample size was larger, there was inadequate information provided to me about the study, and I am surprised that any expert would draw any definitive opinion based on it.

**191**  The defendants also point to the leading text valid at the time [*Williams Obstetrics,* Cunningham et al., 20th ed (New York: Appleton & Lange, 1996)] which stated that *"*less than 10% of women with scar separation experience pain and bleeding, and fetal heart rate decelerations are the most likely sign of such an event". To the extent they rely on that to suggest "pain" is not a reliable signal of uterine rupture, that is, with respect, not an inevitable conclusion from that statement. The logic is faulty. The fact that 90% of women who had scar separation did not have pain, does not mean that when pain is present, it is not a possible sign. Moreover, given the potentially catastrophic consequences of a uterine rupture, why is 10% not enough to be considered a possible sign? Also, it is unclear if, in that study, scar separation is restricted to uterine rupture or also included cases of uterine thinning. It is also unclear if the statement would be the same if it was restricted to "pain" instead of "pain and bleeding".

**192**  Moreover, the Guideline specifically identifies unusual abdominal pain as a signal of possible rupture or scar separation. The Guideline does not purport to prioritize any of the symptoms in the manner by which Nurse Marsh found FHR to be most important.

**193**  I also note that the plaintiffs did not suggest the pain at 21:45 was diagnostic in the way Dr. Oppenheimer has interpreted. The plaintiffs' position is that the pain at 21:45 ought to have been treated as a symptom of the potential of uterine rupture. They say that required Nurse Marsh to urgently call for assistance, which she did not do. I did not understand the plaintiffs to suggest no other checks needed to be made to confirm the suspicion, but that the team needed to act quickly with a high degree of suspicion.

**194**  For all those reasons, I am not persuaded by Dr. Oppenheimer's opinion. I find the evidence supports on a balance of probabilities that in 1999, the unusual report of pain between contractions in a VBAC situation was a signal of potential uterine rupture that required an urgent response.

**195**  Ms. Brodeur was a high risk patient that Nurse Marsh acknowledged was challenging to monitor because of her obesity. For nine minutes Nurse Marsh was aware that Ms. Brodeur had unexplained, constant pain between contractions. Her obesity made it difficult for Nurse Marsh to reposition her when she was vomiting and the repositioning compromised the accuracy of the electronic fetal monitoring. I accept that she felt her auscultation of the FHR was sufficient information, but faced with the challenge of trying to reposition Ms. Brodeur, which compromised the reliability of the fetal monitoring, it was incumbent upon Nurse Marsh to call for assistance and report the pain immediately. Failing to do so fell below the standard of care.

**B. Reaction to the Electronic Fetal Monitoring**

**196**  The plaintiffs allege that Nurse Marsh ought to have been suspicious of potential uterine rupture prior to 21:45. This position rests on the assumption that the FHR and uterine activity were either not adequately monitored, or showed signs consistent with potential uterine rupture before 21:45.

**197**  Nurse Marsh points out that the interpretation of a fetal heart monitoring strip is fraught with difficulty. Clearly, it is subjective. In *Lotocky v. Markle*, [*2006 BCSC 1295*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B18Y-00000-00&context=), Justice Macaulay similarly faced differing interpretations of FHR at critical time. At paras. 105-06 he stated:

... The real question, of course, is whether the plaintiffs demonstrated that the nurse's interpretation of the August 18 NST as reassuring fell below the standard of a reasonably competent nurse in those circumstances. In effect, the plaintiffs say that no reasonably competent nurse could have interpreted the test result as reassuring.

In my view, the plaintiffs' own expert evidence does not support this conclusion, particularly when I consider the differences in the various interpretations of the August 18 NST insofar as amplitude, cycles, decelerations and accelerations are concerned. In reviewing this evidence, I am satisfied that the Kubli scoring system provides a convenient and useful, but not an exact, means of recording the examiner's interpretation of the strip. Nurse Tier scored amplitude the same as Nurse Callander. Nurse Callander scored cycles at 1-2. Nurses Tier and Burke scored them at 1; Dr. Farmer scored them at 2. Nurse Burke scored accelerations at 1, exactly the same as Nurse Callander. ....

**198**  I agree that with regard to interpreting the strip, it would not be enough for the plaintiffs to show another nurse would have interpreted it differently. I also keep in mind that the standard of care cannot require perfection and must not amount to "hindsight analysis".

**199**  The strip was put into evidence and many witnesses commented on it. To evaluate the opinions and testimony presented, I had to scrutinize a small section of that strip. In my view, it would be improper to base my conclusions about the standard of care solely on such a detailed analysis of one piece of evidence covering a short period of time. That type of focus on a few details inevitably leads to improper hindsight analysis into what was a dynamic situation.

**200**  The only witness that classified the FHR prior to 21:45 as non-reassuring was Ms. Rokosh. I have already noted that I have concerns with the reliability of her evidence. Even if I did not, however, the other problem is her opinion contradicts Dr. Doersam's on the same issue. He identified the loss of fetal heart signal at 21:47 to be the signal that required a response, not the earlier tracing. During cross-examination by counsel for Nurse Marsh, he did not disavow the opinion in his draft report that "the tracing from 2015 until 2147 hours is nearly continuous throughout and the pattern is reassuring".

**201**  I agree with Nurse Marsh's position (mentioned earlier in this decision) that the conflict within the plaintiffs' expert evidence is highly problematic (although on a slightly different basis than suggested by Nurse Marsh).

**202**  I add that Nurse Marsh testified that in her view a non-reassuring FHR was the most reliable signal of possible uterine rupture, and at no time before 21:54 did she perceive the FHR to be non-reassuring. Her evidence is based on her auscultation of the FHR, rather than a post-incident examination of the strip. I found her to be a credible witness and on this point, her testimony is reliable. For all those reasons, I do not find that prior to 21:45 the FHR was non-reassuring.

**203**  The plaintiffs also say that Nurse Marsh ought to have viewed the contraction activity with more suspicion. This is based on both Dr. Doersam and Ms. Rokosh's opinion. Dr. Doersam opined that if Nurse Marsh was not "keeping her hand" on Ms. Brodeur's abdomen she failed to meet the standard of care because she had no accurate knowledge of the contraction pattern. The electronic monitoring was acknowledged by most to be less reliable because of Ms. Brodeur's girth, but as pointed out by Nurse Marsh, unless the patient was put in an unsafe position (lying on her back), manual palpations were not likely to be any more reliable. There was no evidence to dispute this.

**204**  Ms. Rokosh's opinion is that Nurse Marsh ought not to have increased oxytocin once she assessed the uterine contraction pattern to be incoordinate and coupling (at 21:20). This requires me to first determine the significance, if any, of an evidentiary issue referred to early in this decision: Did Dr. Mujaibel authorize an increase to the oxytocin at 21:05? Dr. Mujaibel's evidence at discovery is that she does not remember ordering an increase when she examined Ms. Brodeur at 21:05.

**205**  The original physician's order to administer oxytocin included directions on the rate of increase (p. 94 of Ms. Brodeur's chart). This was consistent with BCW Policy 225 - "Induction/Augmentation of Labour using Oxytocin or Prostaglandin" at clause 3.5 which stated that oxytocin is commenced at 1 or 2 mU/min. and increased by 1-2 mU/min at 30 to 60 minute intervals. Clause 1.13 of the policy confirmed that only if oxytocin dosage was to go beyond 20mU/min was a medical assessment and physician's order required. The policy also stated at clause 3.8 that oxytocin should be discontinued in certain circumstances, including prolonged fetal heart rate deceleration or severe variable decelerations (more than 60 bpm, longer than 60 sec, to less than 60 bpm). Neither of those conditions existed.

**206**  I find Nurse Marsh's actions were consistent with the standing physician order on the administration of oxytocin. She did not require a medical assessment or order to increase the infusion rate to 11 mU/min. Complying with the attending doctor's orders in the absence of "clear and obvious evidences of neglect or incompetence" cannot amount to ***negligence***: *Serre et al. v. de Tilly et al.* [*(1975) 58 D.L.R. (3d) 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M42B-00000-00&context=) at 367 (Ont. H.C.); *Lotocky* at para. 24; *Tekano* at para. 110. Accordingly, I reject Nurse Rokosh's opinion.

**207**  Based on the preceding analysis, I do not find the evidence supports a finding that prior to 21:45 the FHR was non-reassuring, or the pattern of uterine contractions was suggestive of a possible sign of uterine rupture. Therefore, Nurse Marsh's actions prior to 21:45 met the standard of care.

**C. Accepting Ms. Brodeur into her Care**

**208**  Ms. Rokosh's suggestion that Nurse Marsh had options before "accepting" the care of Ms. Brodeur because of her admitted lack of experience is unrealistic. I find a similar flaw in Dr. Doersam's opinion where he states:

Nurse Marsh was called upon to deliver specialized bedside nursing care to a high-risk obstetrical patient. In Nurse Marsh's mind, the patient was not a suitable candidate for the process she was undergoing and nursing staff did not have adequate monitoring parameters in place for [Nurse Marsh] to perform safe nursing practice on [Ms. Brodeur]. Nurse Marsh nonetheless undertook single-handedly the care of a patient for whom she felt she could not safely provide care. As a nursing professional relatively new to high-risk obstetrics, working in a specialized hospital with many more experienced nursing staff on hand, Nurse Marsh's failure to call for additional help as she first undertook [Ms. Brodeur's] care in my opinion did not meet the standard of professional nursing care expected of her.

**209**  Apart from the obvious employment implications as well as the effective functioning of the unit in which she worked, Nurse Marsh testified eloquently that failing to provide care for Ms. Brodeur would have been unethical and not in keeping with her responsibilities as a nurse. I agree. I do not find Nurse Marsh negligent for not refusing to care for Ms. Brodeur.

**D. Calling Dr. Freedman**

**210**  The plaintiffs allege Nurse Marsh should have called immediately for Dr. Mujaibel or Dr. Galerneau, rather than Dr. Freedman. As a resident in 1999, Dr. Freedman did not have authority to decide if an emergency caesarean section was necessary; she was required to inform Dr. Mujaibel of any situation that raised the possibility of that complication. Dr. Mujaibel was authorized to decide if an emergency caesarean section was needed and perform that surgery, but she was obliged to inform Dr. Galerneau. Dr. Freedman did acknowledge one of her responsibilities would be to organize for surgery so that it could be done as quickly as possible if that was ordered by whoever did have that authority.

**211**  Ms. Rokosh and Dr. Doersam said Nurse Marsh failed to meet the standard of care by calling the charge nurse and Dr. Freedman instead of Dr. Mujaibel because she should have known this was an emergency. Dr. Mujaibel's evidence is consistent with that because during her discovery, she stated that she understood that at any sign of uterine rupture the nurse ought to have called her rather than the resident.

**212**  Nurse Marsh's actions were consistent with BCW's policy CU020- Non-Urgent/Urgent/Emergency Situation: Obtaining Medical attendance/Assistance for women and newborns. Clause 1.0 of that states that "[i]n an emergency situation, the RN/delegate consults the most immediately available Physician including resident." While the policy cannot be definitive, I find it to be a significant factor supporting Nurse Marsh's actions.

**213**  More importantly, nurses do not diagnose. Her responsibility as the "eyes and ears" of the physician in charge was to ensure assistance was called to respond to the urgent situation. To fault her for not disobeying hospital policy by going over the head of Dr. Freedman would impose on her the duty to know both that Dr. Freedman could not call the caesarean section, but also that it was probable that a caesarean section was needed. In my view, that would make Nurse Marsh responsible for diagnosis which is beyond a nurse's responsibility.

**214**  These reasons also explain why I disagree with Dr. Doersam that Nurse Marsh should have started the process for moving Ms. Brodeur to the operating room. To do so would have required a diagnosis that a caesarean section was probable, and that was not her role.

**215**  I find Nurse Marsh did not fail to meet the standard of care by calling the charge nurse and Dr. Freedman instead of Dr. Mujaibel or Dr. Galerneau when she realized the situation was urgent.

**E. Conclusion on Nurse Marsh's Conduct**

**216**  In my view, Nurse Marsh failed to meet the standard of care by not immediately reporting to the physician at 21:45 Ms. Brodeur's report of constant pain between contractions. I do not find any other actions by Nurse Marsh fell below the standard of care.

**VII. DID DR. FREEDMAN MEET THE STANDARD OF CARE?**

**217**  The plaintiffs allege several actions by Dr. Freedman failed to meet the standard of care. I have concluded that Dr. Freedman was negligent for not immediately calling Dr. Mujaibel or Dr. Galerneau when Nurse Marsh advised her that the FHR had dropped to 60 bpm. I find her equally negligent for not responding in an urgent manner when she was advised of Ms. Brodeur's constant pain between contractions.

**A. At what point did Dr. Freedman call Dr. Mujaibel?**

**218**  Dr. Freedman testified that she called Dr. Mujaibel after completing the first ultra sound exam. The plaintiffs submit Dr. Freedman did not call Dr. Mujaibel until she was doing or had done the vaginal exam. Why does this matter? The plaintiffs submit Dr. Freedman's failure to immediately call for Dr. Mujaibel when she walked in the room fell below the standard of care (discussed below); a finding that she waited until after performing the vaginal exam would compound the impact of that failure. It may also have some probative value on the issue of causation.

**219**  The plaintiffs point to Dr. Mujaibel's evidence that during the telephone call she had with Dr. Freedman, Dr. Mujaibel realized it was uterine rupture and told Dr. Freedman that. Their theory is that it is more likely Dr. Mujaibel came to the conclusion of a potential uterine rupture not just on the basis of the ultrasound results, but also because the baby was not presenting against the cervix. Dr. Freedman pointed out Dr. Mujaibel made no mention of the vaginal exam in her discovery evidence, but in my view that is not necessarily inconsistent with her having been told about it at the time. There is no evidence on that from her one way or another.

**220**  Dr. Freedman testified that she had a clear memory of wondering where everyone was while performing the vaginal exam; her position is that this is inconsistent with the suggestion that she called Dr. Mujaibel after that exam. The plaintiffs submit that it is equally likely that her thinking "where is everyone" arose upon her realization that this was an emergency situation; they say that did not happen until she did the vaginal exam because she did not believe Nurse Marsh's report of the FHR being 60 bpm.

**221**  I have no direct evidence as to when Dr. Mujaibel was called, but she did testify that Dr. Freedman was performing the second ultrasound when she arrived; I find her evidence on that point credible and reliable. I find that she arrived just before 22:06. The plaintiffs' theory is that Dr. Freedman called Dr. Mujaibel either simultaneous with, or just after vaginal exam so at 22:01.

**222**  Dr. Mujaibel's discovery evidence is that she "really ran" to get to the room after speaking with Dr. Freedman because at the time, the room she would have been in was "away" from the labour room. Dr. Mujaibel was not busy with other patients and, given the urgency with which Dr. Mujaibel responded, I find that the phone call would not have lasted very long, perhaps a minute.

**223**  On the plaintiffs' theory, that meant Dr. Mujaibel would have left between 22:02 or 22:03, arriving at 22:06 which is consistent with the partogram and strip.

**224**  Based on Dr. Freedman's theory that she spoke with Dr. Mujaibel after the first ultra sound (which was no later than 21:58), and adding a minute or two, that means Dr. Mujaibel would have left between 21:59 and 22:00. On that theory, Dr. Mujaibel would have taken between 6 to 8 minutes to get into the room; I do not find that to be as consistent with Dr. Mujaibel's evidence that she "really ran" as the plaintiff's timing.

**225**  But my conclusion is not dependant on determining the precise time of events; rather, I am assessing what sequence of events most probably occurred given the information there is about timing. On that measure, I find the plaintiffs' theory is more probable.

**226**  Other evidence is also more consistent with the plaintiff's timing. During her testimony in chief, Dr. Freedman was asked if "there [were] circumstances in 1999 where you'd come into the room and even before you start your assessment ask the attending to come?" She answered as follows:

A. I don't recall any situation that it happened to me personally, but there could be a clinical situation where you would walk in and ask the attending, but my feeling about a situation would be that if that was the case and it was an acute emergency**, it would have been a call to everybody that would have come out at the same time**.

Q. Meaning a calling to --

A. To the entire team: myself, the staff, anybody else who was on call.

[emphasis added]

**227**  It was put to Dr. Freedman that she under-estimated the severity of Ms. Brodeur's condition on the assumption that the nurse would have called Dr. Mujaibel if it was a true emergency. Dr. Freedman testified that she could not remember if that would have even been part of her thinking at that time.

**228**  In my view, her testimony in chief provides the answer as to what was most probably her thinking at the time. I find that Dr. Freedman did underplay the urgency of the situation when she was called on the assumption that Dr. Mujaibel would have been called if it was an urgent situation. I find this also accounts in part for why she did not believe Nurse Marsh's report of a 60 bpm FHR.

**229**  I am not satisfied that Dr. Freedman's recollection (wondering where everyone was) is enough to override the evidence that demonstrated the probability that she called Dr. Mujaibel during or after the vaginal exam. I do not suggest she is not credible. The recollection she has is an emotional one not a clinical one and less likely to be reliable as to timing. Based on all of the preceding evidence, I find on a balance of probabilities that Dr. Freedman called Dr. Mujaibel while performing or shortly after having performed the vaginal exam.

**B. Should Dr. Freedman have called Dr. Mujaibel upon receiving Nurse Marsh's report of Ms. Brodeur's condition?**

**230**  The plaintiffs' position is that Dr. Freedman's insistence on verifying the FHR after Nurse Marsh reported she auscultated it at 60 bpm fell below the standard of care and that she should have immediately called for Dr. Mujaibel.

**231**  Dr. Freedman's evidence on why she insisted on conducting an ultrasound was somewhat inconsistent. While stating her training required her to "verify" information received from the nurse, she also admitted that she relied on nursing staff to advise her of any signs of a possible uterine rupture. She agreed during cross-examination that if she had been told the FHR had dropped to 60 bpm, she needed to rule out the possibility of uterine rupture as quickly as possible, because uterine rupture has the potential to be life-threatening for both the mother and baby. She also confirmed a few times that she relied on nursing staff as the "eyes and ears" to monitor for signs and symptoms of possible uterine rupture. Yet, she maintained she was "required" to verify the information from the nurse.

**232**  I find Nurse Marsh's testimony about what was said in these moments to be credible and more reliable than Dr. Freedman's. I find that Nurse Marsh reported to Dr. Freedman that the FHR was at 60 bpm, and Ms. Brodeur was enduring constant pain and vomiting, but that Dr. Freedman did not believe her. In my view, although Dr. Freedman testified she was attempting to "verify" Nurse Marsh's information, she was effectively disregarding it. She failed to act on it. This is not consistent with the team approach to providing obstetric care to a high-risk patient.

**233**  Dr. Oppenheimer concluded that Dr. Freedman was justified in using the ultrasound to verify the FHR, but importantly he added a qualification to his opinion that confirmation was unnecessary if the bradycardia had been clearly recorded. In my view, Nurse Marsh telling Dr. Freedman that she auscultated the FHR at 60 bpm was such a clear report and ought to have been relied upon by Dr. Freedman.

**234**  It is also important to note that Dr. Oppenheimer's opinion does not take into account the report of unusual pain at 21:45, which I have found Nurse Marsh relayed to Dr. Freedman as soon as the latter entered the room. Accordingly, Dr. Freedman was not faced with a single symptom of possible uterine rupture; there were two -- the bradycardia and unusual abdominal pain. The facts therefore are different from what Dr. Oppenheimer relied upon in giving his opinion and that reduces the weight I attach to it.

**235**  I have concerns about the significance Dr. Oppenheimer attaches to Ms. Brodeur's obesity with regard to the standard of care. If obesity made monitoring of Ms. Brodeur's FHR less reliable, presumably that was true throughout her labour and not just at the report of bradycardia. In that way, I find two of the four factors upon which he based his opinion (see above para. 159) are somewhat inconsistent.

**236**  I find the evidence was clear and the experts agreed that careful monitoring for VBAC patients is crucial to provide adequate care. They also agreed Ms. Brodeur's obesity possibly reduced the accuracy of the electronic monitoring. The evidence also establishes that her obesity demanded increased suspicion and vigilance, not less. That ought to have made staff more suspicious of potential problems, rather than the opposite.

**237**  Instead, the defendants' experts point to her obesity to support the assumption that the monitoring was not reliable, and that it was reasonable to assume abnormalities had a benign cause. But upon her admission to hospital, everyone was aware monitoring was more difficult with Ms. Brodeur because of her personal characteristics, which included obesity. In my view, the medical staff failed to integrate that clinical fact into how they approached her care. Dr. Freedman relied upon Ms. Brodeur's obesity to disregard Nurse Marsh's report of the FHR. Ms. Brodeur's obesity cannot be a reason to explain away a failure to respond quickly to possible signs of an emergency situation.

**238**  In my view, that is essentially what Dr. Oppenheimer's opinion did. Her obesity should have informed the standard of care under which medical staff operated by increasing the vigilance and index of suspicion they would have about potential problems, especially uterine rupture. I find Dr. Oppenheimer's opinion is premised on an opposite approach. He found it acceptable for staff to assume symptoms were the result of inaccurate or unreliable monitoring because of Ms. Brodeur's obesity. For that reason, I place less weight on Dr. Oppenheimer's opinion with regard to whether Dr. Freedman was justified in conducting the ultrasound.

**239**  I find Dr. Doersam's opinion on this point to be reasonable and most consistent with the evidence. In his opinion, doing the ultrasound to verify the FHR was acceptable so long as help had already been called. This is also supported by Dr. Mujaibel's evidence:

1. Did you have a conversation with Dr. Freedman after the Caesarean section to talk about what had happened?

A. Yes.

1. At that time did you ask her why she was wasting time with doing an ultrasound rather than ...
2. I think she wanted to make her own assessment at that time, but I said it was clear; the fact that she had severe bradycardia, and she being at her level of registrar or a chief resident or whatever, she should have called me or called Dr. Galerneau to come to the labour room immediately because, okay, it's not the simple bradycardia with a simple patient. This is a high-risk patient with all the factors which going with the possibility of uterine rupture all raising up, okay.

Q. Right.

1. But she said that, "Khalida, I have to make my own judgment." I respect her opinion but I said, "Still, you have to call me because this is a maternal-fetal medicine patient and I should make the decision, not you." That's it.

**240**  For all those reasons, I find that Dr. Freedman failed to meet the standard of care by not calling for Dr. Mujaibel upon learning from Nurse Marsh that she had auscultated the FHR at 60 and Ms. Brodeur had constant pain between contractions.

**C. Conclusions on Dr. Freedman's Standard of Care**

**241**  I conclude Dr. Freedman failed to meet the standard of care by failing to immediately recognize the report of unusual pain as a possible sign of uterine rupture, and by not immediately calling Dr. Mujaibel and/or Dr. Galerneau. I also conclude disregarding Nurse Marsh's report of FHR 60 bpm fell below the standard of care.

**VIII. CAUSATION**

**242**  Dr. John Van Aerde provided an expert report on behalf of the plaintiffs related to causation. He is a neonatologist and clinical professor of pediatrics for the University of Alberta and the University of British Columbia. He has achieved the highest level of Neonatal Intensive Care (classified as level III/IV) for infants with the most complex problems. He has a PhD in medical sciences. He has extensive and impressive clinical experience in neonatal intensive care, including being involved in the development and implementation of policies, guidelines and quality of care to reach or exceed standard of care for newborn infants.

**243**  Dr. Van Aerde produced a report dated June 12, 2015 that was admitted into evidence; he was not called for cross-examination so his opinions were not contested. I accept his evidence as reliable and credible.

**244**  Dr. Van Aerde's report was based on his review of the literature and relevant medical studies. That literature confirms that there are "three periods of progressive brain damage during an asphyxia lasting approximately 25-30 minutes." If resuscitation is started within the first 10-15 minutes of the onset of asphyxia, human brain function is most likely not negatively impacted. The second period (from 10-15 to 25-30 minutes of asphyxia) is itself divided into two smaller but overlapping periods. At the 20 minute mark, and close to it is when damage to the thalami and basal ganglia occurs which results in choreoathetoid cerebral palsy. The closer the period of asphyxia gets to the 25-30 minute mark, the more likely the cortex will be damaged causing quadriplegic cerebral palsy and cognitive impairment.

**245**  Dr. Van Aerde confirmed that Tianna has choreoathetoid (also termed athetoid or dyskinetic) cerebral palsy. The condition is the result of static and non-progressive, bilateral brain lesions to the thalami and basal ganglia. That diagnosis was confirmed by a number of brain scans including one taken when Tianna was 12.

**246**  In addition, according to Dr. Van Aerde, Tianna fulfills all criteria identified by the American Academy of Pediatrics & the American College of Obstetricians and Gynecologists to link "the acute perinatal event with the neonatal encephalopathy (HIE) after birth with her current choreoathetoid cerebral palsy."

**247**  After reviewing the literature and the background facts, Dr. Van Aerde opined that "Tianna's brain damage occurred mostly between the 10-15 minute mark and 20-25 minute mark after the onset of the acute and total or near-total asphyxia." He continued:

... The clinical history and the findings of the brain images obtained at 3 days, [2 ] years and 12 years of age indicate that the asphyxia lasted up to 20-25 minutes. According to classic studies and publications, for the first 10-15 minutes, the brain would have been normal; if a stat caesarean section had been called immediately at that time, the delivery would have happened at a time when the brain was still normal and the child would have been normal today. ...

...Given that the stat caesarean section was executed in the respectable time of 10 minutes with an additional 2 minutes from decision to incision, the child would have had a much higher probability than not to have a normal brain with normal function if the infant had been delivered within 10 and probably within 15 minutes after the onset of the bradycardia.

**248**  Dr. Van Aerde's opinion is unassailable and I accept it.

**249**  Dr. Kenneth Poskitt is a radiologist. He reviewed three head scans taken of Tianna at ages 3 days (CT scan), 2 years (MR) and at about 12 years (MR). Dr. Poskitt's February 17, 2015 report was entered into evidence without objection and he was not called for cross-examination. In his report he finds all three scans are consistent with Tianna having suffered an acute profound asphyxia at or very near to the time of her birth. I also accept and rely on his opinion.

**A. Legal Principles**

**250**  The parties agree on the governing legal test for causation that was established in, among others, *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. 9-12; *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 330; 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=) at paras. 16-17. The plaintiffs have the burden to prove on a balance of probabilities that "but for" the ***negligence*** of the defendants the injury would not have occurred. Causation does not need to be proven with scientific precision. It is a question of fact which relies on practicality and common sense.

**B. Analysis**

**251**  In my view, the uncontested evidence of Drs. Van Aerde and Poskitt are sufficient to meet the plaintiffs' burden. Dr. Van Aerde's report is entirely consistent with the evidence presented at trial. His evidence was not challenged and, as I have noted above, I find it reliable and credible. His ultimate opinion is that Tianna would have had "a much higher probability than not to have a normal brain with normal function if [she] had been delivered within 10 and probably within 15 minutes after the onset of the bradycardia." Dr. Poskitt's opinion confirms that the asphyxia suffered at birth is the cause of her cerebral palsy.

**252**  The defendants submit that the facts in the case do not support a conclusion of causation based on the evidence of what happened after the onset of bradycardia. They reconstruct time lines to support their position.

**253**  As I note above, it not appropriate to make definitive conclusions based on exact calculations of time. Common sense dictates that all clocks in a hospital are not perfectly synchronized. It is possible that medical staff refer to their own watches which might not be synchronized with each other, nor with hospital clocks. Common sense also dictates that in times of stress nurses and doctors may not be able to be completely accurate in writing down the time of certain events, especially in an urgent situation when it might be necessary to make a note a short time after an event. It is also true, that courts need to be careful when accepting people's estimation of times, especially during stressful or traumatic events. I was given no evidence upon which I could discount these common sense propositions. An analysis of timing is helpful, but I approach with caution any analysis that seeks to draw definitive conclusions about causation, based on suppositions of what might have happened.

***1. Timing in Relation to Nurse Marsh's Actions***

**254**  Tianna was born at 22:20. We know that Ms. Brodeur was moved from her room towards the operating room at 22:08. As discussed above, I found that Dr. Mujaibel entered the room at about 22:06 because her testimony was that Dr. Freedman was doing an ultrasound exam as she arrived.

**255**  Accordingly, Tianna was born within 14 minutes of Dr. Mujaibel making the call for an emergency caesarean section. She was clear that as soon as she walked in the room she made the decision to call the caesarean section based on how much pain Ms. Brodeur was in. The fact that she did a vaginal examination to confirm her diagnosis does not increase this timeline as asserted by the defendants. The evidence was that the nurses would have started the process of unplugging the equipment in order to move Ms. Brodeur to the operating room while Dr. Mujaibel was conducting a quick vaginal exam to confirm her suspicion of uterine rupture.

**256**  The defendants submit I cannot assume Dr. Freedman would have come right away if Nurse Marsh had called at 21:45. I disagree. There is neither any evidence before me nor any basis upon which a reasonable inference can be drawn that had Nurse Marsh made the appropriately urgent call at 21:45, Dr. Freedman would not have arrived as quickly as she did when the call went out at 21:54.

**257**  The partogram indicates that help was called at 21:54 and that Dr. Freedman was in the room at 21:56 to help. Looking at the strip, there is a notation that Dr. Freedman was in the room at 21:55. In any event, I find it reasonable to assume that Dr. Freedman would have arrived no later than 21:47 if Nurse Marsh had called for assistance at 21:45.

**258**  At 21:47, the strip starts to show variability in the FHR. This may be because Nurse Marsh was repositioning Ms. Brodeur. However, with another person in the room, it is more probable than not that a more accurate assessment of Ms. Brodeur's condition would have occurred.

**259**  As discussed above, the standard of care for a high-risk VBAC patient required Dr. Freedman to have a high degree of suspicion based on the report of unusual pain at 21:45. This means when she arrived, she ought to have done two things: (1) immediately called Dr. Mujaibel and/or Dr. Galerneau, and (2) investigate if she could rule out the suspicion of uterine rupture. Even if I assume that took two minutes (Dr. Freedman testified a vaginal exam could be done very quickly), Dr. Mujaibel would have been called at the latest at 21:49.

**260**  Dr. Mujaibel indicated she was running because she understood uterine rupture was a possibility. According to her testimony, Dr. Freedman told her she could not find the FHR. Based on the model above, it is not probable that Dr. Freedman would have made that same report [that she could not find the FHR] at 21:49. But Dr. Mujaibel was clear that the report of unusual pain was enough for an urgent call to be made. Nevertheless, I will assume she might not have rushed in the same manner, but taken a bit longer. Assuming she took five minutes to arrive, that puts her arrival at 21:54.

**261**  At 21:54, the fetal heart rate dropped to 60 bpm. I find that Dr. Mujaibel would have reacted to that, and made the call for an immediate caesarean section. This is consistent with her evidence that she based her decision to call a caesarean section upon seeing the amount of pain Ms. Brodeur was in when she walked in the room. The bradycardia would simply have made Dr. Mujaibel more confident in her decision. This means the surgery would have been done and Tianna delivered at 22:08. That is 12 minutes sooner than she was delivered.

**262**  Dr. Van Aerde's opinion was that the brain could have been normal for the first 10 and probably up to 15 minutes after the fetal heart rate dropped. The evidence as discussed above puts Tianna's birth within that time frame, and in my view, this analysis is sufficient to establish the facts upon which Dr. Van Aerde's opinion is based. I conclude the plaintiffs have established on a balance of probabilities that "but for" Nurse Marsh's negligent conduct, Tianna would not have suffered injury.

**263**  Nurse Marsh also put forward a timeline analysis to submit that the plaintiffs have not proven causation. I agree with the plaintiffs that most of this analysis fails to be persuasive because it is based on evidence that is not before me, or it requires me to speculate. I do not find any of the inferences Nurse Marsh has asked me to draw to be reasonable based on the facts I have found.

***2. Timing in Relation to Dr. Freedman's Actions***

**264**  Counsel for Dr. Freedman submitted that the evidence in this case is such that the plaintiffs' succeeding on the standard of causation is virtually impossible. They say an analysis of the timeline suggests Dr. Freedman's ***negligence*** would have saved at most, two minutes in the surgery. I do not find that analysis persuasive. Furthermore, the analysis above defeats that submission.

**265**  Counsel for Dr. Freedman assumed that time needs to be added for Dr. Mujaibel to have done her own assessment of the patient. However that is not in keeping with the evidence because she testified that she made the call for the caesarean section immediately and did the vaginal exam after, in order to verify that diagnosis. There is no evidence that the vaginal exam she conducted delayed going to surgery because I have inferred, as is consistent with the evidence, that the nurses would have started the preparations for moving the patient while she was doing the exam.

**266**  The defendant constructed a timeline starting at 21:54. I agree with the plaintiffs' written summations in response to that:

Had Dr. Freedman acted in accordance with the standard of care expected of her, meaning had she acted more promptly to the clear signs and symptoms of uterine rupture which were presented to her, the evidence indicates that Dr. Galerneau or Dr. Mujaibel would have been called within a minute of her arrival (i.e. - by 21:56 hrs) ...The stat caesarean section would have been called at that time and delivery would have been effected within 12 minutes. Even if that took us slightly over the 22:09 "deadline" [from Dr. Van Aerde's report], there is no doubt that the delays caused by the ***negligence*** of Dr. Freedman contributed to the injury suffered by [Tianna] and, on that basis, she is liable for all the damages associated with this indivisible injury.

**C. Conclusion**

**267**  For all those reasons, I find that the plaintiffs have established on a balance of probabilities that, but for the ***negligence***, Tianna would not have suffered her injury.

**IX. DAMAGES**

**268**  The parties agreed that if I concluded any of the defendants were negligent, the following represent appropriate awards, and I so order:

1. non-pecuniary damages in the amount of $363,200;
2. damages for income loss in the amount of $1,000,000;
3. damages for loss of interdependency in the amount of $221,638; and
4. damages for speech language pathology in the amount of $125,000.

**269**  The parties also agreed that the amount of the Ontario Hospital Insurance Plan claim is $7,817.57, and the amount claimed pursuant to the *Health Care Costs Recovery Act*, *S.B.C. 2008, c. 27* is $54,577.07. I make those awards.

**270**  The items in dispute are damages for the cost of future care and both the entitlement and quantum of special damages.

**A. Legal Principles Relating to Cost of Future Care**

**271**  *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=) remains a leading case about cost of future care damages. More recent cases also describe the applicable legal test, including *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, *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. 55, and *Joinson v. Heran*, [*2011 BCSC 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S21H-00000-00&context=) at para. 420. The Court of Appeal repeats the test 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=) at paras. 62-63:

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.

**272**  The Supreme Court of Canada emphasizes that the plaintiff must be given the "full measure" of her loss but that the award should not transform the injury into a windfall: *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=) at 962. As an aid to determining the appropriate amount, Justice Dickson states the court must ask whether a right minded person would consider the expenditure to be a squandering of money: *Thornton v. School Dist. No. 57 (Prince George) et al.,* [*[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 280-81.

**273**  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. 151, the court discusses the distinction between medical justification and medical necessity, noting the plaintiff need only prove the former to succeed:

The distinction between medical justification and medical necessity is that the former requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact. The latter test, necessity, would require the court to impose some standard other than reasonableness by asking not whether the expense is a reasonable one, but rather, whether there is any way in which it might be avoided. The latter test is inappropriate. It would impose upon the victim of an accident to be content with a state of affairs other than that which he or she would have occupied had they not been injured.

**274**  While expert evidence is necessary to establish the costs of future care, it need not be from a physician. The court must be satisfied, however, that an evidentiary link exists between a physician's assessment of pain or disability and the recommended treatment and care: *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.

**275**  Lastly, it is well settled law that in determining future events, the evidentiary burden is whether the plaintiff can prove there is a "real and substantial" possibility the costs will be incurred, rather than a balance of probabilities: *Athey v. Leonati* at para. 27.

**B. Tianna's Early Years**

**276**  Tianna's older sister, Ms. Breanne Brodeur (to avoid confusion with references to her mother, I will refer to her as Breanne and I intend no disrespect in doing so), their father, Mr. Brodeur, and Ms. Brodeur all testified, describing Tianna and what it is like to spend time with and care for her.

**277**  Tianna spent her first month after birth hospitalized. From birth, she needed to be fed through a tube. Her father became familiar with operating the tube and was responsible for feeding her during the night once she was discharged from the hospital. Each feeding required about 15 or 20 minutes because a pump had to be operated since she had not developed a gag reflex.

**278**  At about six months of age she received a G-tube which delivered nourishment directly to her stomach. Mr. Brodeur recounts how, despite this, they would always try to see if Tianna could take a bottle and at most she would take a very small amount: only about one or two teaspoons. He said that at about 15 months of age, Tianna spontaneously was able to drink an entire bottle without incident. He said it was as if a switch had been turned on. Up until that point, he estimates that he was getting at most two or three consecutive hours of sleep each night because of the frequency and length of feedings Tianna required.

**279**  Tianna was between 3 and 3 1/2 years old when she began speaking with short and simple sentences. She did not start walking until about 4 1/2 years old. Tianna was not toilet trained until about age 5 or 6. In kindergarten and grade one, Tianna had a teaching assistant assigned exclusively to her to assist with toileting, homework and even carrying her backpack. After grade one, the teaching assistant had other students, so Tianna no longer received one-to-one care.

**280**  Breanne recalled often being called out of class during elementary school to help calm Tianna. Tianna did not enjoy school and would sometimes have fits which could only be addressed by her sister sitting with her. In other respects, Breanne described her sister as having a fun and energetic personality. She said that Tianna talks a lot and they are close, spending a great deal of time together.

**281**  Ms. Hicks provided much needed respite but in early 2010, Ms. Hicks moved back to Thunder Bay. Both parents testified that they depended on Ms. Hicks to assist with Tianna's care, and therefore they felt it was necessary for Ms. Brodeur and her daughters to relocate to Thunder Bay. By this time, Mr. and Ms. Brodeur had separated and he remained in Vancouver to work. He was planning on moving to Thunder Bay, but not until he could sell the family home.

**282**  Breanne testified that after the move to Thunder Bay, before Mr. Brodeur arrived, Tianna was experiencing more fits at home and at school; this was a very stressful time for Tianna. According to Breanne, Tianna never fully adjusted to living without her father. Tianna has always been very close to him and Breanne described her as a "daddy's girl". As a result, Mr. Brodeur moved to Thunder Bay sooner than he planned, having to pay a penalty on the mortgage. He found a house in Thunder Bay that is about a seven minute walk away from Ms. Brodeur's house.

**283**  Tianna's parents both agreed that they have shared in her care over the years and that Breanne and Ms. Hicks have also contributed to Tianna's upbringing. Because of Ms. Brodeur's illness, Breanne has provided the majority of Tianna's care with respect to daily tasks for a number of years.

**C. Tianna's Current Functioning**

**284**  Tianna has always lived with her family. Currently, she lives with her mother during the week and with her father on the weekends. No party contested the fact that Tianna cannot live alone. She is not capable of any kind of planning and tends to live day-by-day, making decisions on the spur of the moment. She does not respond well to any change in her circumstances. Her family members testified that she is rarely left home alone because they are worried about her safety.

**285**  Breanne assists Tianna's getting ready for school, especially during those times when their mother is ill and unable to do so. Breanne helps her wake up and assists with dressing. Tianna lacks the fine motor skills that would allow her to fasten buttons or clasps (such as on a bra).

**286**  Tianna can shower on her own, but has to be reminded to clean up after herself after a shower. She needs constant reminders to take care of her hygiene including brushing her hair and brushing her teeth. Mr. Brodeur commented that even when Tianna has been told to take a shower and does so, she will sometimes forget to wash her hair and she will have to go back to do that. He is concerned about Tianna's difficulty with her hygiene as she becomes older and needs greater privacy. In addition to needing assistance with these things because of her physical limitations, it takes Tianna a longer time to get ready than normal.

**287**  While she can make her own simple breakfast and lunch, Tianna does need to be reminded to clean up. She can do laundry but has difficulty separating different colours.

**288**  Fortunately Tianna's difficulty with tasks requiring fine motor skills does not impede her ability to use a computer. Everyone agrees that Tianna has excellent computer skills, can type easily and enjoys being on the computer. She also loves music and often listens to her iPod.

**289**  The two girls are in the same school and Breanne sees her sister every day. Breanne testified that Tianna may get lost and has difficulty remembering where her classes are at school. This makes the start of each school year especially stressful because Tianna has to get used to a new routine.

**290**  Tianna does not make friends her own age at school, but does develop close relationships with some of her teachers, and she is particularly close with the school counsellor, Ms. Honeysett. Ms. Honeysett testified and described her observations and impressions of Tianna's behaviour. According to her, Tianna gets agitated and frustrated very often, and can easily dissolve into tears. Tianna has had difficulties with personal hygiene to the extent Ms. Honeysett has had to intervene and ask Ms. Brodeur to bring clean clothes to school for Tianna. Tianna does not interact with her peers and gravitates towards adults. In Ms. Honeysett's view, Tianna succeeds best when clear expectations and parameters are set for her, and she has a relationship with the teacher. Even then, she needs constant reminders. Ms. Honeysett testified that even after two years, Tianna has to be reminded that she cannot simply walk into Ms. Honeysett's office without knocking first.

**291**  In terms of her academic achievements, Ms. Honeysett explained that it is expected Tianna will graduate in June 2017 with a high school diploma from a special stream, which is a program designed for students with cognitive deficits. The school attempts to integrate the students from that stream into the main stream but special instruction is provided for some subjects to accommodate those students' different needs. The expectation for graduation from this stream is that the student will achieve about one half of the credits compared to students in the regular stream. Tianna has already achieved that goal. Although these special streams do allow students to stay in school up to age 21, Ms. Honeysett has not seen many students who have stayed that long.

**292**  The girls took the bus to school together, although Tianna leaves the house earlier than Breanne because it takes her longer to walk to the bus stop. Breanne watches from the window because she worries whether Tianna checks for traffic when crossing the road.

**293**  Tianna's balance is compromised. At school she has a key to the elevator so she does not have to use the stairs, but the evidence was that she does not use it often. Mr. Brodeur and Breanne commented that Tianna usually only goes up or down stairs while holding railings on both sides. She has sometimes tripped but fortunately has not injured herself. She stumbles or trips easily because of her disability, even when walking on a level surface.

**294**  Tianna enjoys swimming, but Breanne does not feel she is able to be in the pool by herself, especially in the deep end. Therefore Breanne always accompanies Tianna to the swimming pool which fortunately is close to their home. For a time the girls were in Girl Guides, but as Breanne is older she moved on to a different group, and Tianna did not continue because she could not be with her sister. Breanne tries to encourage Tianna to use a gym during the time of year when the pool is closed, but she has not had much success at doing so.

**295**  Tianna also has certain unique movements. When she gets excited or anxious she will flap her arms quickly, often for very long periods of time. On some occasions she will rub her legs constantly. Mr. Brodeur and Breanne also commented that when Tianna is upset, she has a tendency to grab and throw things; Mr. Brodeur said Tianna has gone through a lot of laptops, phones and other electronic equipment because of this. Ms. Brodeur testified that Tianna continues to have tantrums, especially when she does not get her own way.

**296**  In terms of her cognitive abilities, Breanne testified that Tianna has difficulty with homework and other tasks. She has difficulty remembering what she needs to do or whose job it is. Tianna also has some challenges speaking clearly. Breanne finds that she has to interpret Tianna's speech even at school because people have difficulty understanding what Tianna is saying.

**297**  Tianna's family have not ever sought out any kind of behavioural management counselling for Tianna despite an incident that could be viewed as very troubling. When Tianna was having difficulty adjusting to a new school year, Breanne witnessed Tianna making motions as if she was cutting herself with a razor. Fortunately she had been unable to remove the plastic cover, or perhaps was simply unaware of it. That was the only incident where she has tried to hurt herself.

**298**  The plaintiffs point to another troubling incident. Breanne testified that the family originally planned on leaving Tianna with her grandmother in Thunder Bay during the trial. They changed their mind, and Tianna came with the family, but her behaviour has caused significant concern. Apparently Tianna overheard a discussion about surveillance of her in relation to this litigation. Breanne said that Tianna became extremely upset and paranoid, believing that she is being constantly monitored. She has been "freaking out" and saying that people are possessed by demons; she had hallucinations, and had been screaming, pushing and saying extreme things like wanting to kill somebody because they killed her family. Breanne testified Tianna had been admitted into the psychiatric ward of BC Children's Hospital.

**299**  Breanne's testimony was the only evidence about this extreme behaviour, even though her mother and father testified after her. The description of Tianna's behaviour is a marked departure from all other descriptions of her emotional or cognitive challenges. Experiencing hallucinations and being paranoid about demons and surreptitious monitoring, appears to fall on a completely different plane from the deficiencies noted in Tianna's judgment or planning skills. They may be indicative of serious psychiatric issues.

**300**  Although I have no reason to doubt Breanne's credibility, I am cautious about this evidence for three reasons. First, it is behaviour that even Breanne admitted must be related to the experience of being away from home in what must be a strange and unfamiliar atmosphere, at a time when, understandably, the people around her may be feeling some stress from the litigation. Given the description of Tianna's difficulty with changes in routine, it would be surprising if the change in location did not manifest in her behaviour in some way. Although extreme, that suggests it is an isolated event. Secondly, although Breanne's description was quite vivid ("hallucinations", "demons", "freaking out"), it is difficult to put those comments in context when there are no other descriptions. I accept that Tianna exhibited behaviour confirming emotional upheaval and upset by travelling to Vancouver, but I am not convinced this particular testimony has any relevance beyond that. Third, as indicated above, despite Tianna's cognitive and intellectual challenges, the family has never sought out counselling for Tianna related to psychological or mental health issues. Without having that exposure, it is possible that Breanna's descriptions do not match how a psychological counsellor or professional would describe the behaviour. For all those reasons, I find it very difficult to rely on this evidence.

**D. The Family's Wishes for Tianna's Future**

**301**  There is no dispute that the levels of Tianna's developmental and cognitive abilities make her vulnerable. Her family testified they are very concerned that she could be taken advantage of and, in particular, as she is now a teenager, that she could be mistreated sexually. These are valid concerns which must be taken into account with respect to any award of future care damages.

**302**  Both parents testified that they want Tianna to live with them until they are no longer able to care for her, at which time they agreed and understood Tianna would live with Breanne. Breanne confirmed that she would always have Tianna in her life and any of her own future plans regarding a family or career, would take into account what is best for Tianna. She would expect any future life partner to accept Breanne's desire to care for Tianna.

**303**  Mr. and Ms. Brodeur testified that they do not want Tianna to live in a group home, particularly because they worry about her vulnerability living with strangers, although there was discovery evidence that contradicted this testimony. But all family members also agree that Tianna is in need of friends and is often lonely.

**E. Evidence about Care Available**

**304**  I heard testimony from four witnesses with regard to what living and care options are available for adults with disabilities in Ontario, and specifically Thunder Bay: Susan Fraser, Michael Manula, Lisa Foster and Rick Menassa.

**305**  Ms. Fraser is the area director for Bayshore Home Health in Thunder Bay. She has worked in different roles for the company for 16 years, but has been area director for the last 10. Bayshore is the largest home care provider in Canada and is externally audited every three years for its compliance with international standards.

**306**  Ms. Fraser described Bayshore's services as client-focused. In-home assessments are done once a year to assess clients' needs. In Thunder Bay, Bayshore serves between 800-900 clients. They have 125 front-line support workers which includes registered nurses, licensed practitioner nurses, personal support workers (PSW), development support workers (DSW) and home support workers (HSW). These categories of workers have different skills which dictate the types of clients to whom they can provide care. DSW are specifically trained to work with people with development disabilities; PSW and HSW do not have this specialized training. DSW can also find or plan recreational and social activities which are designed to help clients progress. Ms. Fraser noted that Thunder Bay currently suffers a shortage of support workers.

**307**  Mr. Manula has been the executive director of the Lutheran Community Care Centre since August 1983. That organization provides social services at the community level. He described what has emerged as the new model of government-funded support for people with disabilities. The Lutheran Community Care Centre is a central access point for government funded services for Northern Ontario and has been since July 2011. It provides information about government services and funding, and confirmation of eligibility. Services are provided by agencies that enter into service contracts with the provincial government. The government remains responsible for setting the quality of services to be provided, but does not provide care directly. The eligibility criteria are also set by legislation.

**308**  People are now assessed individually and receive funding depending on their level of need. They are provided with a "passport", and they decide how to utilize it for the type of support care they receive. Passport funding ranges from $2,000 to $35,000 per year.

**309**  Applicants are interviewed to assess what type and level of support is needed. Clients do have input into the assessment. The interview is conducted by trained assessors and is comprehensive, taking three or four hours to complete. Eligibility for services is based on the thresholds set by legislation for cognitive abilities and adaptive functioning.

**310**  While care is available upon turning the age of 18, individuals are able to start the application process at age 16. Mr. Manula acknowledged there is a waiting list for services, although clients can be on a number of different waiting lists at the same time. Also, clients' positions on the wait list are determined by the level of support needed, and not by the date they applied. He confirmed there is no means-testing to be eligible.

**311**  Ms. Foster has been executive director of Community Living in Thunder Bay since July 2013. She has been a front line support worker in group homes for 15 years and is currently undertaking DSW training. Community Living currently oversees 26 group homes in Thunder Bay, but consistent with Mr. Manula's testimony, Community Living's philosophy is shifting from group living towards community supports. Thus, if a group home is closed, it is not replaced.

**312**  Ms. Foster stated that Community Living is unable to guarantee that the occupants of any group home would be exclusively female, nor are residents able to choose their own roommates. In general, she was critical of the quality of care provided in group homes and recounted certain "horror stories" of inadequate care. I am concerned that her testimony may have gone beyond providing facts and observations and may have been tainted by a bias against group home living, and I therefore approach it with caution.

**313**  Lastly, I also heard testimony from Mr. Menassa who has been the president for four years of iCare Home Health Care. This organization is located in Oakville but offers servicers throughout the province of Ontario. It is in the process of being accredited. Given the lack of current accreditation, and the fact that iCare has never provided services to clients that live in Thunder Bay, I do not rely on his evidence in terms of assessing future cost of care.

**F. Expert Evidence**

**314**  As noted above, the parties have agreed on the quantum for certain items. Because of that I will not summarize or describe the expert evidence which supports those items.

**315**  The following expert evidence was tendered by the plaintiffs:

1. Dr. Jacqueline Purtzki is a specialist in pediatric and adult physical medicine and rehabilitation and she provided an expert report dated June 4, 2015. She was not cross-examined on her report.
2. Dr. Michael Joschko has a Ph.D. in psychology and is a registered psychologist specializing in clinical psychology and neuropsychology. He provided a report dated May 4, 2015, a supplemental report dated May 19, 2015 and a responding report dated July 24, 2015. He did not testify.
3. A "Home Accessibility Report" dated June 16, 2015 was prepared by David Wallace. He is Vice-President of "Adapt-Able Design Group". His report was accepted into evidence and he was not required to testify.
4. Karyn Drewnowsky is a registered physiotherapist and Certified "Life Care Planner". She submitted a "Life Care Plan" for Tianna dated June 13, 2015. She also prepared a report dated July 29, 2015 which responded to one of the defendants' expert's reports. She testified and was cross-examined.
5. Marla Rosenfeld is an occupational therapist. She completed a functional assessment of Tianna on March 16, 2015 and her report dated June 9, 2015 was accepted into evidence. She too was cross-examined.
6. Darren Benning is an economist and he provided three reports; he did not testify.

**316**  The following expert evidence was submitted on behalf of the defendants:

1. Scott Puddicombe prepared a report reviewing the Home Accessibility Report of Mr. Wallace dated July 22, 2015, and an updated report dated August 6, 2015. He did not testify.
2. Dr. Jo-Anne Finegan has a Ph.D. in psychology and is a clinical psychologist. She prepared a report dated January 14, 2015 and a supplementary report dated July 20, 2015. She was cross-examined.
3. Sandra Vellone is a certified rehabilitation counsellor. She prepared a report dated June 19, 2015 based on an in-home interview and assessment she conducted of Tianna on October 27, 2014. She also prepared a letter dated July 28, 2015 which responded to Ms. Drewnowsky's report. She testified.
4. Douglas Hildebrand is an economist who prepared a report dated September 15, 2015. He did not testify.

**317**  The defendants submit I ought to place little or no weight on Ms. Rosenfeld's evidence because her opinions were not consistent with the plaintiffs' medical experts (Dr. Purtzki and Dr. Joschko) or testimony from Tianna's family members.

**318**  I agree I must approach Ms. Rosenfeld's evidence with caution. In particular, in her report, she opined that Tianna would need daytime supervision but she testified that Tianna needs 24 hour "awake" care. This is a dramatic change in her opinion from her written report, and I was not satisfied that she explained what led her to change her opinion. Moreover, the family's evidence did not support a finding that Tianna requires overnight awake care; there was no suggestion that any family member stays awake all night while living with Tianna. In my view, this recommendation is unfounded.

**319**  The defendants also say that Ms. Rosenfeld put little thought into her plan because it was based not on an analysis of what was required to address Tianna's situation, but merely on a gross number of hours needing a support worker. In that way, her opinions were not tailored to the evidence at trial. The defendants also point to Ms. Rosenfeld's statement in her report that Tianna experienced an "increased frequency" in falls and that she "repeatedly" fell in the bathtub. Those observations did not appear in her notes, nor were they supported by the family member's testimony. Given these examples, I do not have confidence that Ms. Rosenfeld's opinions are reliable and I reduce the weight I attach to her evidence.

**320**  The defendants also point to things in Ms. Drewnowsky's evidence that they say establishes she was acting as an advocate. I am not persuaded that she overstepped her role as an expert, but I agree her opinions did sometimes come close to advocate for the plaintiffs. I approach her evidence with some caution.

**321**  The plaintiffs did not suggest any overarching concerns with the defendants' experts and I found their evidence to be relevant and reliable.

**G. Cost of Future Care**

**322**  Rather than summarize the expert's evidence at length, I prefer to first identify those facts relevant to assessing the cost of future care on which the parties agreed, or which I find have been established on a balance of probabilities based on both expert and lay witness evidence.

1. Tianna's life expectancy is 72.5 years.
2. Tianna will never be able to live independently. She is vulnerable to being taken advantage of financially, emotionally and physically, including sexually.
3. Tianna will never be competitively employed.
4. Tianna cannot manage her own finances except for small purchases.
5. She will always need help with some aspects of her daily, personal care including getting dressed, grooming, personal hygiene and eating habits.
6. She will need some type of physical therapy to address issues with her fine and gross motor skills.
7. She is able to perform some basic housekeeping chores such as making light meals for herself and doing some laundry. She does not need help manoeuvring in her own home except for grab bars in the tub and relying on rails while on stairs.
8. With regard to her cognitive capacity, she has a mild intellectual disability but she is functionally literate. She is computer literate.
9. With regard to psychological adjustment, Tianna has difficulty with emotional and behavioural self-regulation; she is disinhibited and impulsive and responds very poorly to stress and adversity. She easily becomes overwhelmed.
10. Her adaptive functioning is poor as a result of both her poor psychomotor skills and intellectual deficits.
11. She has only basic social communication skills and has difficulty with complex social communication that will probably lead to frustration and anxiety as she gets older. These difficulties may increase over time.
12. She would benefit from increased socialization and recreational activities, but they must be introduced gradually in a way that she can handle. She is not capable of initiating this or finding out what is available.
13. She will never be competent to drive and would not be safe taking public transit unaccompanied.
14. It would be beneficial for her to remain living with or very close to her family, so long as that does not impair her ability to get support to gradually improve her level of independence, socialization and community engagement.

**323**  The expert evidence was divergent on some important facts that impact the level of care Tianna will need. The most significant difference is the plaintiffs' submission that Tianna cannot be left unsupervised at any time, including overnight. This is based on Ms. Rosenfeld's testimony, whose evidence I approach with caution as discussed earlier in this decision, and Dr. Purtzki's report. But the plaintiffs' position is not supported by Dr. Joschko's evidence. In his first report, he opined that it is unlikely "from a neuropsychological perspective that Tianna will need full time, one-to-one supervision" and that she can safely be left on her own. In a subsequent report, however, he answered "no" to the following two questions: 1. "Is it safe for Tianna to be unsupervised during the day?", and 2. "Is it safe for Tianna to be unsupervised during the night?" He does not explain how he reconciles his answer to the first question with his opinion in his original report. In my view, the two statements are congruent if we assume that supervision does not mean "one on one", vigilant supervision, but the assurance that a responsible adult is available to monitor Tianna. This fits with the fact that Dr. Joschko emphasized the importance of making sure doors and windows are locked for night time supervision.

**324**  As to Dr. Purtzki's opinion, I agree with Dr. Mason's interpretation that she simply assumed that level of care was necessary rather than conducting her own analysis. Even if she had, however, I find Dr. Mason's opinion that Tianna "requires a supervised and assisted environment, but not one-to-one care" to be compelling. This is the only conclusion that is consistent with the rest of the evidence. There was no suggestion that a family member stays awake all night to supervise Tianna. I conclude the recommendation for 24 hour awake care is unreasonable and unfounded.

**325**  There was also a disagreement about Tianna's executive functioning. Dr. Joschko concluded that Tianna exhibits poor motivation which is not reflective of noncompliance or disinterest, but simply that she has "difficulty getting started". Dr. Purtzki's findings were consistent with this observation. But Dr. Finegan questioned whether Tianna's low motivation and effort are related to her injury. She said those types of symptoms ought to have been seen early on, whereas Tianna's school history was not consistent with that conclusion. Dr. Finegan also concluded that Tianna did not put her best effort into some of the tests administered by Dr. Finegan.

**326**  I am not satisfied that Dr. Finegan's single observation of poor engagement can be determinative that Tianna's brain injury is not responsible for deficits in initiative and motivation. There is evidence from other experts and lay witnesses to support a finding that Tianna genuinely has difficulty with the initiation of tasks and staying focussed. Also Dr. Finegan's assumption about Tianna's functioning is based on report cards which do not present a complete picture of Tianna's functioning.

**327**  I also do not rely on Dr. Finegan's statement that "[l]ittle is known about the executive functions" of people with cerebral palsy. She suggested that studies were inconclusive with respect to the impact of that condition on memory, communication and visual perception and functioning. Both Dr. Purtzki and Dr. Joschko opined specifically on Tianna's characteristics rather than referring generally to studies of people with cerebral palsy. Dr. Finegan's statements about executive functioning are not opinions based on Tianna's circumstances and I do not rely on them. I find that Tianna does have executive function deficits related to her injury that should be recognized in any award for cost of future care.

**328**  The parties also disagree about whether Tianna needs counselling. Dr. Joschko opined Tianna "may have more difficulty than the average person in coping with unpredictable future adversity, although serious problems requiring professional support are not an inevitable outcome and cannot be predicted with certainty." In his opinion, Tianna demonstrates "poor psychological resilience". This accords with the evidence at trial about how difficult it was for Tianna to adjust to new living arrangements and a new school. While that conclusion was not controversial, the parties disagreed on the mode of addressing it. Dr. Joschko also said Tianna was "mildly depressed" and that her self-esteem and social skills could be improved by psychotherapy.

**329**  I do not find there is sufficient evidence to demonstrate Tianna has psychological or mental health problems causatively linked to her birth injures. Mental health disorders cannot be casually diagnosed and unlike her other physical and cognitive characteristics, there was not a consistent history supporting Dr. Joschko's opinion.

**330**  I agree with Dr. Finegan who made the obvious point that "psychotherapy is unhelpful in those with limited insight, poor self-awareness, and weak capacity for abstraction and generalisation." Her opinion accords with common sense. She also stated that in her experience, "self-esteem and social skills cannot be addressed in a vacuum, or in the abstract", but need "real life interventions" by engaging in recreational and social groups. In her view, once Tianna's social contacts increase, her mood and self-esteem will naturally improve. I find Tianna does not have a psychological or mental health condition. In my view, the evidence falls short of demonstrating counselling sessions can be reasonably justified for Tianna.

**331**  Dr. Purtzki concluded that Tianna met the criteria for "secondary" or acquired Attention Deficit and Hyperactivity Disorder, and on that basis she recommended a trial of medication to treat that condition. Dr. Purtzki is a physiatrist. I am not satisfied her opinion is sufficient evidence to conclude Tianna has ADHA and requires medications. Nor is there any evidence to support a conclusion that if she has ADHD it is sufficiently related to the injuries she sustained at birth to require compensation.

***1. What model of care is most appropriate for Tianna?***

**332**  The parties disagree whether I should base an award for future care premised on group home or shared living, or living with her family with community supports.

**333**  In my view, group home living is not a viable option. I am not satisfied a suitable group home would be available for Tianna when she would be ready for that life change given the evidence that government-funded care for people with disabilities in Ontario is shifting away from the philosophy of group care. Ms. Vellone recommended this option primarily to increase the socialization and community engagement for Tianna. All experts agreed that is an important goal for Tianna. However, I am satisfied those concerns can be addressed in other ways. Furthermore, given Tianna's vulnerabilities and cognitive deficits, there is a legitimate concern whether a group home would be safe for Tianna.

**334**  I also place importance on the fact that Tianna's family want her to live with them. Breanne testified that she plans to have a family, but that any potential partner will have to accept that Tianna will be integrated into their life. Breanne is still very young and it is not unreasonable to think that view may be modified to some degree in the future, but I am satisfied that Tianna's family will remain closely involved in Tianna's care and life.

**335**  I also agree with the plaintiffs that the evidence does not support the option of Tianna living with roommates with similar care needs or interests from age 21. Although Dr. Finegan recommended that arrangement, I note that Ms. Foster and Mr. Manula testified that in their experience, today's youth prefer to live with their families, or at least in a family setting. Another consideration is that even if it could be established that there is a real possibility Tianna would, for a period of time, live with other developmentally delayed adults, it is not clear there would be a reduction in her care costs; in fact, they would likely increase.

**336**  The goal of assessing an amount for future care is to make sure the plaintiffs will have the means to provide a living environment for Tianna that approximates as close as possible what she would have enjoyed but for the injuries she suffered at birth. I agree with the defendants that it is likely Tianna will live with her family with support. But I do not think it is realistic to assume that arrangement will be in place for the entirety of Tianna's life. It is common for elderly people to live in care homes and given the challenges Tianna will continue to have, I find it is reasonable to assume in her later years, Tianna will be placed in a care facility. The evidence was unclear about the viability and availability of elderly care homes for people with disabilities so it is possible she would need support if she were to live in that environment.

**337**  Taking all these factors into account, Mr. Justice Sigurdson's comments in *Kahlon v. Vancouver Coast Health Authority*, [*2009 BCSC 922*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0DV-00000-00&context=) at para. 385 are apposite. He noted that "the reality is that the care that will be provided for [the plaintiff] will be an amalgam of all of the options that were discussed in the evidence." I find that some combination of living with her family, with attendant care and elderly care home is the most likely scenario.

**338**  The plaintiffs seek $400,000 for accessible housing based on an assumption that she would buy her own home, but would need extensive renovations to accommodate her disabilities. They concede it is reasonable to assume she would have bought her own house but for the accident so that the purchase price is not compensable. They claim an amount they say represents only renovations. The amount is also based on recommendations that she requires separate rooms for exercise and homework and accommodations in the kitchen. None of these are medically justified. The only home renovations that are supported by medical evidence are the grab bars in the tub or shower and hand rails for stairs.

**339**  Furthermore, I agree with the defendants' position that the case law does not permit awarding funds to buy the plaintiff a capital asset because of the possibility that amounts to over-compensation (*Greenhalgh v. Douro-Dummer (Township*), [*[2009] O.J. No. 5438*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JKHB-632K-00000-00&context=) (S.C.)) or enrichment that is not justified (*Fullerton (Guardian ad litem of) v. Delair et al.*, [*2005 BCSC 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S18N-00000-00&context=)). It is important to keep in mind that compensation is for "the pecuniary loss aspect of the cost of future care" and not "the non-pecuniary goal of providing solace": *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. 120.

**340**  In light of that, the defendants submit that a contingency amount for renovations in the amount of $50,000 is reasonable; I agree.

***2. Should the cost of future care be reduced to account for government funding?***

**341**  The parties disagree on whether a contingency should be applied to any award for cost of future care on the basis that there will be government funding available for people with developmental disabilities. The plaintiffs submit that the court should not take into account government-funded programs because there is no guarantee they will exist in future, or not be cut back.

**342**  The plaintiffs point to the evidence there are significant wait lists for government funded support and services in Ontario and only limited funding is available. They also suggest that the supports are discretionary in nature, and the limited pool of funds available is insufficient to provide all necessary supports. They submit that the law does not require plaintiffs to "make do" with government subsidized care and only receive compensation that falls outside of the "system": *Cojocaru (Guardian Ad Litem) v. British Columbia Women's Hospital*, [*2009 BCSC 494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M217-00000-00&context=). That is true but the defendants are not suggesting government funding would replace compensation, only that there should be an adjustment for that contingency.

**343**  The plaintiffs rely on *Fullerton (Guardian ad litem of) v. Delair*, [*2006 BCCA 339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G35C-00000-00&context=) in which the Court of Appeal found that no deduction to compensation could be made for a government service entitled, "At Home Program". The defendants say the case is distinguishable and I agree. The "At Home Program" considered in *Fullerton* had a proviso that funding could be eliminated or reduced if damages were awarded. There was no evidence that this is a feature of the current Ontario scheme.

**344**  The defendants point to the principle that damages must be assessed once and for all at the time of trial, and adjustments are appropriate for the contingency that the future will differ from the evidence: *Krangle* at para. 21. The defendants rely on *Ediger v. Johnston.* The court held it was appropriate to take into account that the plaintiff may live in a group home environment (provided by Community Living BC) and applied a contingency to recognize that "a reasonable method of cost-sharing will arise in the future, and the portion of the award reflecting the cost of [the injured infants'] future attendant care" should be reduced (at para. 261). In *Forde v. Inland Health Authority*, [*2010 BCSC 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-201B-00000-00&context=), the court held government benefits must be taken into account if they are available regardless of tort compensation. This assures there is no double recovery. The defendants also submit the evidence demonstrates a substantial possibility that Tianna will be eligible for Passport funding.

**345**  I agree with the defendants' position. Based on the evidence I have heard, I am persuaded that whatever criteria is legislated, Tianna would be eligible given the undisputed evidence that she cannot live alone and will need support for the rest of her life. Mr. Manula testified that current funding ranges from about $2,000 to $35,000 per year and there is no means-testing. The defendants submit Tianna is likely to receive something above the minimum.

**346**  Accordingly, I conclude a contingency must be applied to reduce the amount awarded for cost of future care to account for the likelihood Tianna will receive government benefits. The defendants did not make submissions on the amount of the contingency or the method of calculating or applying it, which leaves the court in a difficult position. Based on the only evidence available to me (Mr. Manula's description of the range of funds available) I find that it is reasonable to reduce the award for attendant care by an amount of approximately $10,000 per year based on the likelihood that Brianna will receive government benefits whether through direct financial payments or access to programs.

**H. Damages Awarded**

**347**  With the preceding comments in mind, I turn to the specific heads of damages claimed. I am mindful that my determination must be based on the evidence at trial but with regard to quantifying future losses, I am not obliged to "[assign] percentage probabilities to ... estimates of the likelihood of certain events and ... take the step of expressly discounting the award by a percentage amount to reflect contingencies": *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 53.

**348**  Therefore, I explain the formula I considered in determining quantum but that explanation is not necessarily accompanied by precise calculations. As to determining the present value for future losses, no party suggested I could not rely on the expert evidence of Mr. Benning or Mr. Hildebrand; nor did any party provide oral submissions on the reliability of their evidence. I have consulted both reports, particularly the multiplier tables, and used multipliers that are roughly an average of their figures to calculate the present value of some of the future care costs.

***1. Attendant Care***

**349**  I find Tianna will need attendant care for the rest of her life but as noted above, I reject the plaintiffs' position that she needs 24 hour care. I find the plaintiffs' experts' recommendations are excessive not only in the amount of hours, but also the level of care.

**350**  In terms of the level of care, I acknowledge that Ms. Rosenfeld recommended the award for attendant care include the cost of rehabilitation support workers (RSW). That recommendation is not justified by the medical evidence. The plaintiffs' expert, Dr. Joschko, opined that Tianna will be capable of some level of independence and that obviates the justification for RSW. I rely on the opinions of Ms. Vellone and Ms. Drewnowsky that DSW will be able to provide adequate support if guided by professionals such as an occupational therapist.

**351**  Overall, I prefer that aspect of Ms. Vellone's model which recommended an amount for some hours of DSW care and near-daily PSW support during the week until Tianna is 21. Because I am not persuaded that there is a real and substantial possibility that Tianna will enter into a shared living arrangement at age 21, I conclude the award should be based on supported care for most of the rest of Tianna's life. Ms. Vellone conceded that she failed to account for the higher wages that will have to be paid for statutory holidays and that should be added. Ms. Vellone did not appear to calculate PSW time for when Tianna lives with her father. In my view, this is necessary because it may no longer be appropriate for Mr. Brodeur to be assisting Tianna with dressing, grooming or hygiene. Ms. Vellone then calculated PSW hours per week.

**352**  In awarding compensation for attendant care, I take into account a number of contingencies that I find were proven likely on the evidence. The most significant contingency is the likelihood that in her senior years, Tianna will need to live in a care home but perhaps with attendant care. The evidence was clear that type of care would be more expensive than Tianna living with her family with attendant care. I also do not find it likely that Tianna will remain in school until age 21 so the award is based on attendant care starting immediately.

**353**  In terms of negative contingencies, I find it reasonable to take into account that while Tianna lives with her family, there will be times (perhaps over Christmas holidays) that support workers may not be hired for the same amount of time because the family wants to enjoy time together with less disruption. I also find it reasonable to acknowledge that Tianna, like any person, will want some "downtime" such as she currently has when in her room listening to music or being on her computer. These factors support a downward adjustment.

**354**  I award $3,000,000 for attendant care. I am satisfied that this award will, to the greatest extent possible, place Tianna in the same position as if she had not been injured. The amount is based on approximately 10 hours for DSW and 25 hours of PSW per week. In addition to the contingencies, I have added an amount to recognize extra pay for statutory holidays and a contingency for family respite each year. That total was reduced for government care as discussed above, and present value tables were consulted.

***2. Physical and Psychological Therapies***

**355**  Because of my concerns with some of the plaintiffs' expert evidence (as discussed earlier), I prefer the evidence of Dr. Mason with regard to Tianna's physical capabilities. He diagnosed Tianna with "bilateral, spastic, ataxic cerebral palsy" and "mild bilateral plantar flexion contractures secondary to the spastic component of the cerebral palsy". His opinion was that she has an increased risk of musculoskeletal problems in her foot and ankle and joint problems in her knees. He also opined she is at an increased risk for falls.

**356**  He recommended some physiotherapy assessment in conjunction with someone to assist with exercise, but also to account for her risk of future falls. He did not recommend a full physiotherapy program throughout her life because his opinion was that her functioning had plateaued. I am also mindful that Tianna will receive trained attendant care and (as will be discussed later in this decision), funds for recreation and occupational therapy and there could be significant overlap and double recovery if too much is awarded for physiotherapy. I award $20,000 for this item.

**357**  Based on that medical evidence, I am also satisfied the evidence supports an award for occupational therapy because Tianna is unable to perform certain tasks for herself related to her personal and environmental care (dressing, grooming, planning etc.). Ms. Vellone estimated an initial block of some hours to set up a program and then an annual award for the rest of Tianna's life. She said that DSW more than likely will be able to follow instructions, but I find that is not a replacement for occupational therapy. Consulting an occupational therapist will provide valuable oversight into how DSW work with Tianna. I award $35,000 for this amount which approximates the present value of six hours a year and additional hours every five years to handle life changes, plus travel costs.

**358**  All experts agreed Tianna needs some type of behavioural management. I have concluded the medical evidence does not justify an award for psychological or psychiatric counselling. Dr. Finegan's evidence was that the type of behavioural management Tianna will require can be provided by DSW's who are trained for that type of care, but she also recommended very specific counselling to address Tianna's tantrums. I find it reasonable to make a specific limited award for that purpose. I award $10,000 for this item.

***3. Case Management***

**359**  I am satisfied the medical evidence justifies an award for these services because of Tianna's executive function and cognitive deficiencies. Ms. Vellone calculated a need for 60 hours a year for one year and then bi-monthly visits for the rest of Tianna's life. That is excessive given that I find it likely Tianna's family will be closely involved in her care. I award $50,000 for this item. This is based on approximately 12 hours a year and 100 extra hours spread over her lifetime to accommodate the extra help she may need with major life changes.

***4. In Trust Claim***

**360**  The defendants submit the evidence to support the quantification of this claim is scant. In *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=), Madam Justice Smith reviews relevant case law and summarizes the factors to consider when awarding an "in trust" claim. The plaintiffs rely on *Cojocaru* (appealed on a different ground) for the principle that precise mathematical calculations are not required. Instead, it is important to provide quantification based on an estimate of extra hours of time.

**361**  The plaintiffs calculated the number of hours of extra care family members provided to Tianna from birth to age 16. The defendants suggested a lower number and used the amount of $15 per hour. The plaintiffs' estimation of the number of hours better accords with the evidence and is reasonable, but the rate they applied was too high. I award $200,000 for the in-trust claim based on approximately the plaintiffs' hours and a per hour rate between the parties' estimates.

***5. Miscellaneous Items***

**362**  I award $4,169 which is the present value of the cost of contraception until Tianna turns age 50. I also award $9,946 for the special deodorant Tianna needs. As noted above, I order $50,000 for home renovations.

**363**  Tianna does not currently wear orthotics and the defendants urged me not to make an award on that basis. I do not agree. In my view it is most likely she is not wearing orthotics presently at least in part because she has not received sufficient prompting to do so. I also find there is a medical justification for orthotics given her demonstrated challenges with balance and walking and Dr. Mason's opinions. It is likely that her physical need for orthotics will increase with her age.

**364**  The plaintiffs' calculation for this item was based on two pairs replaced every two years for the rest of her life which I find to be unreasonable. I reduce that amount by two-thirds to account for the fact that she is not currently wearing them and the replacement interval is wholly dependent upon how often Tianna wears them. I award $9,000.

**365**  All experts agree Tianna would benefit from increased recreational activities, but those may need to be specialized to her needs. The plaintiffs seek costs based on a specific facility membership and activity. I prefer Ms. Vellone's approach which is to provide an annual sum that can be spent on whatever activity Tianna and her caregivers decide is best. However, I also find it most likely that had the injury not occurred, Tianna's family would have spent some money on leisure or recreation as that is a common, every day expense. There is also a real and substantial possibility some of the recreational opportunities she will access will be government funded. An award is appropriate, but I reduce the annual amount assessed by Ms. Vellone. I award $16,500 for recreation over her lifetime (this takes into account the present value calculations).

**366**  Tianna will not be able to drive and on that basis, the plaintiffs claim an amount for taxi trips. Many people do not drive or do not own vehicles and therefore they pay for transit. It is not reasonable to base an award on the total amount of transportation it is anticipated Tianna would need on an annual basis. It is more likely than not that she would have incurred transportation costs without the injury. I do find it reasonable to recognize the extra number of medical and professional appointments she will need to attend over her lifetime and make an award for that. I award $10,000 for this item.

**367**  The plaintiffs seek an award for housekeeping services. Ms. Drewnowsky estimated a need for 12 hours a week for the rest of her life (meant to address cleaning and light meal preparation). I am not persuaded this item is justified based on the evidence. Tianna is capable of making herself light meals and doing some chores to contribute to the upkeep of her dwelling. Any amounts beyond that duplicate what would naturally be provided by a family member or facility in which she would live; I therefore find the expense would be duplicative and I award no amount for it.

***6. Special Damages***

**368**  The defendants emphasize that no receipts were provided for the amounts claimed apart from the amount Mr. Brodeur had to pay to cancel his mortgage early and move to Thunder Bay. In *Camp Development Corporation v. South Coast British Columbia Transportation Authority*, [*2011 BCSC 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K3-00000-00&context=), Mr. Justice Cullen explains the rationale for the need to specifically plead special damages (at para. 8), but I do not read that passage as precluding recovery just because no receipts are provided; what is required is to particularize the claim.

**369**  The plaintiffs say Tianna's family does not have receipts for most special damage claims because the money was spent before the litigation was contemplated by the family, and when it was commenced they were unaware of what items could be reimbursed. The plaintiffs particularize a claim for $33,027.80, of which the defendants say only $15,000 is reasonable, which approximates the interest charges Mr. Brodeur paid, and an amount for extra trips to, and parking at the hospital.

**370**  An amount for extra diapers and wipes would have been reasonable to claim because it took Tianna longer to be toilet trained. But I was presented with no evidence to explain the amount claimed; even some evidence about the current cost of this item would have been helpful. Without any evidence, I do not make that award.

**371**  I also do not find expenses related to the family's move to Thunder Bay to be appropriate. I understand why Ms. Brodeur and her daughters would choose to move to Thunder Bay to be closer to Ms. Hicks, but there is no evidence that Ms. Hicks' move to Thunder Bay was in any way related to Tianna's injuries.

**372**  I do agree, however, that Mr. Brodeur having to hasten his move and pay a penalty on his mortgage was caused by Tianna's unique circumstances. The evidence was clear she was having difficulty coping living without her father. In my view, $15,000 is appropriate award for special damages.

**X. SUMMARY OF DAMAGES**

**373**  I order the following:

**By Consent:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non pecuniary damages | $363,200.00 |  |
|  | Damages for income loss | $1,000,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Damages for loss of interdependency | $221,638.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Speech language pathology | $125,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL** | $1,709,838.00 |  |

**Cost of Future Care:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Attendant Care | $3,000,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Physiotherapy | $20,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Occupational Therapy | $35,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Behavioural Management | $10,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Case Management | $50,000.00 |  |

Miscellaneous Items

|  |  |  |  |
| --- | --- | --- | --- |
|  | Medication - | $4,169 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Deodorant - | $9,946 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Home Renovation - | $50,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Orthotics - | $9,000 |  |
|  | Recreation - | $16,500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transportation - | $10,000 |  |

|  |  |
| --- | --- |
| $99,615.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL** | $3,214,615.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **In Trust Award** | $200,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Special Damages** | $15,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **OHIP** | $7,817.57 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | ***Health Care Costs Recovery Act*** | **$54,577.07** |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL DAMAGES** | $5,201,847.64 |  |

**XI. REMAINING ISSUES**

**374**  Should the parties be unable to agree on the issue of apportionment, they may provide to me via the Registry no more than five pages each on the issue. All submissions must be received no later June 15, 2016.

**375**  If the parties cannot agree on costs, they may contact the registry within 30 days of this judgment being released to arrange a time convenient to counsel and the court for a brief hearing. In the alternative, the parties may provide written submissions in which case I expect them to compose a fair schedule amongst themselves for the exchange of submissions so long as the last submission is received by me via the Registry no later than September 30, 2016.

N. SHARMA J.

**End of Document**

[***Chahal v. Righele, [2014] B.C.J. No. 1234***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0XJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

Heard: April 7-11, 2014.

Judgment: June 17, 2014.

Docket: M120475

Registry: Vancouver

**[2014] B.C.J. No. 1234** | [*2014 BCSC 1086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1TT-00000-00&context=)

Between Kulwant Chahal, Plaintiff, and Reno Righele, Defendant

(38 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Headaches — Psychological injuries — Depression — Action by Chahal for damages for personal injuries sustained in a motor vehicle accident allowed — Chahal was driving through an intersection when her vehicle struck a vehicle driven by the defendant Righele, who was turning left — Righele did not yield the right of away and his *negligence* caused the accident — 46-year-old Chahal suffered from back pain, headaches, and depression — Her life had drastically changed for the worse — Chahal was awarded $327,467 in damages, including $120,000 in non-pecuniary damages, $51,750 for future care, $5,717 in special damages, and $150,000 for loss of future earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Non-pecuniary loss — Action by Chahal for damages for personal injuries sustained in a motor vehicle accident allowed — Chahal was driving through an intersection when her vehicle struck a vehicle driven by the defendant Righele, who was turning left — Righele did not yield the right of away and his *negligence* caused the accident — 46-year-old Chahal suffered from back pain, headaches, and depression — Her life had drastically changed for the worse — Chahal was awarded $327,467 in damages, including $120,000 in non-pecuniary damages, $51,750 for future care, $5,717 in special damages, and $150,000 for loss of future earning capacity.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Rules of the road — Action by Chahal for damages for personal injuries sustained in a motor vehicle accident allowed — Chahal was driving through an intersection when her vehicle struck a vehicle driven by the defendant Righele, who was turning left — Righele did not yield the right of away and his *negligence* caused the accident — 46-year-old Chahal suffered from back pain, headaches, and depression — Her life had drastically changed for the worse — Chahal was awarded $327,467 in damages, including $120,000 in non-pecuniary damages, $51,750 for future care, $5,717 in special damages, and $150,000 for loss of future earning capacity.**

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 174*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0H8-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: T. Pettit.

Counsel for the Defendant: L.J. Mackoff, F. Mohamed.

**Reasons for Judgment**

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

**A. Liability**

**1**  This is an action for damages for injuries suffered in a motor vehicle accident for which liability is denied.

**2**  On April 29, 2010 the plaintiff was injured when her car struck a car driven by the defendant which had turned left across an intersection through which the plaintiff's vehicle was traveling. The defendant denies he was at fault and alleges the plaintiff was traveling too fast in the circumstances. For the reasons that follow I disagree.

**3**  The accident happened at Kingsway and Boundary Road in Vancouver during the morning rush hour. The defendant was driving eastbound on Kingsway in a large older model station wagon. He was intending to turn left to go north on Boundary Road. The plaintiff was westbound on Kingsway in the curb lane intending to continue through the intersection. The defendant travelled into a dedicated left turn lane and the light for him was green. The defendant stopped his vehicle and waited for a break in the oncoming traffic. He saw a westbound pickup truck about 70 to 80 yards to the east of the intersection. He testified it was the closest westbound vehicle to the intersection. He accelerated to go north and while still in the intersection facing approximately north his vehicle was struck over its right rear wheel by the plaintiff's vehicle. The defendant had not seen the plaintiff's vehicle before the collision.

**4**  The plaintiff testified that she approached the intersection in the westbound curb lane with two lanes to her left in which the traffic was moving slowly. She testified she was traveling at about 50 km per hour. The light for her was green. She entered the intersection and did not see the defendant's vehicle until it was immediately in front of her traveling from her left. She testified she had no time to brake to avoid the collision.

**5**  A witness, Mr. Nguyen, was a pedestrian on the north sidewalk of Kingsway on his way to his work place which was a short distance to the east of Boundary Road on Kingsway. He did not see the defendant's vehicle making its left turn because the intersection was behind him but saw the plaintiff's vehicle as it approached the intersection from the east. Mr. Nguyen was walking with his back to the intersection and was not paying attention to the traffic lights but believed, because he had already walked across the intersection, that the light had changed to red for east and westbound traffic. When he saw the plaintiff's vehicle he concluded it was traveling too fast because it was approaching what he thought was a red light. Mr. Nguyen agreed in cross-examination that if the light was green for the plaintiff's vehicle it was not traveling too fast. He heard a sound which he attributed to tires skidding on pavement. He did not see any vehicle from which the sound came. He heard the collision but did not see it.

**6**  Another witness Mr. Hon, like the plaintiff, was driving westbound on Kingsway approaching the intersection with Boundary Road. He testified he was traveling at about 55 km per hour in the middle of these lanes. When he was about three or perhaps four car lengths from the intersection he saw the plaintiff's vehicle in his mirrors. The plaintiff's vehicle overtook Mr. Hon's vehicle and he estimated her speed at 70 to 75 km per hour. The plaintiff's vehicle was traveling in a lane to the right of Mr. Hon's vehicle and there were no vehicles between the plaintiff and the intersection when Mr. Hon saw her vehicle overtaking his. When Mr. Hon saw the plaintiff's vehicle the light was green for westbound traffic. Simultaneously Mr. Hon saw the defendant's vehicle turning left to go north on Boundary Road.

**7**  In a statement given to an adjuster shortly after the accident, Mr. Hon described the left turning car as "going fast". At the trial he accepted that observation was correct. In the statement he also said that "as soon as I saw the other car making a left turn [the plaintiff's vehicle] hit the back passenger side of the left turning car". I have no reason to conclude Mr. Hon was incorrect in his observations of the defendant's vehicle.

**8**  I find the defendant's vehicle was 15 to 20 meters from entering the intersection when the defendant began his turn. The defendant's vehicle needed to accelerate from a standstill across 3 lanes of travel to clear the intersection for westbound traffic. He did not have enough time to do so, particularly in a large vehicle.

**9**  Section 174 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* provides:

When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard...

**10**  The defendant did not yield the right of way. The explanation is that he did not see the plaintiff's vehicle even though it was there to be seen. A left turning driver who does not see a vehicle approaching an intersection from the opposite direction so closely that it presents a hazard is not driving with reasonable care. Absent fault on the part of the approaching driver, the left turning driver will be found solely responsible for a subsequent collision.

**11**  The defendant submits the plaintiff was traveling too fast. The plaintiff's evidence is that she was traveling about 40 to 50 km per hour. Mr. Hon's evidence suggests otherwise but I am not satisfied his estimate of the plaintiff's speed is accurate. Mr. Nguyen accepted the plaintiff's vehicle was not traveling too fast if the light was green for her, which I find it was. Mr. Hon's ability to estimate the speed of a vehicle coming from behind him may have been distorted by observing it only in his mirrors. Even if the plaintiff was traveling slightly beyond the speed limit, which I do not find, the cause of the collision was the defendant's decision to turn left across the path of the plaintiff's vehicle without seeing it. But for that imprudent decision the accident would not have happened. I find no fault on the plaintiff for the collision.

**B. The Plaintiff's Injuries**

**12**  The plaintiff is 46 years old. Prior to the accident she had no health difficulties. She was physically active without being particularly athletically inclined. She has never married. Prior to the accident her life was focused on her work as a long serving employee of the Insurance Corporation of British Columbia ("ICBC"). She was also considerably involved in social events with family and friends. Her parents live in Abbotsford and it is customary for her family, including a number of nephews and nieces, to gather at their home on weekends. Apart from that her life has been absorbed with her work, into which she put a great deal of energy.

**13**  The plaintiff has never had a regular family doctor and unfortunately despite efforts to obtain one following the accident she has not been able to do so. She has seen various physicians at walk in clinics for the injuries that she experienced. The medical evidence before me suggests that a family physician could manage the plaintiff's care better if that physician had regular contact with her. The absence of a family physician presents the unusual feature on a personal injury trial that there is no evidence from a treating physician.

**14**  Following the accident the plaintiff began to experience pain and stiffness in her neck. Pain began to develop in her left shoulder and into her upper and lower back and left buttock. She developed serious headaches. The injuries were superimposed on pre-existing asymptomatic degenerative changes in her cervical spine.

**15**  Prior to the accident the plaintiff had no difficulty sleeping. Since the accident she has had to resort to medications and on some occasions she has taken wine along with her medications in an attempt to sleep. She now uses magnesium sulfate but still finds she has no more than four hours of continuous sleep and sometimes less. As a result she often feels exhausted. The plaintiff now suffers from a major depressive disorder which was not being treated in any effective way in the years since the accident.

**16**  The medical opinions are largely in agreement that the plaintiff's physical symptoms are not likely to improve. She has chronic pain throughout much of her back as well as headaches. The medical opinions also share the view that although the pain cannot be entirely resolved it may be possible to alleviate it and permit the plaintiff to function at a higher level than is now the case. This may be achieved in part by improving her mood, and by assisting her to overcome her sleep disorder. The plaintiff has had four sessions with a counsellor for her sleep problems but they have not resolved. The medical evidence is that she should be seen by a psychiatrist to determine the medications that may be beneficial to improve her mood generally and overcome the depressive disorder.

**17**  The plaintiff has not had the therapies that could optimize her recovery. Dr. William Koch, a clinical psychologist describes the plaintiff as suffering from a somatic symptom disorder with related pain, a major depressive disorder, post-traumatic stress disorder and a panic disorder with agoraphobia. None of these symptoms have received adequate attention in the last four years. This is at least partly attributable to the absence of a family physician who could manage her case.

**18**  Prior to the accident the plaintiff enjoyed an active social life mainly through her family outings in Abbotsford. However, since the accident her participation in these and other events has been difficult for the plaintiff. Her social life has become substantially less than what it was before.

**C. The Plaintiff's Employment**

**19**  The plaintiff is a valued employee of ICBC. She has sustained a high level of involvement with her work by minimizing all other activities. She began her employment with ICBC in 1994 as an office assistant and progressed to becoming a bodily injury adjuster in 2008. She has consistently received very high performance reviews and they have continued to be high even since the accident. Prior to the accident, her review for the first quarter of 2010 compliments her for her willingness to help when a co-worker was ill and she is described as "never late" and "little dynamo". Her present manager who testified at the trial would recommend her for a promotion to a litigation manager position.

**20**  Jodi Fischer, an occupational therapist, conducted a functional capacity evaluation of the plaintiff which is consistent with the evidence generally. I accept Ms. Fischer's opinions as accurate:

Ms. Chahal has worked at ICBC for the past 18 years. For the past 6 years, she has worked as in Injury Adjuster. She had some time off after her motor vehicle [accident], and eventually resumed her pre-accident job and full time hours within approximately 6-7 weeks. She is currently working full time. Physically, her job involved primarily sitting, with frequent telephone and computer use. She does a combination of writing and typing. She makes handwritten notes when speaking with people on the phone, and then inputs information onto the computer after each phone call.

Ms. Chahal stated that does not always have the flexibility to get up from her desk and take a stretch break when she wants to as there are calls coming in regularly, stringent time deadlines for work completion, and she needs to respond to administrative staff requests.

During her Functional Capacity Evaluation, Ms. Chahal presented with generally slow movement patterns related to her neck, mid back, and lower back function, and reduced sitting tolerance in association with tasks involving prolonged looking down and static upper limb postures (computer use). Her productivity declined when she was engaged in tasks involving these physical demands over prolonged periods. As her testing day progressed, there was also a general decline in her neck/upper back and lower back musculoskeletal function.

Ms. Chahal stated that she is able to perform her job as an Injury Adjuster for ICBC, although when she arrives home from work she is unable to do little else due to increased pain and fatigue. Late day test finding of functional decline corroborated her subjective reports. Overall, such findings indicate that she is performing her job more out of perseverance than full physical suitability. She is better suited to part time work of approximately 30 hours per week. Working a shortened work day will allow her more recovery time, and the opportunity to participate in non-work related activities such as making cooked meals for herself, and exercising.

Given Ms. Chahal's reduced physical tolerance, she would have difficulty taking on a job that involves more responsibility and meeting more time sensitive deadlines. Ms. Chahal stated that not applying for higher level positions at ICBC in the litigation department will affect her career advancement and the opportunity to earn a higher salary.

**21**  The plaintiff has been ambitious and intensely conscientious at her work. She remains conscientious despite her injuries and drives herself to perform at a high level but inevitably that is at the sacrifice of other aspects of her life that previously gave her pleasure. She is no less ambitious having come to terms with the limitations imposed by her injuries.

**D. Damages**

1. **Loss of capacity**

**22**  There is a real and substantial prospect that the plaintiff's capacity to earn an income in the future has been diminished. The plaintiff has a high school education. There is no real possibility she could replace her income from ICBC with other work more suitable to her present disabilities. Her difficulties at work are caused by prolonged sitting and the posture imposed by the use of a computer screen. ICBC has done much to ameliorate the difficulties being experienced by the plaintiff but those difficulties none the less remain. As the plaintiff ages with continuing chronic back pain, neck pain and headaches I expect her working day will become increasingly troublesome.

**23**  But for the accident the plaintiff would probably have worked until age 65. Her work schedule requires her to attend approximately 70 hours every 2 weeks and she is earning an income of about $70,000 per annum. There was a reasonable prospect that she would have been promoted if she had not had the accident but in my view that prospect is now probably gone. Mark Gosling, an economic consultant, calculated the present value of her future earnings to age 65 with adjustments for the risk of disability and unemployment from causes other than the accident. He concluded but for the accident, the earnings would have been $999,927. I do not expect the plaintiff will maintain full time employment with ICBC until age 65 and when she can no longer continue with that work I do not expect her to find employment elsewhere. I do not think it is likely she will be promoted to the position of litigation adjuster or examiner despite her initial ambition. She may, with more effective therapies, sustain her present employment on a part-time basis or may sustain it full time, but retire early. Mr. Gosling puts the potential loss in the future depending on the plaintiff's retirement date at between $199,358 and $236,073. The defendant does not offer evidence of an alternative opinion.

**24**  The plaintiff is a very determined woman and despite her injuries I expect that she will carry on working, which is her major source of satisfaction, for as long as she finds it physically manageable. The plaintiff submits that I should assess the loss of earning capacity at $150,000. I agree that sum is reasonable.

1. **Cost of future care**

**25**  The plaintiff claims $62,014 as the present value of the cost of future care. This sum of money is based on the evidence of the need in the future for pain medication, chiropractic and massage therapy, kinesiology and physiotherapy services, psychological counseling, an ergonomic assessment of her place of work and household services. The plaintiff needs to have a family physician to monitor her care. That, together with the advice of a psychiatrist, and perhaps other experts may have some prospect for ameliorating her condition. I will not attempt to predict if she can find a family physician, but I expect she can obtain a referral to a psychiatrist. I reach the following conclusions on the cost of future care on the basis that some pain may be alleviated and her depressive disorder managed:

1. I assess her future medication costs at $2,000. Ms. Fischer recommends prescription analgesics as do the physicians who have assessed the plaintiff and her evidence is that she also purchases over the counter medications.
2. I assess the cost of future massage and chiropractic services at $9,000. A larger number has been urged on me by the plaintiff but Dr. Crossman, a physiatrist, whose opinions I find persuasive, is in favour of continuing passive therapies and recommends the plaintiff's use of them be gradually diminished.
3. The plaintiff needs to exercise. She is apparently concerned she may be reinjured if she does so. The evidence is that this concern is not valid. The plaintiff claims $6,500 for kinesiology and physiotherapy into the future and I agree this is reasonable and takes into account that passive physiotherapy will not provide adequate ongoing benefits.
4. Ms. Fischer, Dr. Koch and Dr. Crossman all recommend psychological counseling to be undertaken as soon as possible. Dr. Koch recommends 50 hours of counseling each of which will cost $185. I agree this is a reasonable cost and I award $9,250 in that regard. There is no need to reduce it to a present value.
5. The plaintiff's employer has cooperated with ergonomic changes to the plaintiff's work station and I make no award for the plaintiff to have an independent assessment.
6. Whereas the evidence suggests that she was once meticulous in that regard the plaintiff has neglected housekeeping at her home since the accident. Ms. Fischer recommends two hours of housekeeping each week. This is not for the remainder of the plaintiff's life but only so long as she would likely be doing her own housekeeping even if she had not been injured. Mr. Gosling gives a present value of the future cost of housekeeping at $25,648. I agree this is a reasonable number and I assess that cost at $25,000.

**26**  The plaintiff makes no past income loss claim. Special damages are agreed at $5,717.21.

1. **Non-pecuniary general damages**

**27**  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. 45 Madam Justice Kirkpatrick wrote:

[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*, [*[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 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 [*[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=)).

[Emphasis in original.]

**28**  At para. 46 in *Stapley* the "inexhaustive list of common factors" influencing an award of non-pecuniary general damages is given as follows:

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=)).

**29**  The plaintiff relies on the following authorities:

1. *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=). In that case there was an award of $120,000. The 43 year old plaintiff had experienced constant and debilitating pain for six years. Barrow J. concluded it was likely to remain "almost completely debilitating for her".
2. *Marois v. Pelech*, [*2007 BCSC 1969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2XG-00000-00&context=). A 49 year old plaintiff alleged chronic plain with anxiety and depression. The court awarded $130,000 for non-pecuniary damages. The plaintiff "lived a full and busy life" which had been "lost over the last six years" and would be "impacted in the future" although she "appears to be improving".
3. *Ashcroft v. Dhaliwal*, [*2007 BCSC 533*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-246D-00000-00&context=). A plaintiff in her 50s suffered from neck and back pain caused by soft tissue injuries. The pain was chronic and the plaintiff was suffering from both depression and post-traumatic stress disorder. Her life had "changed drastically for the worse". The court awarded $120,000 for non-pecuniary general damages.

**30**  The defendant relies on:

1. *Badyal v. Sidhu*, [*2006 BCSC 1877*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61H7-00000-00&context=), in which $75,000 in non-pecuniary damages was reduced to $55,000 by consent on appeal. The plaintiff suffered soft tissue injuries with chronic pain and depression. The trial judge was "satisfied that the resolution of her pain from her injury [which has persisted for two years] will not occur for some time and not until her depression is resolved".
2. *Middleton v. Morcke*, [*2007 BCSC 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21H5-00000-00&context=), in which $60,000 was awarded for non-pecuniary damages. The plaintiff suffered soft tissue injuries in two accidents. She had generalized pain, sleep disturbance and a major depressive episode. The accident had affected her relationship with family and friends as well as her memory and concentration. She was not expected to make a complete recovery.

**31**  The plaintiff's life has been drastically changed for the worse as a result of the car accident of four years ago. There has been episodic improvement in her condition but a return to her previous condition is unlikely and she will probably live for many years with chronic pain and with a form of depression. The injuries have had a major effect on her social life. Her capacity to continue working will be adversely affected, robbing her of one of the principal sources of pleasure in her life. I award the plaintiff $120,000 in non-pecuniary general damages.

**Mitigation**

**32**  The defendant submits:

1. the plaintiff has not taken advantage of the psychological counseling available to her through her employment and has not followed the advice of Dr. McKenzie to be "formally assessed" for her anxiety and depression;
2. the plaintiff has failed to follow an exercise program which have been showing gains in her condition particularly in its early stages; and
3. the plaintiff ought to have made greater efforts to obtain a family physician to manage her care more efficiently.

**33**  The onus is on the defendant to demonstrate the plaintiff has failed to act reasonably to overcome the effects of her injuries. Notwithstanding that some of the criticisms of the plaintiff's conduct in this regard have merit, I am not satisfied the defendant has met that burden.

**34**  The plaintiff points out that she had 23 physiotherapy treatments, 87 chiropractic treatments, 20 massage therapy treatments, did some home exercises, "tried yoga", "tried to remain active" and used many analgesics for her pain and other medications for sleep. I agree with the defendant that most of the physical therapy the plaintiff has undertaken has been passive and I agree that her exercise has not been consistent. I agree the plaintiff ought to exercise more and has done less than might have been helpful for her recovery. I also agree a psychiatrist may have been helpful and I agree the plaintiff has not vigorously sought out a family doctor. However, despite those criticisms in my view the plaintiff's primary focus since the accident has been to preserve her employment. She has clearly become anxious at times that she will lose her employment which is so valuable to her not only financially but also emotionally. That anxiety may be misplaced given the praise she receives in her performance reviews but the plaintiff appears to be the sort of person who inevitably will suffer that form of anxiety. She has kept her employment and has kept her reputation high at work but that has been achieved by an intense and even ruthless concentration on her work to the exclusion of all else. I have no doubt that doing so has left her with little energy to spare for exercise or seeking a family physician or to obtain the "assessment" suggested by Dr. McKenzie.

**35**  The defendant injured a person whose essential aim in life for many years has been to excel at her work. Her personality is such that all else since the accident has been subordinate to that aim. The plaintiff could have decided to step back from the demands of work and concentrate on getting better. This might have been done by taking an extended leave or perhaps by requesting only part time work. It cannot be known if she would have recovered further if she had chosen that path. If she had, the defendant would be faced with an income loss claim from the date of the accident. By continuing to work at the pace the plaintiff has since the accident she has mitigated her income loss to the date of trial to zero. The defendant cannot reasonably insist she should have done more.

**36**  I am not persuaded the plaintiff should be criticized for her failure to find a family doctor. I have only the most general evidence on what she might have achieved in that regard with increased effort. I have no means of knowing if greater effort would have led to success. Without the services of a general practitioner the process of obtaining a referral to a psychiatrist may be more difficult. The evidence does not assist me in that regard.

**E. Conclusion**

**37**  My conclusions are as follows:

1. The ***negligence*** of the defendant is the sole cause of the plaintiff's loss and damage.
2. Non-pecuniary damages are awarded in the sum of $120,000.
3. Damages for the cost of future care are awarded in the sum of $51,750.
4. Special damages are awarded as agreed at $5,717.21.
5. Damages for the future loss of earning capacity are awarded in the sum of $150,000.

Total: $327,467.21.

**38**  Unless there are matters of which I am unaware the plaintiff is entitled to her costs on Scale B.

K.N. AFFLECK J.

**End of Document**

[***Cheung v. Moorley, [2011] B.C.J. No. 2299***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22N5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.W. Williams J.

Heard: April 12, 2011.

Judgment: November 30, 2011.

Dockets: S131702 and S131836

Registry: New Westminster

**[2011] B.C.J. No. 2299** | 2011 BCSC 1641

Between Dr. Stephen Cheung and Dr. Malcom Rondeau, Petitioners, and Timothy Albert Moorley, Respondent And between Fraser Health Authority, Surrey Memorial Hospital and Vancouver Coastal Health Authority, Petitioners, and Timothy Albert Moorley, Respondent

(79 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Dismissal of action — Failure to comply with court order — Judgments and orders — Summary judgments — Evidence — No triable issue — Setting aside judgments or orders — Grounds — Application by defendant health authorities and doctors for judicial review of Chambers judge's dismissal of their application to dismiss respondent's claim allowed — Respondent was previously ordered to produce medical-legal report by deadline or have case dismissed — So-called guillotine order did not clearly indicate it was final decision, so Chambers judge reasonably exercised jurisdiction in hearing application — Chambers judge unreasonably concluded letters from two doctors could disclose triable issue given they did not address respondent's narrow claim applicants were negligent in losing his test results — Order set aside and remitted for reconsideration.**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Standard of care — Particular professions — Doctors — Practice and procedure — Evidence — Burden of proof — Application by defendant health authorities and doctors for judicial review of Chambers judge's dismissal of their application to dismiss respondent's claim allowed — Respondent was previously ordered to produce medical-legal report by deadline or have case dismissed — So-called guillotine order did not clearly indicate it was final decision, so Chambers judge reasonably exercised jurisdiction in hearing application — Chambers judge unreasonably concluded letters from two doctors could disclose triable issue given they did not address respondent's narrow claim applicants were negligent in losing his test results — Order set aside and remitted for reconsideration.**

**Professional responsibility — Self-governing professions — Duties — Duty of care — Standard of care — Files and records — Retention — Professions — Health care — Doctors — Application by defendant health authorities and doctors for judicial review of Chambers judge's dismissal of their application to dismiss respondent's claim allowed — Respondent was previously ordered to produce medical-legal report by deadline or have case dismissed — So-called guillotine order did not clearly indicate it was final decision, so Chambers judge reasonably exercised jurisdiction in hearing application — Chambers judge unreasonably concluded letters from two doctors could disclose triable issue given they did not address respondent's narrow claim applicants were negligent in losing his test results — Order set aside and remitted for reconsideration.**

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| Application by the defendant health authorities and doctors for judicial review of the Chambers judge's dismissal of their application to dismiss the respondent's claim. The respondent commenced his ***negligence*** claim in 2008. In 2010, the applicants applied to have the action dismissed as disclosing no cause of action. An order was made requiring the respondent to produce all medical-legal reports by September 1, 2010 and stated "in the event there is a failure to comply with this order, this case is dismissed". The applicants argued the respondent failed to comply with the 2010 order, so the Chambers judge's failure to dismiss the action was an error in jurisdiction and law. The respondent argued he submitted two letters from doctors that constituted threshold proof of his claim.  HELD: Application allowed.  The wording in the so-called guillotine order of 2010 was not sufficiently specific to indicate a final and conclusive decision, so it was reasonable to conclude the Chambers judge still had some discretion. However, the Chambers judge's finding that the respondent had adduced evidence that could disclose a triable issue was unreasonable. The respondent's allegation was that the defendant cardiologist performed a diagnostic test, lost the results and then denied doing the test. His ***negligence*** claim was based on this narrow issue. There was no dispute the respondent had structural abnormalities of the heart. The letters relied on by the respondent did not contain any evidence on the applicable standard of care regarding test results, did not assert a breach of that standard of care had occurred and did not show that lost test results caused any injuries to the respondent. The obligation was on the respondent to establish a prima facie case and he failed to do so. The Chambers judge's decision was set aside and remitted for reconsideration. |

**Statutes, Regulations and Rules Cited:**

Judicial Review Procedure Act, [*RSBC 1996, CHAPTER 241, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JC0G-61TM-00000-00&context=), s. 2(2)(a), s. 5

Small Claims Act, [*RSBC 1996, CHAPTER 430, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F7ND-G098-00000-00&context=)(1)

Small Claims Rules, *B.C. Reg. 261/93, Rule 7*(9), Rule 7(14), Rule 16(6)

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| On judicial review from the Provincial Court of British Columbia, Surrey Registry, Docket C62997, Order made November 8, 2010 |

**Counsel**

Counsel for the Petitioners Dr. Stephen Cheung and Dr. Malcom Rondeau: C.B.P. Elder.

Counsel for the Petitioners Fraser Health Authority, Surrey Memorial Hospital and Vancouver Coastal Health Authority: E.J.A. Stanger.

Respondent Timothy Albert Moorley: In Person.

**Reasons for Judgment**

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| **J.W. WILLIAMS J.** |

**1**   The applicant health authorities and medical doctors petition this Court for the following orders:

1. An order pursuant to section 2 of the *Judicial Review Procedure Act*, *R.S.B.C. 1996, c. 241*, quashing the November 8, 2010 order of the Provincial Court of British Columbia (Small Claims Court) (the "Provincial Court") dismissing the application of the petitioners to have the respondent's claim dismissed and setting the matter for trial.
2. An order pursuant to section 5 of the *Judicial Review Procedure Act*, *R.S.B.C. 1996, c. 241*, that the petitioners' application be remitted to the Provincial Court with instructions that its decision to dismiss the petitioners' application was in error.
3. An order that the respondent pay the petitioners' costs of this petition.
4. Such other and further relief as this Honourable Court may deem just.

**Background**

**2**  On February 20, 2008, the respondent Mr. Moorley filed a Notice of Claim in the Provincial Court, naming certain doctors and health agencies as defendants. He alleged ***negligence*** on the part of those parties with respect to a medical procedure performed upon him.

**3**  The defendants filed their Replies.

**4**  On October 8, 2008, the defendant health authorities applied in the Provincial Court to have the claim dismissed or, in the alternative, for orders with respect to time limits for the exchange of documents and the filing of a Certificate of Readiness.

**5**  On October 31, 2008, a judge of the B.C. Provincial Court ruled that the claim would not be dismissed; an order was made that the claimant had 21 days to file a Certificate of Readiness, and that the matter would then be set for settlement conference.

**6**  A Certificate of Readiness was filed and a settlement conference scheduled for February 24, 2009. At the conclusion of that conference, the court adjourned the proceeding and directed the parties to schedule another settlement conference after July 1, 2009. At the same time the court made certain orders, including that the claimant would produce a medical legal report to all defence counsel within 120 days, setting out the applicable standard of care, specifically how it was alleged that standard of care had not been met in the circumstances, and what damages resulted (I will refer to those collectively in these Reasons as the "Elements of the ***Negligence*** Alleged"). The claimant was also ordered to produce an itemized list setting out the quantum of damages claimed within 90 days.

**7**  A subsequent settlement conference took place on July 14, 2009. At that time, claims against two of the named defendants were dismissed. As well, the claimant was ordered to produce certain clinical records in his possession, and was ordered to produce medical legal reports from Dr. McCuaig and Dr. Jessop, setting out the Elements of the ***Negligence*** Alleged. He was also ordered to produce to defendants' counsel an itemized list of damages. The time deadline stipulated for these productions was August 28, 2009.

**8**  On July 21, 2009, the claimant filed an application seeking an extension of the times allowed for production of the medical opinions of Dr. McCuaig and Dr. Jessop. By consent, the time for the claimant to provide the ordered documentation was extended to October 30, 2009.

**9**  On August 27, 2009, the claimant filed an application seeking to have his claim moved to the Supreme Court of British Columbia and for a further extension of the deadline to produce documents from Dr. McCuaig.

**10**  On November 16, 2009, the defendant health authorities and doctors filed an application seeking to have the claimant's case dismissed.

**11**  Those applications were heard by Judge Field of the B.C. Provincial Court on February 11, 2010. He made the following orders:

1. Claimant is to produce to all counsel medical-legal reports by September 1, 2010 from a physician which sets out the standard of care, their comments about whether there was a failure to meet the standard of care, how and why the standard was not met, and what damages (if any) resulted.
2. Claimant to produce to all counsel by September 1, 2010 an itemized list of quantum of damages.
3. In the event that there is a failure to comply with this order[,] this case is dismissed.

**12**  On August 5, 2010, the claimant filed an application seeking again to have his claim moved to the Supreme Court of British Columbia and to amend the February 11, 2010 order of the Provincial Court.

**13**  On August 24, 2010 that application was heard and the following orders were made:

1. The application to transfer the file to Supreme Court is dismissed.
2. On or after September 1, 2010, the matter is to be set for application to set a fix date.
3. The claimant's other application, to amend the previous order, is adjourned generally.

**14**  On August 30, 2010, the claimant filed an application seeking to remove the requirement that he file and serve a medical legal report which comments on the standard of care.

**15**  On September 22, 2010, the two defendant doctors filed an application seeking to have the claimant's claim dismissed as it disclosed no triable issue.

**16**  On September 23, 2010, the defendant health authorities filed an application seeking to have the claimant's claim dismissed as it disclosed no triable issue.

**17**  On November 8, 2010, the claimant and counsel for the defendants appeared in chambers with respect to these three applications. Judge Jardine of the B.C. Provincial Court (the "Chambers Judge") heard the parties. In *Moorley v. Fraser Health Authority et al* (8 November 2010), Surrey C62997 (B.C.P.C.) (the "Chambers Decision"), he ultimately dismissed all three applications and directed that the matter be set for trial.

**18**  It is that decision which is the subject of the present application.

**Positions of the Petitioners**

**Jurisdictional Argument**

**19**  The petitioners say that, because the court had ordered the claimant to produce a medical legal report by September 1, 2010, setting out certain specific elements, and because the court order provided that "in the event there is a failure to comply with this order[,] this case is dismissed", the Chambers Judge hearing the application on November 8, 2010 ought to have considered only whether there was a failure to comply with the court's February 11, 2010 order. The petitioners say that by ordering that this matter proceed to trial, the learned Chambers Judge exceeded his jurisdiction, given the previous order of the same court requiring the claimant to produce a medical legal report.

**Error of Law**

**20**  The petitioners submit that Rule 7(9) of the *Small Claims Rules*, *B.C. Reg. 261/93*, requires that, in a claim for personal injuries, the claimant must file, within six months after serving the Notice of Claim and before a settlement conference is held, a Certificate of Readiness that has attached copies of all: (a) medical reports, and (b) records of expenses or losses incurred or expected. They say that the court can and has dismissed claims where the action is in ***negligence*** and the claimant is unable to provide any evidence of ***negligence*** prior to trial. As well, the petitioners assert that by failing to dismiss the claim in the absence of a critical medical legal report, the learned Chambers Judge erred in law.

**21**  The petitioners say that with respect to each of these errors, the standard of review is one of correctness.

**Position of the Respondent**

**22**  The respondent disputes that the Chambers Judge was without jurisdiction to permit his litigation to continue, and he says that the material that was in evidence, the letters from Dr. McCuaig and Dr. Bernstein, constitute the necessary threshold proof of the Elements of the ***Negligence*** Alleged, particularly in the circumstances of the present case, where he contends that it is difficult to find doctors who are prepared to provide an opinion that is critical of another medical professional.

**Discussion**

**Allegation of Absence of Jurisdiction**

**23**  In advancing their argument on this issue, the petitioners describe the order made by Judge Field on February 11, 2010 as a "guillotine order". In their submission, a decision had been made by Judge Field, subject to a specific event (the filing of the required materials) occurring or not. They say that when that event did not occur within the time stipulated, the dismissal of the claim was a consequence that must necessarily and automatically follow. By that analysis, the Chambers Judge who heard the subsequent application was obligated to make the order of dismissal; he had no alternative, and no jurisdiction, to do otherwise.

**24**  In the course of examining that argument, I have had occasion to consider in detail the use of so-called "guillotine orders" and have concluded that the matter is not as straightforward as that submission might suggest.

**25**  There is no precisely-defined format for such an order. There are however different formats that are used. I will set out here two such configurations:

Format No. 1

An order that the plaintiff deliver reports within 30 days of the date of this order, failing which the plaintiff's claim will be dismissed without the necessity of a further hearing before this court, upon the filing of an affidavit by defence counsel verifying that there has not been compliance with this order.

Format No. 2

An order that the plaintiff deliver reports within 30 days of the date of this order; in the event that there is a failure to comply with this order, the case is dismissed.

[The second format is virtually identical to the order which is in issue in this application.]

**26**  Parenthetically, I would also make reference to a somewhat similar, although materially different, form of order in such circumstances:

An order that the plaintiff deliver reports within 30 days of the date of this order. In the event the reports are not filed, the defendant is at liberty to bring an application to have the claim dismissed.

**27**  Generally, a guillotine order provides that a party's failure to comply with an order of the court within a fixed time automatically results in the dismissal of that party's claim. Most usually, this type of order is made with respect to security for costs in the appeal context. There is no question that this Court has the jurisdiction to make such orders. It is also true that the Court of Appeal makes them from time to time and its jurisdiction seems evident. I can see no principled reason to conclude that the Provincial Court would not have a similar jurisdiction in appropriate circumstances.

**28**  The Court of Appeal has repeatedly stressed that only very exceptional circumstances warrant the granting of a guillotine order: *Global Banking Systems Inc. v. Datawest Solutions Inc.*, [*2006 BCCA 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61JC-00000-00&context=) at para. 19, [*233 B.C.A.C. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61JC-00000-00&context=) ("*Global Banking*"); *Tribe (Estate) v. Farrell*, [*2005 BCCA 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1FV-00000-00&context=) at para. 25, [*216 B.C.A.C. 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1FV-00000-00&context=) ("*Tribe*"). It can fairly be concluded that there is a substantial reluctance to grant guillotine orders; the authorities do not specifically state what circumstances are sufficiently exceptional to warrant the making of such an order: *Global Banking* at para. 23.

**29**  The case law is essentially silent as to the format in which such orders must be made, although Ryan J.A. in *Tribe* at para. 25 did suggest that it might be preferable to have an order that:

... provide[s] something to the effect that on the passing of a specified date the respondent could obtain his order on the filing of an affidavit of counsel or the respondent stating that the operative date had come and gone and the required material had not been received.

Thus, Ryan J.A.'s suggestion in *obiter* seems to endorse a format in keeping with Format No. 1, rather than Format No. 2, discussed previously. Given their exceptional nature, I would also conclude that guillotine orders ought to be made in very clear and explicit terms.

**30**  The present case raises the issue of the jurisdiction of a subsequent judge where a guillotine order has been made by one judge of the court, and the pronouncement of the final disposition comes before another judge of the court, rather than the judge who made the order initially. I have not been able to find any authorities that would provide any assistance in that particular matter.

**31**  To my mind, the issue is substantially influenced by the manner in which the initial order is articulated. Where wording such as I have set out in Format No. 1 is used, it is reasonable to conclude that jurisdiction has been fully exercised by the judge who heard the initial application. He or she has decided the issue, subject to a particular contingency.

**32**  In other cases, where the wording is less precise, such as in Format No. 2, described earlier (and as used in the case at bar by Judge Field), the outcome is less certain. It is not clear that the judge in the first instance has definitively decided the issue.

**33**  In the matter at bar, the actual order that was entered uses the wording of "the case is dismissed." In the transcript of the proceeding before the Chambers Judge, he appears to make reference to a transcript of the proceedings before Judge Field and very pointedly quotes the latter as having said:

... If that order is not complied with, it's very clear, and this is the third order made by the court, the case will be dismissed. [Emphasis added.]

As is apparent, there is a slight difference in the wording that was actually used in the order as entered and the wording that the Chambers Judge believed had been used by Judge Field. I am not convinced that there is any material difference, but the discrepancy is noted nevertheless.

**34**  It is my conclusion that, unless the wording of Format No. 1 (above) is used, or something with a similar degree of specificity about it, there remains a degree of uncertainty as to whether the judge who makes the order in the first instance (in this case Judge Field) has definitively decided the outcome of the matter. That uncertainty is exacerbated by the situation where the pronouncement of the final determination comes before another judge of the court. If one were to take the position that the subsequent judge had no choice other than to order the action dismissed, the implication is that the subsequent judge had no discretion in the matter.

**35**  While it is an accepted principle that a judge does not ordinarily have the jurisdiction to set aside or vary a substantive decision of another judge of the same court, I am not convinced that the so-called guillotine order, worded as it was in the case at bar (either as set out in the entered order or as understood by the Chambers Judge on his reading of the transcript), can necessarily be found to be a substantive, conclusive and final decision of that first judge. Certainly there appears to be some room to conclude that when the matter comes before the subsequent judge, he or she would have an element of discretion to exercise. In the result, it seems to me that where the order is worded as the order was in this case, it is a situation capable of leading to an embarrassing situation. That is what has occurred here.

**36**  In the circumstances, I am not satisfied that the Chambers Judge was without jurisdiction to make the order that he did. Accordingly, I find myself unable to accede to the petitioners' submissions on this point.

**37**  In submissions, counsel for the petitioner suggested two alternate characterizations of the matter. He says the situation can be examined under the doctrine of *res judicata* - a case of the consequences having been already decided by Judge Field. He also contends that it is a matter which can be analyzed in terms of the earlier order of Judge Field having been a final order. In my view, neither of these approaches is conceptually different than the manner in which I have considered the situation. The foregoing discussion seems to me to answer these alternative ways of looking at the problem.

**38**  As an observation, I would suggest that, in those rare instances where such an order is to be used, it is especially important that the wording be sufficiently clear and precise so as to address the same jurisdictional argument as has arisen in this case. Where wording less clear than Format No. 1 is used, it is not surprising that the effect may be found to be more consistent with the formulation described in paragraph 26.

**Error of Law**

**39**  I will deal now with the petitioners' second issue. They say that the Chambers Judge erred in law by ordering that the matter proceed to trial in the absence of any expert evidence to support the claim.

**40**  It will be recalled that one of the matters before the Chambers Judge on November 8, 2010 was the application of the petitioners to dismiss the claim because, despite repeated orders requiring the claimant to adduce evidence of the Elements of the ***Negligence*** Alleged, he had not done so and, as a result, there was no triable issue before the court.

**41**  The Chambers Judge had before him two letters that the claimant relied upon. One was a letter of Dr. McCuaig dated March 6, 2010. Apparently relying in part on the reported result of an echocardiogram that had been done by Dr. Jessup in Bellingham, Dr. McCuaig offered an opinion in the matter. The portion of Dr. McCuaig's letter referred to by the Chambers Judge was as follows:

I have not been involved in Mr. Morley[']s care since the summer of 2009, but based on his history and the findings of the Birmingham echocardiogram[,] he deserves the most basic standard of care in this situation. He needs this conflict settled finally by whatever means necessary. In my medical opinion[,] he has a defect in the atrial septum whether it is a PFO or ASD, it is the most reasonable explanation of his medical history and investigational findings. As well, I'm not a specialist in this area so I'm unable to provide much of an answer as to why there is a conflict. I will leave that to those Doctors with the training and expertise in this area.

Mr. Morley is not asking for anything more that [*sic*] the standard level of medical care in these situations, and he deserves that standard, as does anyone else who finds themselves with medical problems.

If that standard cannot be met locally in the lower mainland for whatever reason, I would suggest that every effort be made to locate an expert/specialist outside of the lower mainland that can provide it. This is a significant medical problem that needs assessment and monitoring by a specialist cardiology service.

In closing I would like to say that I hope I have provided some light on a very difficult situation if anything further is required please do not hesitate to contact me at the above address.

**42**  There was a second doctor's letter before the Chambers Judge, authored by Dr. Bernstein. The relevant portion of Dr. Bernstein's letter, quoted also by the Chambers Judge, was this:

I reviewed the CD that he brought from Dr. David Jessup's lab in Bellingham with one of my ECHO colleagues. There is no doubt that there appears to be quite a brisk flow of bubbles from the right atrium into the left atrium and the left ventricle is well seen with bubbles.

I explained to him that we needed to do a TEE as was recommended in Bellingham and he has agreed to that. I will make the arrangements for him to have a TEE. I am not positive that he is having embolic events through a PFO to cause a complete femoral occlusion as well as an ulnar occlusion. At this time he will not accept that and blames Celebrex for causing him to clot and being responsible for all his problems. He still smokes which puts him at risk for arterial problems.

**43**  In reaching his decision to refuse to dismiss the claim, the Chambers Judge stated at paras. 21-22 of the Chambers Decision:

[21] What informs that discussion, as set out by Dr. [McCuaig] and Dr. Bernstein and the characterizations by Mr. Moorley, is this. There is some evidence that he has, to quote him, a hole in his heart, that there is a means by which he does not have a complete separation from the ventricles within his heart and that he requires medical treatment for this condition. That is clear from Dr. Jessup, hearsay through Dr. [McCuaig], and from Dr. [McCuaig]'s direct statement in his letter from March 6th. In addition, that is clear from the report of Dr. Bernstein, who, for the reasons addressed in her addendum, chooses not to treat Mr. Moorley. Mr. Moorley is angry. He is upset. And he is, as I have tried to explain to him, to some extent his own worst enemy in the way in which he approached the medical experts. But is there a body of evidence before me which discloses that there is not a triable issue in this case? I think not. I think there is a body of evidence which, properly led, is such that the trier of fact might well have to hear the whole of the evidence and weigh the evidence in order to come to a proper conclusion on the facts before me. The weighing of evidence is, of course, the responsibility of a trial judge.

[22] An order under Rule 16(6) is one which does not provide for the claimant in this matter his day in court. While I can understand the frustration legally of those defending the defendants and their difficulty with Mr. Moorley, who has an abrasive nature, I am not prepared to grant the application under Rule 16(6) dismissing the claim.

[Emphasis added.]

**44**  In order to assess the viability of the Chambers Judge's conclusion, it is necessary to carefully examine Mr. Moorley's claim as articulated in his Notice of Claim.

**45**  The essence of his complaint is that Dr. Stephen Cheung, a cardiologist at Surrey Memorial Hospital, performed a certain diagnostic examination, a Micro-bubble test on December 8, 2006, but that the results of that test were lost. Mr. Moorley alleges that Dr. Cheung, when confronted, denied having done the test.

**46**  I pause to note that all of the evidence supports the conclusion that Mr. Moorley has a structural abnormality of his heart. It was that condition which brought him to Surrey Memorial Hospital on December 6, 2006 for the tests in question. No party disputes that Mr. Moorley suffers from that condition.

**47**  Mr. Moorley then makes reference to a whole series of events in which he says he was given a great run-around by a number of health system personnel and agencies. At the same time, he was experiencing further health adversity and complications.

**48**  Mr. Moorley has persisted doggedly in trying to have his health issues addressed and in having those whom he believes to have been at fault held to account. He does not feel those efforts have been at all successful and he is very frustrated.

**49**  With that background, it is critical to understand that his claim which alleges ***negligence*** (medical malpractice) against certain named doctors and health agencies, specifically states that the act that constitutes the ***negligence*** is the loss of the results of the Micro-bubble test. No other conduct is encompassed in the allegation.

**50**  Parenthetically, I would note that in his submissions before this Court, Mr. Moorley reiterated that to be the case.

**51**  Accordingly, that narrow and specific allegation of ***negligence*** has to frame the analysis of the application to dismiss the claim.

**52**  To succeed in his action, the claimant would be obliged to prove that the test was performed and that the record was lost. He would also be required to prove:

1. The relevant standard of care of a medical practitioner or agency in those circumstances, that is, relating to the care and retention of the record;
2. That the conduct of the defendant doctors and/or medical agencies in failing to retain the record fell short of that standard; and
3. That the breach of that duty of care, the loss of the record, caused harm or injury to him.

**53**  Although the petitioners characterize the decision of the Chambers Judge as an error of law, I think the decision is better characterized as one of mixed law and fact. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [*[1997] 1 S.C.R. 748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SR-00000-00&context=), [*144 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SR-00000-00&context=), Mr. Justice Iacobucci for the Supreme Court of Canada defined questions of "mixed law and fact" as "questions about whether the facts satisfy the legal tests" (para. 35). In contrast, Iacobucci J. defined questions of law as "questions about what the correct legal test is", and questions of fact as "questions about what actually took place between the parties" (para. 35).

**54**  Thus, I think the Chambers Judge's decision is properly characterized as a question of mixed law and fact since his decision that the record before him disclosed a triable issue involved a determination of the whether the evidence, particular that evidence relating to the loss of the results of the Micro-bubble test, satisfied the legal test of whether there was a triable issue of ***negligence***.

**55**  Post-*Dunsmuir v. New Brunswick (Board of Management)*, [*2008 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BH-00000-00&context=), [*[2008] 1 S.C.R. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BH-00000-00&context=) ("*Dunsmuir*"), the judicial review of questions of mixed fact and law have generally attracted a standard of review of reasonableness.

**56**  A number of British Columbia decisions support the conclusion that the appropriate standard of review to be applied to an interlocutory decision of the Small Claims Court is, post-*Dunsmuir*, "reasonableness": *Shaughnessy v. Roth*, [*2006 BCCA 547*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X338-00000-00&context=) at para. 17, [*233 B.C.A.C. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X338-00000-00&context=); *Farrell v. TD Waterhouse Canada Inc.*, [*2010 BCSC 1930*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G361-00000-00&context=) at paras. 22-25, [*[2010] B.C.J. No. 2770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G361-00000-00&context=), aff'd [*2011 BCCA 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G30X-00000-00&context=), [*[2011] B.C.J. No. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G30X-00000-00&context=); *0763486 B.C. Ltd. v. Landmark Realty Corp.*, [*2009 BCSC 810*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S06J-00000-00&context=) at paras. 16, 21-23, [*179 A.C.W.S. (3d) 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S06J-00000-00&context=).

**57**  Thus, I am satisfied that the standard to be applied to the judicial review of the decision of the Chambers Judge is appropriately that of reasonableness as defined in *Dunsmuir*.

**58**  In *Dunsmuir*, Bastarache and Lebel JJ. for a majority of the Supreme Court of Canada stated at para. 47:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

**59**  Applying that standard to the matter at bar, in my respectful view, it was not within the range of possible, acceptable outcomes, on the basis of the facts and the law, for the Chambers Judge to conclude that the record before him disclosed a triable issue.

**60**  It simply cannot be said that the two letters constituted any evidence of the applicable standard of care with respect to the missing test result, that a breach of that standard of care had been made out and that, as a result, some injury was sustained by Mr. Moorley.

**61**  Dr. McCuaig refers to Mr. Moorley having a defective atrial septum and the fact that there is some dispute as to the precise nature of the problem. He makes clear his view that it is important to address that medical condition. He makes no reference to the matter of a missing bubble test result.

**62**  It is true that he uses the terms "standard of care" and "standard of medical care", but not with any reference to the specific issue alleged by Mr. Moorley to constitute the ***negligence***. Dr. McCuaig appears to use these words in expressing his general view that Mr. Moorley has a significant heart problem and that persons in such a predicament are entitled to have access to medical care which can assess, monitor and treat such cardiac problems.

**63**  As for the letter from Dr. Bernstein, she explained that she reviewed the result of the medical test which had been done in Bellingham and concluded that it showed a flow of bubbles from the right atrium into the left atrium and other bubbles as well. She discussed an appropriate medical procedure to deal with the problem.

**64**  However, Dr. Bernstein made no comment whatsoever with respect to the lost records issue. Her only reference to those records was this:

... He had another bubble study done at Surrey Memorial Hospital which was read by Dr. Stephen Cheung. It was a bubble study and apparently he was told by Dr. Ch[e]ung that it was a positive study although Dr. Cheung stated in a later report that there was a bubble study done but it was not stored so that he could not give a definitive report.

**65**  I have examined each of the letters in question, including the parts not referred to by the Chambers Judge. I am satisfied my characterization of the letters is fair and accurate and that there is nothing else in them that provides the necessary support for Mr. Moorley's claim.

**66**  I have been provided with an abundant body of authority which demonstrates what appears to be a well-established practice in the Small Claims Court whereby a claimant will be required to adduce evidence which satisfies the court that the claimant has a proper basis to prosecute his claim, and particularly with respect to the three elements necessary to support a claim in ***negligence***.

**67**  The proposition was helpfully articulated by Skilnick P.C.J. in *Sigurdur v. Fung,* [*2007 BCPC 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3VX-00000-00&context=), [*[2007] B.C.J. No. 1746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3VX-00000-00&context=) *[Sigurdur]* at para. 21:

[21] In exercising the function of a gatekeeper determining which cases merit the allocation of the resource of trial time, judges in settlement conferences are permitted to first determine if a claimant has prima facie evidence to support an allegation that a professional person has failed to meet the requisite standard of care for their profession. It is insufficient for a claimant merely to allege that a professional such as a dentist has been negligent or has breached a contract by failing to provide professional services according to the requisite standard, without some supporting evidence. Judges have required this to be provided prior to trial under rule 7. This is so for a number of reasons:

1. An accusation of ***negligence*** or failure to meet a professional standard cuts a wide swath. Fairness dictates that a person accused of such ought to be told what case he or she has to meet at trial in order to gather together the necessary evidence to meet such claim;
2. An accusation against the reputation of a professional person is a serious matter and one which should not be publicly tried only on the strength of suspicion, hope of proof materializing at trial, innuendo or anger;
3. The amount of court time required in cases of professional ***negligence*** should not be allocated without some indication as to how the claimant intends to prove the case. To set aside this resource of court time where no evidence exists, in the hope that the proof will be found between the date of the settlement conference and the trial, is unfair not only the Defendants, but also to other litigants in the cue waiting for court time and for the taxpayer generally.

**68**  Imposition of the obligation is usually framed in terms of the requirement made pursuant to Rule 7(9) of the *Small Claims Rules*:

1. In a claim for damages for personal injuries, the claimant must file at the registry, within 6 months after serving the notice of claim and before a settlement conference is held, a certificate of readiness (Form 7) that has attached copies of all
2. medical reports, and
3. records of expenses or losses incurred or expected.

**69**  Although the requirement to show the Elements of the ***Negligence*** Alleged is not specifically spelled out in the *Small Claims Rules*, imposing the obligation by order seems to be the usual practice. *Rodvik v. Estey* (25 May 1997), Sechelt No. 95/1089, [*[1997] B.C.J. No. 1199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614B-00000-00&context=) (B.C.P.C.), *Poy v. Dr. Edward Coates Inc.*, [*2009 BCPC 388*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-253M-00000-00&context=), [*[2009] B.C.J. No. 2671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-253M-00000-00&context=), and *Sigurdur* are examples of cases in which provincial court judges dismissed the claimants' claims due to their failure to provide evidence to substantiate their respective allegations of ***negligence***.

**70**  Such an imposed requirement seems eminently reasonable and sensible. That is particularly so in a court where a great many litigants are self-represented.

**71**  The practice also aids in furthering the fundamental principle that the Small Claims Court is intended to provide a forum where parties can expect to have claims resolved in a just, speedy, inexpensive and simple way (*Small Claims Act*, [*R.S.B.C. 1996, c. 430, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F7ND-G098-00000-00&context=)(1)).

**72**  Part of the legitimate process to ensure those ends are met is the jurisdiction of the court to identify and deal with cases where there is no triable issue or some other reason that the matter should not proceed to court. Rule 7(14) of the *Small Claims Rules* provides for the dismissal of such cases:

1. At a settlement conference, a judge may do one or more of the following:
2. mediate any issues being disputed;
3. decide on any issues that do not require evidence;
4. make a payment order or other appropriate order in the terms agreed to by the parties;
5. set a trial date, if a trial is necessary;
6. discuss any evidence that will be required and the procedure that will be followed if a trial is necessary;
7. order a party to produce any information at the settlement conference or anything as evidence at trial;
8. order a party to
9. give another party copies of documents and records by a set date, or
10. allow another party to inspect and copy documents and records by a set date;
11. if damage to property is involved in the dispute, order a party to permit a person chosen by another party to examine the property damage;
12. dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it
13. is without reasonable grounds,
14. discloses no triable issue, or
15. is frivolous or an abuse of the court's process;
16. before dismissing a claim, counterclaim, reply or third party notice, order a party to file an affidavit setting out further information;
17. Repealed.
18. make any other order for the just, speedy and inexpensive resolution of the claim.

**73**  In summary, the *Small Claims Rules* and the established jurisprudence make clear that cases that have no realistic possibility of succeeding can be identified and terminated without the necessity of proceeding to a trial, and that there is a recognized wisdom in doing so.

**74**  In the present case, Mr. Moorley was obliged to satisfy the Court that there was *prima facie* evidence that the requisite elements of his ***negligence*** claim were provable. The record discloses that he had been afforded a number of opportunities to meet that requirement but had failed to do so.

**75**  In all the circumstances, it seems clear to me that fairness must extend to all of the parties. In the present case, Mr. Moorley presents himself as a sincere litigant with a problem that is indeed worthy of sympathy. Nevertheless, the defendants have a right to require that the threshold be met for the matter to be permitted to continue. When that was not done, despite orders having been made, it was reasonable for them to expect the Court to exercise its supervisory role.

**76**  In conclusion, it cannot be said that the Chambers Judge's decision that the record before him disclosed a triable issue in the case was within the range of possible, acceptable outcomes open to him. There was no evidence before him to support Mr. Moorley's claim of ***negligence***. Thus, it is my view that it was unreasonable for the Chambers Judge to conclude as he did.

**Conclusion**

**77**  For the reasons set out above, I would set aside the Chambers Judge's conclusion that the record before him disclosed a triable issue, pursuant to s. 2(2)(a) of the *Judicial Review Procedure Act* (the "*Act*"). Furthermore, pursuant to s. 5 of the *Act*, I would remit the petitioners' applications seeking to have the claimant's claim dismissed as disclosing no triable issue back to the Provincial Court for it to reconsider and determine this issue specifically. In doing so, the Provincial Court is to consider whether it is appropriate to enforce the "guillotine order" in part (c) of Judge Field's February 11, 2010 order, thereby dismissing the claimant's claim, on the basis that part (a) and (b) of the order have allegedly not been complied with (to be established, preferably, upon affidavit evidence provided by the petitioners). For the purpose of conducting its analysis, the Provincial Court is to be advised of these Reasons and, in particular, my determination that it was unreasonable for Judge Jardine to conclude that the record before him disclosed a triable issue when the record, as it now stands, contains no evidence to support Mr. Moorley's claim of ***negligence***.

**78**  It is open to Mr. Moorley, during the same reconsideration before the Provincial Court that I have ordered pursuant to s. 5 of the *Act*, to seek a further extension of the deadlines stipulated in Judge Field's order dated February 11, 2010.

**79**  In view of the outcome of this hearing, the Petitioners are entitled to have their costs at Scale B.

J.W. WILLIAMS J.

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[***Gorman v. Meghji, [2018] B.C.J. No. 3584***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TPT-S5S1-JG02-S002-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.B. Butler J.

Heard: February 26-28, March 1-2, 5-7, 2018.

Judgment: November 6, 2018.

Dockets: M153411, M164655, M164658, M165524, M164660

Registry: Vancouver

**[2018] B.C.J. No. 3584** | 2018 BCSC 1904

Between Chad Steven Gorman, Plaintiff, and Shiraz Hassanali Meghji, Defendant And between Shelina Meghji, Plaintiff, and Shiraz Hassanali Meghji, Constable Chad Gorman, Constable Harmis, Her Majesty the Queen in Right of the Province of British Columbia, and Minister of Public Safety and Solicitor General for the Province of British Columbia, Defendants, and Constable Chad Gorman, Her Majesty the Queen in Right of the Province of British Columbia, and the Minister of Public Safety and Solicitor General for the Province of British Columbia, Third Parties And between Safeena Meghji, Plaintiff, and Shiraz Hassanali Meghji, Constable Chad Gorman, Constable Harmis, Her Majesty the Queen in Right of the Province of British Columbia, and Minister of Public Safety and Solicitor General for the Province of British Columbia, Defendants, and Constable Chad Gorman, Her Majesty the Queen in Right of the Province of British Columbia, and the Minister of Public Safety and Solicitor General for the Province of British Columbia, Third Parties And between Shiraz Hassanali Meghji, Plaintiff, and Minister of Public Safety and Solicitor General of British Columbia and Constable Chad Steven Gorman, Defendants And between Shamez Meghji, by his Litigation Guardian, Shelina Meghji, Plaintiff, and Shiraz Hassanali Meghji, Constable Chad Gorman, Constable Harmis, Her Majesty the Queen in Right of the Province of British Columbia, and Minister of Public Safety and Solicitor General for the Province of British Columbia, Defendants, and Constable Chad Gorman, Her Majesty the Queen in Right of the Province of British Columbia, and the Minister of Public Safety and Solicitor General for the Province of British Columbia, Third Parties

(139 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Emergencies — Contributory *negligence* — Duty of care — Motor vehicles — Emergencies — Relation to causation — Motor vehicles — Rules of the road — Speed — Trial of liability in five actions arising from collision between officer and civilian — Liability apportioned 80/20 between officer and civilian, respectively — Officer responded to emergency at high rate of speed — Civilian stopped at stop sign and did not see officer, due to foliage blocking his view and officer's distance away, and proceeded into intersection where he was struck by officer — Officer breached duty to ensure public safety by travelling 90 kph over speed limit in busy commercial area — Civilian had some liability for not proceeding more slowly into intersection to ensure he could clear five lanes.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Care and control of vehicle — Proper lookout — Emergency vehicle and services — Police — Intersections — *Negligence* — Speed limits — Rate of speed — Liability — Civil actions — *Negligence* — Contributory *negligence* — Defences — Emergencies — Trial of liability in five actions arising from collision between officer and civilian — Liability apportioned 80/20 between officer and civilian, respectively — Officer responded to emergency at high rate of speed — Civilian stopped at stop sign and did not see officer, due to foliage blocking his view and officer's distance away, and proceeded into intersection where he was struck by officer — Officer breached duty to ensure public safety by travelling 90 kph over speed limit in busy commercial area — Civilian had some liability for not proceeding more slowly into intersection to ensure he could clear five lanes.**

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| Trial on liability in five actions arising from a collision between a police car and a civilian driver. The officer responded to a priority one call about a man who said he was being chased by a man with a gun. The officer activated his lights and sirens and accelerated. The civilian was stopped at a stop sign. The civilian proceeded into the intersection and was struck by the officer. The officer testified he had to consider the urgency of the situation in deciding how to respond, and that he was travelling at a safe and effective speed. The officer testified he saw the civilian enter the intersection and stop in the middle of the lane. The civilian saw a first police vehicle pass by quickly with its siren on just before he entered the intersection, but testified he did not hear or see this officer and decided it was safe to proceed. While moving forward, he saw the officer but the officer was still a considerable distance away so he continued. The officer and RCMP defendants argued the officer was the dominant driver and his risk assessment was reasonable, and there was no evidence he could have avoided the civilian, whereas the civilian had sufficient time to respond. The civilian argued he yielded and proceeded with caution, and the officer's excessive speed made it impossible for him to perceive and react.  HELD: Liability was apportioned 80 per cent to the officer and 20 per cent to the civilian.  The expert evidence confirmed the Airbag Control Module data was reasonably accurate within a few kilometres per hour. The ACM data was consistent with the civilian's evidence that he stopped, moved forward and then accelerated. He did not stop in the middle of the lane. The ACM data showed the officer never slowed down. Many witnesses, including the civilian, did not hear the officer's siren. It was accepted he turned it on, but it appeared that only witnesses who actually saw his vehicle were able to distinguish it from the siren of the first police car, which passed 10-20 seconds beforehand. The expert evidence differed on the point of impact, but this was not a significant point. The ACM data showed the officer was going upwards of 140 kph as he approached the intersection, and he did not see the civilian until five seconds before the impact, at which point he was only 200 metres away. The civilian was moving forward from the stop sign 4.5 seconds before the impact and would not have been looking as far to the east as needed to see the officer, because he would not expect someone to be approaching at that speed. Once the civilian saw the officer, he attempted to clear the intersection but did not make it. The civilian was required to yield the right-of-way, and he did not see the officer but could not be faulted for this. At the stop sign, the civilian's view was blocked by foliage, and as he moved forward, the officer was still too far away. The civilian did not breach his statutory obligation by entering the intersection. The hazard was created by the officer's speed. The officer was required to follow s. 4 of the Emergency Vehicle Driving Regulations and balance the risk of harm to the public. The officer breached the standard of care expected of a reasonable police officer by travelling at 145 kph in a busy commercial area in the afternoon, close to 90 kph over the speed limit. That the officer was responding to a priority one call did not allow him to create an unreasonable risk to the public. The civilian was also negligent. He knew one police car had just passed at a high rate of speed so was aware of the possibility there could be another, but chose to proceed in a vehicle that did not accelerate quickly and had to clear five lanes of traffic. Had the civilian proceeded more slowly, he would have had the opportunity to perceive and react to the officer. The majority of fault was with the officer, however, given the degree of risk created by his breach of duty. |

**Statutes, Regulations and Rules Cited:**

Emergency Vehicle Driving Regulations, [*B.C. Reg. 133/98, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RCB1-FC1F-M1TS-00000-00&context=)(3), s. 4(7), s. 6

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 119*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5GBY-CM31-JYYX-633F-00000-00&context=)(1), s. 122(1), s. 122(2), s. 122(4), s. 175(1), s. 175(2), s. 177, s. 186

***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)

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

**1**   On July 22, 2014 in the early afternoon, Constable Chad Gorman, an officer with the Langley detachment of the RCMP, was attending a call at an elementary school in Langley. While sitting in his marked police car, he received a Priority 1 alert on his radio. He was notified that a 911 call had come in from a man who said he was being chased by someone with a gun (the "911 Call"). A Priority 1 call is the most urgent priority call for RCMP officers. The call was in Cst. Gorman's zone of patrol and so he responded immediately. He initiated a U-turn and began driving towards the Fraser Highway. He says he activated his lights and sirens; this is described as a Code 3 response. He knew that one of his fellow officers, Cst. Vetter was also responding to the 911 Call and was proceeding on the same route ahead of him. When he reached the Fraser Highway he turned left and proceeded west to reach the location of the person who had initiated the 911 Call. He accelerated his vehicle quickly and reached a speed of 147 km/h.

**2**  At the same time, Shiraz Meghji and his family had just arrived in the Langley area. Mr. Meghji was driving the family's 2006 Chevrolet camper van (the "Meghji van"). Mr. Meghji's wife Shelina was sitting in the front passenger seat, his 18-year-old daughter Safeena and his 15-year-old son Shamez were sitting in the backseat. They were on vacation, having left their home in Calgary two days before. They spent the night of July 21 in Merritt, British Columbia and were heading for Vancouver. They decided to stop in Langley because Shamez wanted to visit an antique car museum located somewhere near the Fraser Highway. Mr. Meghji was not familiar with the roads. He had turned south off of the Fraser Highway when he should have turned north. As Cst. Gorman was turning onto the Fraser Highway, Mr. Meghji had turned around and was facing north at the intersection of 268 Street and the Fraser Highway (the "Intersection"). He intended to cross the highway and turn left after the Intersection.

**3**  Mr. Meghji drove into the Intersection and as his van crossed the westbound lane of the Fraser Highway his vehicle was struck at a high speed by Cst. Gorman's car. Both vehicles were destroyed by the force of the collision and the Meghji van was flipped onto its side. Somewhat miraculously, no one was killed. All five people suffered injuries, but they were able to walk away from the accident. They all commenced separate actions seeking damages for personal injury. The five actions (Vancouver Registry action nos. M153411, M165524, M164655, M164658, and M164660) were ordered to be heard at the same time on the question of liability.

**4**  The trial of the five actions was somewhat complicated by the number of counsel. Mr. Meghji had separate counsel to represent his interests as plaintiff and defendant, just as Cst. Gorman had counsel acting for him as plaintiff and counsel who represented his interests and those of the Her Majesty the Queen in Right of the Province of British Columbia and the Minister of Public Safety and Solicitor General for the Province of British Columbia (the "RCMP defendants") as defendants or third parties. I thank counsel for the care they took to avoid unnecessary duplication or repetition as they conducted examinations and made submissions.

**5**  The issue to be decided in all of these actions is whether one or both of the two drivers is at fault for the accident. If both are at fault, liability must be apportioned between the two drivers. Cst. Gorman and the RCMP defendants submit that Mr. Meghji should be found solely at fault for the accident. They say Mr. Meghji breached his statutory obligation to yield the right-of-way to Cst. Gorman's emergency vehicle travelling with lights and sirens activated. In addition, they say Mr. Meghji breached his statutory obligation to yield to Cst. Gorman's vehicle, which had the right-of-way and posed an immediate hazard. Mr. Meghji says that Cst. Gorman should be found substantially at fault for the accident. He says the officer acted negligently and unreasonably by travelling at an excessive speed in light of the conditions on the Fraser Highway at the Intersection. It was mid-day in a busy area with homes and commercial premises and the speed limit was only 60 km/h.

**6**  For the reasons that follow, I conclude that both drivers are at fault for the accident. I apportion fault 80% to Cst. Gorman and 20% to Mr. Meghji. I will explain how I arrive at this conclusion by setting out the evidence of the drivers and other lay witnesses. In addition, both vehicles had Airbag Control Modules ("ACMs") that were imaged and analyzed. These are the "black boxes" in a vehicle's airbag system that record and preserve valuable information about the speed, acceleration and deceleration of a vehicle shortly before impact. I have considered that evidence along with the evidence of the expert witnesses called by the parties. After summarizing the evidence I set out my findings of fact and my conclusions on liability based on application of the relevant law.

**Agreed Statement of Facts**

**7**  The parties submitted an Agreed Statement of Facts that sets out relevant information about the 911 Call, the intersection where the accident occurred as well as the ACM data from the two vehicles.

**8**  Cst. Gorman received the 911 Call at 1:28 p.m. He immediately started to drive his 2014 Ford Taurus police car (the "Gorman car") towards 49 Avenue and 240 Street, the location of the caller. He drove north on 272 Street and turned left to travel west on the Fraser Highway. Another police car, driven by Cst. Vetter (the "Vetter car"), was responding to the 911 Call along the same route ahead of the Gorman car. The Vetter car had the emergency lights and sirens activated.

**9**  The Gorman car approached the Intersection at approximately 1:30 p.m. The weather conditions were clear and the road was dry. The Fraser Highway has two through lanes and a left turning lane for west and eastbound traffic at the Intersection. On both sides of the Intersection there is a concrete median between east and westbound traffic. The speed limit on the Fraser Highway at the Intersection is 60 km/h. The Intersection has a pedestrian controlled traffic light to allow foot-traffic to cross the highway. The light flashes green for east and westbound traffic when it is not activated by a pedestrian. There were stop signs for north and southbound traffic on 268 Street.

**10**  The ACM in the Gorman car captured five seconds of pre-accident data in half-second intervals. That data shows that at -5.0 seconds the vehicle was travelling 139 km/h. It accelerated slightly and reached a speed of 147 km/h at -1.0 seconds before the accident. At -0.5 seconds the speed was 145 km/h and at zero time it is 123 km/h.

**11**  Mr. Meghji approached or was stopped at the south side of the Fraser Highway when the Vetter car drove by. Mr. Meghji stopped at the stop sign. The ACM in the Meghji van captured eight seconds of pre-accident data in miles per hour at one second intervals. The vehicle was not moving between -8.0 and -5.0 seconds. From -4.0 to -1.0 seconds it recorded speeds of 1, 6, 11 and 17 mph.

**Evidence of the two drivers**

**Cst. Gorman**

**12**  At the time of the accident, Cst. Gorman had been with the RCMP for six years. When he was in training at the RCMP depot, he took driver training courses that included high-speed driving and evasive manoeuvres. He studied emergency vehicle operation ("EVO"), including how to make decisions about an appropriate emergency response. He agreed in cross-examination that the primary objective of any intervention is public safety, and that the risks of injury, fatality and property damage must be taken into account. He received a professional passing grade on all of the driver training courses.

**13**  Cst. Gorman explained the difference between a pursuit and an emergency response ("ER"). The latter is when an officer is responding to a call. A judgment call must be made based on risk assessment. Depending on that assessment and all of the circumstances, the officer uses emergency equipment which could mean lights or sirens or both. He also explained that there are three levels of priority: Priority 3 is no immediate risk of harm; Priority 2 involves some degree of risk of harm; and Priority 1 involves immediate risk to public safety. Priority 1 calls usually require emergency equipment to be activated while a judgment call must be made by the officer as to activation of emergency equipment for Priority 2 and 3 calls. The dispatcher determines the priority level.

**14**  Cst. Gorman described how an officer who receives a call must consider the urgency of the situation, the distance to travel, and decide on the route to take based on traffic conditions and the surrounding circumstances. The primary concern is public safety, which includes the safety of the person making the call as well as the general public. The officer is expected to make the public safety assessment on a continuous and ongoing basis. Prior to the date of the accident, Cst. Gorman had responded to four or five ERs involving a firearm. It is a fairly rare occurrence and results in a high level of stress for the officer.

**15**  On July 22, he started his shift at 6:00 a.m. He had performed a morning inspection on his car that day, which was in good working order. When he received the 911 Call, he was writing his report on the call he had just completed. Cst. Gorman knew that Cst. Vetter had been dispatched to the 911 Call. The call had been made from a location that was some distance from Cst. Gorman's location. Cst. Gorman says he immediately activated his lights and siren and kept them on continuously until the accident. He recalls changing the tone of the siren as he approached intersections on the drive. This is accomplished by pressing on the horn.

**16**  As Cst. Gorman headed north on 272 Street, he saw Cst. Vetter's car about a half block in front of him. He saw traffic pulling over and stopping at the side of the road. Cst. Gorman had to stop for one or two seconds to make sure the traffic was clear at the intersection with the Fraser Highway. He then proceeded west on the highway. The highway widens into two lanes going each direction around 270 Street. He was taught that when there are two ER vehicles there should be a safe distance between them. He did not estimate the distance between them when he was up to full speed.

**17**  Cst. Gorman was very familiar with the Fraser Highway in that area. The north side of Fraser Highway has commercial premises to the east of the Intersection and residential buildings to the west. The commercial lots all have driveways on the highway. He knew that the speed limit increased from 50 km/h at 272 Street to 60 km/h at the point where the highway widens to four lanes. He was driving in the centre or left lane as he approached the Intersection. He did not check his speed as he was driving. Instead, he made a judgment call as to a safe and effective speed. As he approached the Intersection the flashing traffic light was green. He does not recall passing any vehicles.

**18**  Cst. Gorman's evidence about how far he was from the Intersection when he first saw the Meghji van was somewhat confusing. In chief he said he was approximately 100 metres east of the Intersection. On discovery, he said he was about 150 metres from the Intersection, but in cross-examination he said he now believed he was further away from the Intersection when he first saw the Meghji van.

**19**  Cst. Gorman saw the Meghji van edging into the Intersection and then saw it stop in the eastbound lane. His evidence about where the Meghji van was stopped changed between discovery and trial. At trial, he said the Meghji van was straddling the crosswalk and the first eastbound lane when it stopped. On discovery, he said the Meghji van came to a stop blocking the two eastbound lanes. Cst. Gorman testified that he took his foot off of the accelerator when he first saw the Meghji van but then accelerated again when he saw it stop. He believed the driver of the Meghji van had stopped to let his car travel through the Intersection. Cst. Gorman estimates that one or two seconds after he first noticed the Meghji van, he saw it accelerate across the Intersection. At trial, Cst. Gorman said he applied the brakes at that moment and made an evasive manoeuvre to the right but he could not avoid the collision. On discovery, he stated that he did not know if he applied his brakes.

**20**  In cross-examination Cst. Gorman agreed that drivers and pedestrians frequently act in unpredictable ways. Drivers do not act consistently when they hear or see police vehicles with emergency equipment activated. He also agreed that police officers are taught to slow down at intersections during EVO, even when they have the right-of-way. At trial, Cst. Gorman stated in cross-examination that as he approached the Intersection coming from the east, he would not have been able to see a vehicle stopped at the stop sign on the south side of 268 Street. He admitted that his statement to the contrary on discovery was incorrect. He changed that evidence because after the discovery he returned to the scene of the accident and re-examined the sight lines.

**21**  Some time after the accident, Cst. Gorman was given a traffic violation ticket by Staff Sargent Gerard Sokolowski who was in charge of the Langley traffic unit at the time. Sgt. Sokolowski had conducted a review of the accident and was of the view that Cst. Gorman was driving too fast. However, the traffic violation offence was never prosecuted and so Cst. Gorman does not have any charge on his driving record as a result of the accident.

**22**  In cross-examination Cst. Gorman agreed that the effectiveness of sirens diminishes as the police vehicle's speed increases. He also agreed that the sound of the sirens can be confusing if there is more than one emergency vehicle in close proximity.

**Mr. Meghji**

**23**  As the Meghji family proceeded on Fraser Highway, Shamez was giving directions to his father. By mistake Mr. Meghji turned left onto 268 Street. He quickly realized the error, completed a U-turn and came back to the Intersection. He intended to drive through the Intersection to make a left turn towards the antique car lot. Mr. Meghji estimates that he was 3 to 4 car lengths from the stop sign when he saw the Vetter car pass by the Intersection. Mr. Meghji believes he made a brief comment, such as, "did you see that". He came to a stop at the stop sign and saw there was no traffic coming from the west. However, from the stop line it was not possible to see the westbound traffic on Fraser Highway because there was considerable shrubbery at the southeast corner of the Intersection.

**24**  Mr. Meghji inched forward into the Intersection and looked to his right. He saw a car slowly approaching about a block away with a right turn signal on. He decided it was safe to proceed and he started accelerating through the Intersection. Once he started moving forward he never brought his vehicle to a second stop. Mr. Meghji did not hear another police siren as he drove forward. As he approached the concrete median, Mrs. Meghji, who was sitting in the front passenger seat, said that a second police car was coming towards them. Mr. Meghji looked to his right and saw a police car approaching his vehicle but thought it was a considerable distance away. He believed that he had enough time to drive through the Intersection and attempted to do so. He thought the police car was more than a block away. He accelerated and continued to accelerate until the collision. He recalls his wife shouting, "he is going to hit us" and that he should stop.

**25**  The Meghjis were all taken to the hospital where they spent a couple of hours. They were then taken to the police station to give statements. At midnight, the police took them to their vehicle where they were able to put their luggage and possessions into six or seven garbage bags.

**26**  In cross-examination, Mr. Meghji agreed that he had to yield right-of-way to any approaching vehicles on the Fraser Highway. He knew it would take some time for his van to cross the highway, which was five lanes wide. He agreed that the police car he saw was travelling well over the speed limit and was likely headed to an emergency. He also agreed that it is not unusual to see more than one emergency vehicle responding to an emergency.

**27**  Mr. Meghji was examined for discovery on two occasions. At the first discovery, he said that the only time he fully stopped was at the stop sign. After the stop sign, he inched forward to get a clear sight line to the east, but did not come to a full stop as he did that. On the second discovery he said he stopped the van twice; once at the stop sign and a second time after he had moved far enough into the Intersection to get a clear view to the east. At trial, he gave evidence consistent with the first discovery; in other words, he came to a full stop only once.

**28**  In cross-examination Mr. Meghji said that Mrs. Meghji told him about the approaching police car when he was at or near the concrete median. He could not be sure of the location, but believed he was still on the eastbound side of the highway. He also stated in cross-examination that he recalled seeing the lights of the police car but did not hear a siren.

**Evidence of the lay witnesses**

**29**  A number of lay witnesses who were at or near the Intersection when the accident took place gave evidence at trial. The following is a brief summary of that evidence.

**Robert Sitnik**

**30**  Mr. Sitnik is a Telus lineman. He was driving a Telus truck heading southbound on 268 Street. He was stopped at the Intersection waiting to turn left onto the Fraser Highway. The pedestrian traffic light was flashing green for traffic on the highway. From that location, Mr. Sitnik had an unobstructed view for approximately 300 to 400 metres to the east. Mr. Sitnik was very familiar with the Intersection. It is usually quite busy and he described the traffic on July 22 as "routine".

**31**  Shortly after he stopped at the stop sign he heard a police siren and saw a police car that was approaching at high speed; in excess of 100 km/h. At the same time, he saw a van stopped at the northbound stop sign on 268 Street. Having heard the siren and seen the police car with emergency lights, he decided to stay put. The police car passed through the Intersection without incident.

**32**  Within 10 seconds Mr. Sitnik saw a second police car coming from the east. He recalls seeing the second police car when it was 300-400 metres from the Intersection. He was somewhat uncertain about how much time had elapsed between the passing of the two police cars. He gave an estimate of between 15 and 30 seconds for the second police car to reach the Intersection after the first police car drove past. However, he also said that he heard the second police car a short time after the first one cleared the Intersection.

**33**  In his peripheral vision, Mr. Sitnik noticed the northbound van starting to move into the Intersection. He did not see the van come to a stop after it left the stop line. The police vehicle was not far away when the van moved into the Intersection. Mr. Sitnik realized they were going to collide. He described the collision as "violent". He does not recall hearing a change in the tone or sound of the police siren as it approached the Intersection.

**Celeste McNamara**

**34**  Ms. McNamara was driving east on the Fraser Highway at the time of the accident. She was very familiar with the Intersection, as she drove past it on most days. A friend, Mariko Brown, was seated in the front passenger seat. Ms. McNamara said that the pedestrian light was flashing green as she approached the Intersection. However, in her statement to the police after the accident she said she was not paying attention to the light. She saw and heard police cars travelling westbound. She agrees that it is difficult to judge distances, but believes the cars were a few blocks away when she first noticed them. She estimates that the second police car was about 10 car lengths behind the first one. They were within a few seconds of each other.

**35**  After seeing and hearing the police cars, she pulled over to the right side of the road. She believes she was about 20 feet from the Intersection. After the first police car drove by, she was watching the second police car and noticed that the van that had been stopped at the stop sign on 268 Street started moving forward. It moved fairly slowly into the Intersection. She believes the collision happened in a westbound lane of the highway within five seconds of the van starting to move.

**36**  She does not recall hearing a change in the sound or tone of the police siren as it approached the Intersection.

**Mariko Brown**

**37**  Ms. Brown lives in Nanaimo and was visiting Ms. McNamara. As their car approached the Intersection she and Ms. McNamara were chatting. She heard police sirens and saw the police cars coming towards them. Ms. McNamara started to pull over to the side of the highway about 140 feet from the Intersection. Ms. Brown recalls seeing vehicles in front of them that did not pull over. She said the police car went "flying by us" very quickly. She estimates that about seven seconds passed from when she first saw the Vetter car until it drove past.

**38**  Ms. Brown saw the van stopped at the stop sign on 268 Street. She said it was at the stop line or behind it. She saw the van start across the Intersection. After it started she thought it hesitated slightly without stopping before going through the Intersection. She thought it was trying to make a left turn. The van was struck by the second police car which was less than five seconds behind the first. She estimated that it was only two seconds from the time the van started moving until the collision.

**Tyler Simonsen**

**39**  Mr. Simonsen was walking west on the south side of the Fraser Highway about 50 metres east of the Intersection at the time of the accident. He walked in that area almost every day. He heard sirens coming from behind him. He glanced around and saw two police cars approaching. He believes that the first car had its lights and sirens on and that the siren in the second police car was turned on as it was driving towards the Intersection. He says the car was 20 to 30 yards behind him when he first became aware of it. There was a slight delay between the two cars but the second one was not far behind the first; maybe a few seconds.

**40**  Mr. Simonsen saw the van pull out from the stop sign on the south side of the Intersection. Given his vantage point, he would not have been able to see the van at the stop sign. This is because there is thick foliage at that corner in the summer. The van was accelerating normally into the Intersection when he saw it. The first police vehicle had already passed through the Intersection and the second vehicle was approaching quickly. He believes the accident occurred in the middle of the westbound lanes.

**Neil Walsh**

**41**  Mr. Walsh worked at a rental store on Old Yale Road, which is located just north of the Fraser Highway. He was inside the premises about 250 feet from the Intersection when the accident happened. He had a clear view of the Intersection from the store. On the day of the accident the doors were open. He heard a police car with a siren coming from the east on Fraser Highway. About 10 to 15 seconds later he heard a big crash. At first he did not know if the collision involved a police car. He did not actually see the collision.

**42**  In cross-examination he said he would have been at the front counter of the store at the time of the accident. He gave a statement to the police in which he said that he saw the first police car go by with its lights on. In his statement he also indicated that he did not hear a second siren but acknowledged that one siren may have cancelled the other out.

**Donald Chessell**

**43**  Mr. Chessell was employed at the same rental store. He had just parked his truck in the parking lot of the business when he saw a police car with lights and sirens drive by on the Fraser Highway. He thought it was going excessively fast. He says he heard an engine roaring loudly as walked into the store where Mr. Walsh was working. He did not hear any police siren when he heard the engine of the second police car. He then heard the collision and saw an explosion of car parts as he went outside. He believes that no more than a couple of minutes passed between the passing of the two vehicles.

**44**  In cross-examination his evidence about where he was when the first police car went by was confusing. He seemed to suggest that he was still in his truck when the first police car drove through the Intersection. He was certain that the second police car was travelling faster than the first one. He saw the second car when he was inside the store. He reiterated his recollection that approximately two minutes went by between the two police cars.

**Shelina Meghji**

**45**  Mrs. Meghji is a public health nurse. She confirmed that her husband had turned south onto 268 Street and had to turn around to go back across the Fraser Highway. Just as the van was coming to a stop at the stop sign, she saw the first police car go by at a very high speed with lights and sirens. After a brief hesitation to make sure it was clear, her husband started to move into the Intersection. At first she could not see to the east because of the vegetation, but once they cleared the vegetation she did not see any traffic coming from the east. She thought that it was safe for her husband to proceed and believes she told him that. She is uncertain about the location of the van when she said that, but believes it was getting close to the median.

**46**  As they got closer to the median Mrs. Meghji saw another emergency vehicle, but it was quite far away. Based on a review of Google maps after the accident, she thinks it was about two blocks away near an intersection with a traffic light. She saw the flashing lights of the police car. She was uncertain if its' siren was on. She is not sure of the van's location at that moment but believes it was in the vicinity of the median. Mrs. Meghji alerted her husband when she saw another emergency vehicle and realized that it was travelling very fast. She yelled at her husband to stop before the cars collided. She emphasized several times in her examination that there was very little time from the moment they entered the Intersection until the accident happened.

**47**  In cross-examination, Mrs. Meghji was referred to her police statement in which she said that her husband came to a stop when she shouted. She subsequently saw the ACM data and realizes that could not have happened.

**Safeena Meghji**

**48**  Safeena was in the left rear passenger seat behind her father. She heard a siren and saw the first police car pass by. It was moving really fast. She was looking to her left, towards the west, as the van moved into the Intersection. She heard her mother say that she saw a second police car that was going to hit them. It was instantaneous between the time that her mother said there was a second police car and the actual collision. She did not see the second police car before the accident. She was looking forward as they crossed the Intersection.

**Shamez Meghji**

**49**  Shamez is an engineering student. He found out about the antique car museum online and directed his father as they drove through Langley. After turning left on 268 Street they made a U-turn so they could cross over to the correct side of the highway. He heard a siren and saw flashing lights as the first police car drove by. He said his father proceeded forward slowly after looking both ways. He does not recall the van stopping again after it moved into the Intersection.

**50**  Shamez was seated behind his mother. He heard her say something about another police car coming and that they should stop. The van was even with the median at that time. He looked and saw the police car just before the collision. He could not recall if it had lights on, but his statement to the police indicates that it did have emergency lights on. He does not recall if he heard a siren.

**Additional police witnesses**

**51**  Three additional police officers gave evidence. None of them were witnesses to the accident.

**52**  Cst. Vetter testified about his response to the 911 Call. He was travelling quickly to the call with his emergency lights and sirens on due to the urgency of the call. He does not know how fast he was going but expects he sped up when the Fraser Highway transitioned from 2 to 4 lanes. As he drove along the highway he would have made a risk assessment in order to decide how fast to travel. Factors he took into account would have been the risk for the 911 caller, the distance to travel, and the road conditions in the areas he had to pass through. Cst. Vetter was taught to exercise caution and slow down at intersections when driving in an EVO situation. He does not recall if he slowed down at the Intersection. He does not recall noting any particular hazards as he drove along the highway. He did not know that Cst. Gorman was behind him. When he arrived at the site of the 911 Call, he learned that the individual with a gun was a member of a combined forces special unit who was effecting an arrest.

**53**  Staff Sgt. Sokolowski conducted a review of the accident seven months after it happened. He made the decision to issue a traffic violation to Cst. Gorman. He confirmed that an officer in an emergency response situation must continuously assess the situation with a view to public safety. There is no maximum speed for an emergency response. However, the faster you travel the more difficult it is to assess risks to pedestrians and vehicles coming from the side. A driver tends to get tunnel vision when travelling at high speeds. He agrees that under EVO officers are taught to proceed cautiously at intersections including where there is a flashing green pedestrian-controlled light.

**54**  Sgt. Alexandra Mulvihill is the current traffic commander with the Langley RCMP. She was not a member of that detachment at the time of the accident. She was assigned the job of prosecuting the traffic violation that had been issued to Cst. Gorman. She was of the view that there were investigational gaps in the file material such that the prosecution could not proceed without further investigation. No further investigation was done.

**55**  Sgt. Mulvihill is an EVO instructor. She teaches officers to continuously conduct a risk assessment based on the changing conditions including vehicle traffic, pedestrian traffic, time of day etc. Officers are instructed about their physiological and physical reactions and how to overcome problems like peripheral vision. They must keep scanning the situation and adjust their driving accordingly. Officers are taught not to exceed their skill set or limitations. Some officers are better drivers at high speeds than others but most improve with experience.

**Expert evidence**

**Robin Brown**

**56**  Robin Brown is an engineer practicing in the field of forensic engineering and motor vehicle accident reconstruction. He was given the ACM data and had access to the accident scene information obtained and created by the Langley RCMP scene investigators, including the large volume of photographs that were entered as exhibits at trial. The information he reviewed included the RCMP Integrated Collision Analysis and Reconstruction Services Report (the "ICARS report"). This is the police accident investigation report that set out the investigators' findings. He reproduced some of the RCMP accident scene drawings detailing the skid marks and the resting positions of the vehicles. He assumed those were accurate. In 2017 he inspected and took photographs of the Intersection and surrounding area. His report was entered as an exhibit and he was cross-examined.

**57**  Robin Brown noted that the ACM for the Meghji van did not record the vehicle speed at the moment of impact. He extrapolated data for the last five seconds before the accident to conclude that the Meghji van was travelling at 22 mph (or 35 km/h) at the moment of impact. He assumed that the Meghji van continued to accelerate at the same rate in the last three to four seconds before the collision.

**58**  Robin Brown also assumed that the location of the vehicles at impact was as estimated by the police investigators. He reproduced the impact location drawing from the RCMP file. The point of impact was determined by the investigating officers based on observations of the tire marks left on the road. However, he assumed the right front tire of the Meghji van was in line with the dotted line on the Fraser Highway that divided the two westbound travel lanes.

**59**  Robin Brown's report includes photos of a vehicle in the locations that the Gorman car would have been in at one second intervals in the five seconds before the accident, taken from the south side of the Intersection. However, those photographs were taken with a camera on the hood of a car three years after the accident. By that time, the foliage had been cut back considerably. The photos taken in this way did not give an accurate representation of what a driver stopped at the stop sign would have seen for two reasons: a driver would have a different angle of vision further back from the Intersection; and there would have been more foliage blocking the view in light of the changes made after the accident.

**60**  Robin Brown calculated the distances that the Gorman car was from the point of impact by using the speed of the Gorman car from the ACM data. The distance of the Gorman car from impact in those five seconds was:

Time to Impact Speed (mph) Distance from Impact 5 seconds 86 mph 195 metres 4 seconds 88 mph 156 metres 3 seconds 89 mph 117 metres 2 seconds 90 mph 77 metres 1 second 91 mph 37 metres

**61**  Robin Brown made assumptions about the reaction time of a driver based on a study by P.L. Olson. However, it was made evident in cross-examination that the reaction times from the study were not necessarily applicable to the circumstances confronting Mr. Meghji. The Olson study considered a visual hazard directly in front of the driver. It did not consider hazards moving at high speed off to the side. In cross-examination Mr. Brown agreed with the statement in the Olson article that, "if one thing is clear... perception-response time is highly variable". Mr. Brown agreed with Olson's statement that driver expectancy is an important factor in response time. If a driver's expectancies are violated, then a driver "requires more potent stimulus and/or more information" such that his or her response time can be increased.

**62**  Robin Brown also agreed in cross-examination that most drivers have difficulty assessing the speed of oncoming vehicles. Indeed, they cannot assess them with accuracy until the gap has closed to a dangerous extent. Further, Mr. Brown agreed with Olson's statement that because humans are not good at judging the speed of oncoming vehicles, they tend to assume that the approaching vehicle is travelling at approximately the same speed as other vehicles on the road. Drivers may not realize such an error until it is too late.

**63**  Mr. Robin Brown provided what he described as an "analysis" based on his examination of the accident site, his review of the available information and the assumptions noted. The analysis was premised to a large extent on the reaction times as set out in the Olson article. The significant points of his analysis are:

1. The Gorman Ford would have been visible to Mr. Meghji for the 5 seconds leading up to the impact.
2. If Mr. Meghji had commenced his perception and reaction when his vehicle was 2 seconds from impact he would only have had to stop accelerating after the perception reaction phase and this would have allowed the Gorman vehicle to clear the path of the van. The collision would have been avoided.
3. If Mr. Meghji commenced his perception reaction phase 1.2 seconds prior to the impact he would have to apply about 1/3rd of his breaking capacity to slow and allow the Gorman Ford to clear the path of the van. The Gorman Ford would have been about 45 meters east of the impact when Mr. Meghji would have to commence perception.

**64**  In cross-examination he agreed that if his assumed area of impact is too far north, then the starting position of the Meghji van would also be too far north. He assumed the Meghji van started 20.4 metres from impact but that distance is calculated based on the Meghji van's speed.

**65**  Mr. Robin Brown also agreed in cross-examination that he does not know how long before impact Mr. Meghji was warned of the second police car or how long before impact he actually saw the police car.

**66**  He also agreed in cross-examination that he made no attempt to assess when Cst. Gorman might have seen the Meghji van or how much time he had to react to its presence.

**Darrin Richards**

**67**  Mr. Richards is a biomechanical engineer and a member of the Society of Automotive Engineers. He works in the fields of accident reconstruction and biomechanical engineering. He prepared a report for the RCMP defendants. He also relied on the RCMP photographs, the vehicle inspection reports, the ICARS report and the traffic accident police investigation report. He also inspected the Intersection in 2017.

**68**  Mr. Richards notes that the data for the Meghji van is not synchronized with the start of the crash. This means that the collision could have occurred at any time between -1 and 0 seconds. In other words, the speed of the Meghji van was in excess of 17 mph (27.3 km/h), the speed at -1 seconds. The data shows that the brakes in the Meghji van were applied from -8 to -6 seconds. No brakes were applied at -5 seconds but the vehicle was not moving. It began to move between -5 and -4 seconds. Unlike the technology for the Meghji van ACM, the data for the Gorman car is recorded in relation to the impact time. Mr. Richards opines that the Gorman car speed was likely underestimated in the ACM data and was probably closer to the speed of 131 km/h at the time of impact.

**69**  Mr. Richards provides figures in which he shows the approximate location of the two vehicles at five seconds, three seconds and two seconds before impact as well as their locations at impact. He shows a photograph of the eastbound view from a position near the travelled edge of the Fraser Highway taken in November 28, 2017. There are no leaves on any of the trees or bushes and so it is possible to see some distance to the east. He opines that "Mr. Meghji would have had a clear view of westbound traffic on Fraser Highway prior to moving forward." He notes that Mr. Meghji did not apply brakes after he started moving forward.

**70**  Mr. Richards also provided a reply report to the report of Craig Brown. He disagrees with the opinion of Mr. Craig Brown as to the location of the vehicles at the point of impact. He believes that Craig Brown placed both vehicles too far to the south by approximately two metres. He is of the view that the crash simulation of the post-impact motion of the vehicles in Craig Brown's report does not match the tire marks documented at the scene. He is also of the view that the Craig Brown simulation provides little insight into the dynamics of the accident. He disagrees with Craig Brown's conclusion that the Meghji van was travelling 40 km/h at impact. He says this opinion is incorrect in part because Craig Brown used the incorrect point of impact, and in part because he assumed incorrectly that the impact occurred at zero seconds.

**71**  Mr. Richards is also critical of Craig Brown's opinion about the speed of the Meghji van at impact because it fails to take into account the fact that the speedometer's needle was stuck at 29 km/h. That speed is consistent with the ACM data. He agreed that the ACM data is reasonably accurate, but not precise.

**Craig Brown**

**72**  Mr. Craig Brown is a mechanical engineer specializing as a forensic engineer in analysis of motor vehicle accidents. He provided an expert report for Mr. Meghji and a reply report critiquing the reports of Mr. Richards and Mr. Robin Brown.

**73**  Mr. Craig Brown worked backwards from the point of impact, which he determined from tire markings to establish the two vehicles' starting points. As noted by Mr. Richards, he assumed that the collision took place at zero seconds using the Meghji van ACM data. The point of impact he assumed was in the middle of the left westbound lane. As noted by Mr. Richards, this is approximately 2 metres south of the point of impact assumed by the other two experts. He concludes that the Meghji van's speed at impact was approximately 40 km/h. Based on those assumptions, he is of the opinion that the Meghji van started near the south side of the east-west crosswalk on 268 Street.

**74**  Mr. Craig Brown concludes that the impact occurred when the Meghji van was about 70% into the left westbound lane, and that the Meghji van accelerated continuously from a stopping point slightly south of the crosswalk on 268 Street. He also opines that the Gorman car was about 2.3 seconds away from impact when it was about 90 metres away, and that Cst. Gorman would not have been able to stop his vehicle at that point. Mr. Meghji's van was about 17 metres from the point of impact at the same time.

**75**  In his reply report, Craig Brown critiques Mr. Richards' reliance on the locked speedometer as an indicator of the Meghji van's impact speed. He notes that research shows that after-crash readings can change on speedometers as a result of collision forces, particularly in collisions which impact a car's interior. Craig Brown is of the view that his calculation of the Meghji van speed (32 to 40 km/h at impact) is more accurate based on tire marks and the high throttle position shown at -1 seconds.

**76**  Craig Brown notes in the reply report that Mr. Richards' calculation of the Meghji van's stopped position is inconsistent with one of the assumptions in his report: that the Meghji van was stopped behind the stop sign. He provides no explanation or description of how the Meghji van moved from the stop sign into a stopped position in the middle of the two eastbound lanes. Craig Brown is also very critical of Mr. Richards' comments about the drivers' view to the east when stopped at the south stop sign on 268 Street. Mr. Richards relies on his photograph that shows the foliage without any leaves and with the limbs cut back considerably from what it was like at the time of the accident (by approximately 1.5 to 2 metres). He is critical that Mr. Richards relies on that photograph rather than the RCMP photos that show the condition at the time of the accident.

**77**  Mr. Craig Brown is critical of Robin Brown's reliance on the article by Dr. Paul Olson to suggest a surprised perception reaction time of 1.1 seconds. Craig Brown notes that the Olson study was dealing with visible hazards on the road directly in front of the driver. He refers to another report that suggests a 1.5 second reaction time for a laterally encroaching hazard. It is also critical that Mr. Robin Brown suggested using a perception reaction time based on a visual hazards when the warning received by Mr. Meghji was audible. Craig Brown refers to a study of audible signal response times that suggests very different results. He states, "it is difficult to predict what [Mr. Meghji's] perception response time would have been to an audible signal from his wife".

**78**  In cross-examination, Mr. Craig Brown agreed that Robin Brown's point of impact is about 1.2 metres further north than his assumed point of impact. This would change the position of the Meghji van before the impact and would mean that it started 1.2 metres further north. Mr. Craig Brown explained why he disagreed with the other party's interpretation of the skid marks. The difference relates to the 3 metre-long "skid mark" that Mr. Craig Brown says cannot have been made by anti-lock brakes. He believes it is a scrub mark that provides information about the position of the vehicles at the moment of impact.

**Position of the Parties**

**Cst. Gorman and the RCMP Defendants**

**79**  These parties submit that Mr. Meghji is solely responsible for the accident. They stress that Cst. Gorman was the dominant driver. Mr. Meghji was required to yield the right-of-way when entering a through highway and was further obliged to yield to Cst. Gorman's emergency vehicle with flashing lights and an audible siren. When Mr. Meghji entered the Intersection, the Gorman car was visible with its emergency lights and sirens activated. Mr. Meghji failed to produce any evidence to explain why he did not see the Gorman car. If Mr. Meghji had been paying proper attention, he would have seen Gorman's car and realized that he did not have time to proceed safely. Quite simply, Mr. Meghji did not proceed with caution.

**80**  These parties say Cst. Gorman's risk assessment was reasonable as he responded to the Priority 1 call and approached the Intersection. He made the decision to proceed when he saw the Meghji van enter the Intersection and then stop. That decision was reasonable and shows that Cst. Gorman was continuously assessing risk as he was trained to do. Further, no evidence was presented to suggest that there was a more reasonable speed at which Cst. Gorman should have been travelling. In order to avoid liability, Mr. Meghji must establish that Cst. Gorman had a sufficient opportunity to avoid the accident. There is no evidence to support such a finding.

**81**  These parties say there is no basis to conclude that Mr. Meghji somehow misjudged the speed of the Gorman car. They say the expert evidence of Craig Brown fails to deal with this question. In addition, they say the expert evidence of Robin Brown establishes that Mr. Meghji had sufficient time to respond to the hazard presented by the Gorman car.

**82**  The RCMP defendants submit that all claims against the province of British Columbia should be dismissed but acknowledge that the Minister of Public Safety and Solicitor General for the Province of British Columbia is liable for torts of RCMP members committed in the course of policing duties. The Meghji plaintiffs do not take issue with this submission.

**Mr. Meghji and the Meghji plaintiffs**

**83**  Mr. Meghji submits that Cst. Gorman should be found wholly or substantially at fault for the accident. Mr. Meghji says he complied with his statutory obligation to yield when he first arrived at the stop sign and that he proceeded with caution as he was required to do. At that point, the Gorman car was too far in the distance to be considered an immediate hazard. Accordingly, Mr. Meghji had the right-of-way when he entered the Intersection.

**84**  Mr. Meghji says he did not move forward from the stop sign and then stop part way into the Intersection as suggested by Cst. Gorman. He says Cst. Gorman's evidence cannot be accepted as it is contradicted by the ACM data from the Meghji van.

**85**  Mr. Meghji acknowledges he had an opportunity to see the Gorman car once he was accelerating into the Intersection, but says a driver must have time to perceive and react. Here, Mr. Meghji did not have sufficient time because of the excessive speed of the Gorman car. The fact that there are no cases involving accidents with emergency vehicles that were travelling at or near 147 km/h is telling; Cst. Gorman was driving at a reckless speed. He did not make a proper risk assessment in accordance with his training. As a result, he should be found solely or substantially at fault for the accident.

**86**  The other Meghji plaintiffs say Cst. Gorman should be found substantially at fault, but that Mr. Meghji was also negligent. They say liability should be apportioned 75% against Cst. Gorman and 25% against Mr. Meghji.

**Analysis**

**Statutory Framework**

**87**  Several provisions of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* (the "*Act*") are relevant to the circumstances of this case. Section 119(1) defines a "through highway" as a highway with stop signs erected at its entrances. The Fraser Highway is a through highway at the Intersection because of the stop signs on 268 Street.

**88**  Section 186 of the *Act* requires a driver at an intersection with a stop sign to stop at the marked stop line before entering the crosswalk on the near side of the intersection.

**89**  Section 122(1) of the *Act* permits the driver of an emergency vehicle to disregard speed limits and rules of the road provided he or she does so with due regard for safety:

122 (1) Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:

1. exceed the speed limit;
2. proceed past a red traffic control signal or stop sign without stopping;
3. disregard rules and traffic control devices governing direction of movement or turning in specified directions;
4. stop or stand.
5. The driver of an emergency vehicle must not exercise the privileges granted by subsection (1) except in accordance with the regulations.

...

1. The driver of an emergency vehicle exercising a privilege granted by subsection (1) must drive with due regard for safety, having regard to all the circumstances of the case, including the following:
2. the nature, condition and use of the highway;
3. the amount of traffic that is on, or might reasonably be expected to be on, the highway;
4. the nature of the use being made of the emergency vehicle at the time.

**90**  The regulations referred to in s. 122(2) are contained in the *Emergency Vehicle Driving Regulation*, [*B.C. Reg. 133/98*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F4W2-600C-00000-00&context=) (the "*Regulation*"). Section 4 of the *Regulation* applies to an emergency response and requires an officer exercising privileges under s. 122 to assess whether the risk of harm to members of the public is greater than or less than the risk if the privileges under that section were not exercised. In doing so an officer must consider the factors set out in subsections (3) to (7) which include:

1. the nature and circumstances of the suspected offence or incident;
2. the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;
3. the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;
4. the nature, condition and use of the highway; and
5. the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.

**91**  Section 6 of the *Regulation* states that an emergency vehicle operator exercising privileges under s. 122 of the *Act* must "slow that vehicle to a speed consistent with reasonable care when approaching or entering an intersection".

**92**  Cst. Gorman acknowledged that the Incident Management Intervention Model ("IMIM") applies to emergency vehicle operation. The seven guiding principles of the IMIM are:

The primary objective of any intervention is public safety.

Police officer safety is an essential element of public safety.

The IMIM must always be applied in the context of careful risk assessment.

Risk assessment must take into account the likelihood and extent of fatalities, injury and damage to property.

Risk assessment is a continuous process and risk management must evolve as situations change.

The best strategy is to use the least intervention to manage the risk.

Prudent intervention causes the least amount of harm or damage.

**93**  Sections 175 of the *Act*, set out the obligations of the driver of a vehicle who is about enter a through highway and s. 177 of the *Act* sets out a driver's obligation to yield when an emergency vehicle approaches:

175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,

1. 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
2. having yielded, the driver may proceed with caution.
3. 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.

...

177 On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren or exhaust whistle, and showing a visible flashing red light, except when otherwise directed by a peace officer, a driver must yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the roadway, clear of an intersection, and stop and remain in that position until the emergency vehicle has passed.

**Findings of Fact**

**94**  Many of the important facts are not in issue. The expert evidence confirmed that the ACM data is reasonably accurate; indeed, the speed data is likely accurate within a few kilometers per hour. Accordingly, I have accepted the ACM speed data as setting out the speed of the two vehicles in the seconds before the accident. Because I have accepted that evidence, I have not referred to the estimates of speed given by the lay witnesses. Those estimates are of no use to my analysis of the circumstances.

**95**  Three questions of fact were contested: (1) did Mr. Meghji bring the van to a stop in the eastbound lanes after leaving the stop sign; (2) did Cst. Gorman have his siren activated; and (3) how much time elapsed between the passing of the two police cars at the Intersection?

***Did the Meghji van stop?***

**96**  Cst. Gorman said he saw the Meghji van come to a stop in the eastbound lanes. Cst. Gorman said he was slowing his police car down as he approached the Intersection, but when he saw the Meghji van stop, he decided to keep travelling at a high speed. Mr. Meghji said he started to move forward slowly and then accelerated when he thought it was safe to do so; he did not stop again. While this question was highly contested, the answer is straightforward. The ACM data is consistent with Mr. Meghji's evidence. Cst. Gorman did not slow his police vehicle. The ACM data shows that he accelerated in the four seconds before reaching the Intersection up to the final second before the collision. Mr. Meghji moved forward in the five seconds before the collision and never slowed down. Further, Mr. Meghji's brakes were not applied from -8 to -6 seconds and the Meghji van was not moving at -5 seconds, so it could not have been moving from -8 to -5. In other words, Cst. Gorman's evidence cannot be accepted. Mr. Meghji did not stop the van in the middle of the eastbound lane. Rather, he proceeded slowly forward after he stopped near the stop sign and started to accelerate when he thought it was safe to do so.

***Was the siren activated?***

**97**  Many of the witnesses said they did not hear the siren of the Gorman car, or that it was activated as the car approached the Intersection. Mr. Meghji, Mr. Walsh and Mr. Chessell do not recall hearing a second siren. Mrs. Meghji does not recall if she heard the siren of the Gorman car. Shamez and Safeena heard the siren of the Vetter car but did not give evidence about Cst. Gorman's siren. Mr. Simonsen did not hear a siren sound from the second police car until it was just behind him. He believed it was turned on at that point. The other three lay witnesses all saw the Gorman car approaching the Intersection and heard its siren.

**98**  Cst. Gorman said he turned the siren on when he left the school to respond to the call. I conclude it is very likely that he did so. This was something he was trained to do. I find that his lights and siren were turned on when he turned his car to respond to the Priority 1 call. The siren was still on as he approached the Intersection.

**99**  While I conclude that Cst. Gorman's siren was on, the evidence of the other witnesses is instructive. The only witnesses who heard the siren are the witnesses who saw the Gorman car approaching. Without that visual clue, the other witnesses either did not hear it or did not realize there was a second siren as it was indistinguishable from the siren sound made by the Vetter car. The police witnesses indicated that they were instructed that a second ER vehicle should not travel too closely behind the first vehicle. I infer that one of the reasons for that instruction is the problem that occurred here: when two emergency vehicles are travelling in relatively close proximity, the efficacy of the siren on the second vehicle is greatly reduced.

***Time between police cars***

**100**  I set out the estimates given by the witnesses of the time or distance between the Vetter car and the Gorman car. The estimates vary by a considerable amount. Mr. Sitnik thought the time between the two cars was between 15 and 30 seconds; Ms. McNamara thought it was 10 car lengths (which would be less than 2 seconds); Ms. Brown thought that less than 5 seconds elapsed between the two cars; Mr. Simonsen thought the cars were a few seconds apart; Mr. Walsh thought the time between the sounds he heard was 10 to 15 seconds; and Mr. Chessell thought the time between the two police cars was less than two minutes. None of the Meghjis gave an estimate of the time between the two police cars.

**101**  This evidence highlights the difficulty that accident witnesses have in giving reasonable estimates of time, speed and distance. That is not surprising. Witnesses are asked to recall specific facts about a momentary event that they were not taking note of as it happened. The witnesses were undoubtedly shocked by the violent collision that occurred at the Intersection which further affects their perception and recollection of speed and timing.

**102**  Cst. Gorman thought that Cst. Vetter was a half block ahead of him as he drove up 272 Street. However, given the fast acceleration of both vehicles and the fact that Cst. Gorman stopped at Fraser Highway for a few seconds, it is likely that he was two blocks or more behind Cst. Vetter on the highway. At the speed Cst. Gorman was travelling, that would mean he was 10 to 20 seconds behind Cst. Vetter.

**103**  When I consider all of the evidence, I conclude that Cst. Gorman was likely travelling 10 to 20 seconds behind the Vetter car.

***Location of Impact***

**104**  The three experts posit slightly different positions for the vehicles at impact. Robin Brown and Mr. Richards place the point of impact further to the north than Craig Brown. It is difficult to determine the point of impact with any precision. Both Mr. Richards and Craig Brown relied primarily on the markings on the pavement, while Robin Brown accepted the RCMP assessment. They are all critical of each other's interpretation of the tire marks. The experts also use their point of impact to calculate the position of the Meghji van at five seconds before impact, in other words just before Mr. Meghji started to move into the Intersection. One of the problems in resolving the differences of opinion as to point of impact and location of the Meghji van at -5 seconds, is that there are critical unknown variables: the speed of the Meghji van at impact and the point in the ACM data sequence (between -1 second and zero time) when the impact occurred.

**105**  I find that Robin Brown's suggested point of impact is likely closest to where the collision occurred. As Craig Brown notes, it is about 1.2 metres north of his suggested point of impact. However, the actual point of impact is not particularly significant to the decision I have arrived at on liability. The point at which the Meghji van was located before it started to move is more relevant.

**106**  I accept that the Meghji van started from a position in front of the stop line but near the south edge of the crosswalk at the Intersection. That is generally in accordance with the opinions of both Craig Brown and Robin Brown and also accords with one of the assumptions that Mr. Richards accepts. Oddly enough, Mr. Richards opines in his report that the Meghji van started from a position north of the crosswalk in one of the eastbound lanes. He does not explain that inconsistency. It likely arises because he accepts that the Meghji van was only travelling at 29 km/h at impact. He accepts the frozen speedometer reading. I do not accept that opinion. It is very likely the Meghji van was travelling at a higher rate of speed which accounts for the fact that it was further south when it started to move. In arriving at this conclusion, I have taken into account the fact that the Meghji van was travelling approximately 8 metres per second at impact. In other words, in the space of two tenths of a second the Meghji van would travel more than 1.5 metres.

***Summary of Findings of Fact***

**107**  Cst. Gorman was travelling at a very high speed with lights and siren activated; upwards of 140 km/h. There were slight variations in the force Cst. Gorman applied to the accelerator pedal between 5 and 1.5 seconds prior to the accident, but he continued to apply force and continued to accelerate. Between 1.5 and .5 seconds prior to impact the force on the accelerator pedal decreased rapidly, but the car did not slow down until .5 seconds before impact. At five seconds before the Intersection, travelling at 140 km/h, Cst. Gorman was more than two hundred metres from the Intersection. It is extremely unlikely that he would have seen the Meghji van earlier than 5 seconds before impact given the speed he was travelling, the foliage cover at the corner and the distance. If he saw the Meghji van at five to three seconds before the Intersection, he did not respond to it. He did not see the Meghji van come to a stop in the eastbound lanes of the Fraser Highway. He did not react to the movement of the Meghji van until just before the collision.

**108**  Mr. Meghji started moving forward very slowly from the stop line at approximately 4.5 seconds before impact. He did not see the Gorman car or hear its siren when he looked east and started to move. When he began to move, it would have been difficult for him to see the Gorman car as he would not have been looking as far to the east for moving vehicles as he would have needed to look in order to see it. He would not have expected a car, even an emergency vehicle, to be travelling that fast in that location. At some point as he drove forward, the Gorman car reached a position where Mr. Meghji had an opportunity to see it and make an assessment as to whether to proceed. That was a momentary opportunity that likely occurred when Mrs. Meghji noticed the speeding police car. Mr. Meghji was not looking eastward at that moment and so, even with Mrs. Meghji's warning, he was not able to take advantage of that opportunity. He continued to accelerate in an attempt to clear the Intersection.

**Liability of Cst. Gorman and Mr. Meghji**

**109**  Assessing the liability of both drivers involves consideration of the relevant sections of the *Act*, the duties of a police officer driving in an emergency response situation, and the duties of a driver entering a through highway and faced with the immediate approach of an emergency vehicle. In the circumstances of this case, it would be artificial to examine the duties and obligations of the two drivers in isolation. The situation was dynamic and the circumstances must be examined throughout the moments leading up to the collision.

**110**  Pursuant to s. 175 of the *Act*, Mr. Meghji was required to stop at the stop sign in compliance with s. 186 and yield the right-of-way to traffic that is approaching so closely as to constitute an immediate hazard. The proper approach to the assessment of liability in this situation was set out in *Walker v. Brownlee*, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.) at 461:

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

**111**  In *Pacheco (Guardian of) v. Robinson*, [*[1993] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=), (B.C.C.A.), the court emphasized that any doubt about whether the dominant driver had an opportunity to avoid the accident should be resolved in favour of the dominant driver.

**112**  Cst. Gorman says that Mr. Meghji was the servient driver who disregarded his statutory duty to yield the right-of-way. Further, he cannot show that Cst. Gorman had a reasonable opportunity to avoid the collision.

**113**  The difficulty with this argument is that I have found that Mr. Meghji did not see the Gorman car and that he cannot be faulted for that failure. When he was at a stop, his view to the location of Gorman's car was at least partially blocked by the foliage. I reject the opinions of Robin Brown and Mr. Richards to the contrary. Both based those views on the condition of the Intersection when they saw it at which time the foliage had been cut back and there were no leaves on the trees. It is clear from the police photos that a car stopped in Mr. Meghji's position near the crosswalk would not have a clear view to the east.

**114**  When Mr. Meghji started forward, the Gorman car was still far away from the Intersection. He looked to his right to see if there was a vehicle approaching so closely as to be an immediate hazard. The Gorman car was too far away for Mr. Meghji, or a reasonable driver in his position, to conclude that it was an immediate hazard. It was too far outside of the field of vision he would have been examining for hazards. Before a vehicle can be an immediate hazard, it must be in a position and travelling at a speed where a reasonable driver would be able to see it and assess the risk it posed. Mr. Meghji would not have expected any vehicle to be travelling 145 km/h and could not have judged the speed of the Gorman car at that distance.

**115**  Accordingly, Mr. Meghji did not breach his statutory obligation by entering the Intersection. As Justice Lambert J.A. observed in *Carich v. Cook*, [*[1992] B.C.J. No. 446*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=), [*90 D.L.R. (4th) 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=) at page 326, the time to assess whether an approaching vehicle constitutes an immediate hazard is at the moment that the servient driver begins to enter the intersection. At that moment, the Gorman car was not an immediate hazard that could be perceived by a reasonable driver.

**116**  Cst. Gorman and the RCMP defendants argued that the speed of the Gorman car is not relevant to the question of whether Mr. Meghji's breached his duty to yield to through traffic. They rely on the decision in *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=), for the proposition that speed alone is not sufficient to cast blame on the dominant driver if the servient driver's actions meant that the dominant driver could not, with the exercise of reasonable care, have avoided the accident. In *Cooper*, there was a head on collision when the servient vehicle turned into the path of a through vehicle travelling at 85 km/h in a 40 km/h zone. The court rejected the argument that the through driver was at fault because the accident could have been avoided if that vehicle was travelling slower, and stated at paras. 42 and 44:

1. Travelling over the speed limit will only constitute ***negligence*** if the speed prevented the driver from taking reasonable measure to avoid the collision. However, the experts agree that the moment that Mr. Garrett encroached onto the westbound lane, it was impossible for Mr. Naeem to avoid the collision.

...

1. While it seems attractive to attribute blame based on the speed of the dominant driver and hypothesize on what would have happened if Mr. Naeem kept to the speed limit, the fact is that Mr. Naeem drove at the speed he did and there was nothing he could have done, driving at the speed he did, to avoid the collision. When Mr. Garrett decided to proceed with his left-hand turn, Mr. Naeem was approximately 40 metres away. He was an immediate hazard and Mr. Garrett should have yielded to him.

**117**  Of course, each case considering the obligations of dominant and servient drivers depends on its facts. In *Cooper*, the court was satisfied that the defendant would have seen the approaching vehicle if he had been looking and that he executed the turn in a way that made it impossible for the dominant driver to avoid the collision. The statement that, "there was nothing he could have done, driving at the speed he did, to avoid the collision" does not establish a principle that can be applied in all cases. Indeed, it would lead to an absurdity: every through driver, no matter what speed the vehicle was going, would not be found at fault. In *Cooper*, the speed of the through vehicle was of little relevance because the defendant was not paying attention to the approaching vehicle that was an immediate hazard and he executed a dangerous turn into that vehicle. Any hazard that existed when Mr. Meghji entered the Intersection was created by the high speed of the Gorman car, not by a failure to pay attention.

**118**  In *Hynna v. Peck*, [*2009 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6229-00000-00&context=), at para. 80, Madam Justice Ballance made a similar observation about the decision in *Cooper*:

80 I do not read the *Cooper* decision as advocating, in the assessment of tort liability, the outright rejection of considerations pertaining to the speed or other conduct of the through driver who constitutes an immediate hazard. Put another way, *Cooper* does not lay down a rigid rule that the Court ought not to consider whether and how the speed of a through driver might have played a causative role in an accident where it has been found that the other driver has failed to yield the right-of-way. In my view, the dictum in *Walker* does not extend that broadly and was not intended to have that reach. The Court in *Walker* speaks of avoidance action to be taken by a reasonably careful and skilful driver. It is difficult to imagine how a driver who is speeding significantly over the applicable limit can legitimately be portrayed as standing in the position of the reasonably careful and skilful driver contemplated by Cartwright J.

**119**  The next consideration is whether Cst. Gorman breached the standard of care of an emergency response vehicle driver. The leading authority in British Columbia on the general standard of care of a police officer is *Doern v. Phillips Estate*, [*[1997] B.C.J. No. 2625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M231-00000-00&context=) (B.C. C.A.). Mr. Justice Finch, as he then was, writing for the court, accepted the legal standard of care as articulated by the trial judge:

13 There is no dispute in this case concerning the legal standard of care to which the police are to be held. After a through [sic] review of the relevant authorities the learned trial judge said:

Based on the authorities provided, there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case ...

**120**  At para. 18, Finch J.A. recognized the difficult task carried out by police officers and the need to carefully examine all of the circumstances when considering if an officer's conduct departs from the standard of care:

18 Every one must recognize that the members of our police forces should not be unduly hampered in the discharge of their difficult and often dangerous work. The police vehicle pursuit policy is a guideline for officers which attempts to balance the public interest in the apprehension of suspected criminals, with the need to maintain reasonable levels of safety for the police and the public as the police discharge their duties. Whether particular police conduct departs so far from the guidelines and from the standard of care imposed by law, as to constitute ***negligence*** is a heavily fact dependent question. ...

**121**  As I noted above, a police officer driving an emergency response vehicle must follow section 4 of the *Regulation*. In order to exercise privileges under s. 122(1) of the *Act*, the officer is required to balance the risk of harm to the public. As all of the witnesses made clear, that balancing exercise is continuous when operating a vehicle in an emergency situation. An officer is also required under s. 6 of the *Regulation* to slow his or her "vehicle to a speed consistent with reasonable care when approaching or entering an intersection". An officer is also required to follow the guiding principles set out in IMIM as noted at para. 92 above.

**122**  In *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. 14, Madam Justice Dardi provides a useful framework for analyzing a police officer's ***negligence***:

14 This Court must analyze whether there was any ***negligence*** on the part of the plaintiff within the context of s. 122 of the *MVA*, the relevant sections of the *Emergency Vehicle Driving Regulation*, and any relevant police policy. The critical inquiry which informs the analysis is whether the emergency to which the plaintiff was responding was sufficiently serious to justify the exercise of his privileges under s. 122 of the *MVA* and the attendant risk to public safety. This mandates an assessment of whether he properly balanced the utility of his conduct with the risk to public safety: *Radke* at para. 13.

**123**  I was referred to numerous decisions involving the actions of police officers in emergency response or pursuit situations. Those decisions are instructive. Of course, assessment of whether an officer breached the standard of care is a "heavily fact dependent question".

**124**  Cst. Gorman referred to *Maddex v. Sigouin*, [*2014 BCCA 213*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2T6-00000-00&context=), for the proposition that "drivers must at all times be particularly aware and accommodating of police officers responding to highway emergencies in carrying out the onerous duties with which they are charged..." While there is no doubt that is so, the circumstances in *Maddex* are not comparable in any way to the circumstances before the court.

**125**  Cst. Gorman also referred to *Singh v. British Columbia (Minister of Safety)*, [*2013 BCSC 923*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0MG-00000-00&context=), in which the court dismissed the claim against a police officer whose vehicle struck another car at an intersection while answering a Priority 1 call. She understood that an unknown male with a knife was going to use it to harm a child. While the case involved a similar Priority 1 call, the circumstances of the officer's driving have no similarity to the present case. The court concluded that the officer "was proceeding cautiously across the intersection". Even though she was responding to a Priority 1 call, she stopped three times in the course of crossing the intersection and the accident occurred when she was travelling at a low speed.

**126**  While in *Singh*, the intersection the police officer crossed was busy, and she was faced with a red light, the contrast between her approach and that of Cst. Gorman cannot be overstated. Cst. Gorman proceeded in a manner that was anything but cautious. He gave little or no weight to the risk to public safety that was created by his manner of driving.

**127**  In *Watkins v. Dormuth*, [*2014 BCSC 543*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61WN-00000-00&context=), the court found the defendant police officer 100% at fault when he passed the plaintiff's vehicle on the left at 80 km/h in a 50 km zone. The defendant officer's vehicle was the third vehicle responding to the call. The plaintiff saw the two other emergency vehicles ahead of her and decided to turn left to avoid any emergency down the road. She did not see or hear the defendant's lights and siren. The defendant maintained the plaintiff was in breach of s. 177 of the *Act* by failing to yield. In finding the plaintiff was not at fault, Mr. Justice Blok stated at para. 89:

The duty imposed by s. 177 of the *Motor Vehicle Act* to yield to an emergency vehicle is not absolute. A driver must have time to perceive and react. Here, Ms. Watkins did not perceive the police car behind her and so she did not react. The defendants say she ought to have perceived it. I am not convinced of this because Cst. Dormuth's police car was behind her for only a short period of time. The defendants have not shown that this time was long enough that a reasonably alert driver would have perceived the lights and sirens of the Dormuth police car and pulled over...

**128**  Those comments are apposite here. The s. 177 duty is not absolute and the court must assess whether a driver had time to perceive and react to the presence of the emergency vehicle in the circumstances. The speed at which Cst. Gorman was travelling was so fast that Mr. Meghji did not have sufficient time to perceive and react to the presence of the police vehicle.

**129**  In *Watkins*, Blok J., at para. 95, also referred to s. 122 of the *Act* and to the *Regulation*. He noted that emergency vehicles do not have "free rein" when exercising privileges under that section:

Emergency vehicles do not have free rein in exercising the driving privileges accorded by s. 122 of the *Motor Vehicle Act*. They may only do so within the limits set by the *Emergency Driving Regulation* and they are constrained by the duty to drive with due regard for safety: *Frers*, at para. 89. I conclude that Cst. Dormuth had no basis to exercise any emergency vehicle driving privileges, and I conclude that in exercising those privileges he did not drive with due regard for safety in the circumstances of this case.

**130**  I have no hesitation in concluding that Cst. Gorman breached the standard of care of a reasonable police officer in travelling on the Fraser Highway at 145 km/h on a weekday afternoon through a commercial/residential zone at a speed that was close to 90 km over the speed limit. In doing so he passed through a number of intersections without slowing his car at all, let alone to a speed consistent with reasonable care. He certainly did not slow down as he approached the Intersection. He chose to travel at such a high speed because he was responding to a Priority 1 call. However, the fact that it was a very high priority emergency response situation does not give an officer the privilege of travelling at a speed that creates an unreasonable risk to the public. He is required to take into account the time of day, that nature of the surrounding neighbourhood and the possibility that vehicles or pedestrians could cross the highway. In these circumstances, Cst. Gorman failed to properly balance the utility of his conduct with the risk to public safety.

**131**  The final question I have to consider is whether Mr. Meghji was negligent in continuing through the Intersection. The fact that the Gorman car was not an immediate hazard when Mr. Meghji entered the Intersection does not mean that he could drive through the Intersection with impunity. As noted in *Carich*, a driver entering an intersection, like the driver approaching it, must keep a proper lookout.

**132**  This raises the issue discussed in *Watkins*, did Mr. Meghji have sufficient time to perceive and react? And, if he did have an opportunity to perceive and react, did any failure on his part to do so contribute to the accident? This involves consideration of the evidence of Robin Brown. Mr. Brown opined that if Mr. Meghji had commenced his perception and reaction at either 1.2 or 2.0 seconds from impact, the accident would have been avoided. I do not accept that opinion. In providing and defending his opinion, Mr. Brown was overly argumentative. He approached the question as an advocate rather than as an independent expert. I conclude that he misused the P.L. Olson study. That study considered response time to a visual hazard directly in front of a driver, not a hazard approaching at high speed from the side. Further, he failed to give any heed to the cautions expressed by the author and, in particular, that perception and response time is highly variable and that when expectations are violated drivers require more input and thus more time to respond. He also failed to take into account the difficulty drivers have in properly assessing excessive speeds.

**133**  While I do not accept Robin Brown's opinion, I conclude that Mr. Meghji's decision to drive through the Intersection in the manner he did was negligent. He knew that one emergency vehicle had passed at high speed. He was aware of the possibility that there could be a second emergency vehicle heading in the same direction. In spite of that, he accelerated immediately after his first assessment of the situation when he did not see any vehicle that posed an immediate hazard approaching from the east. He had five lanes to cross in a vehicle that does not accelerate quickly. In those circumstances, proceeding at a slower rate would have given him some opportunity to perceive and react to Gorman's fast approaching vehicle. Had he done so, he may have had enough time to see the Gorman car and assess how fast it was travelling. In these circumstances, I conclude that Mr. Meghji must also bear some fault.

**Apportionment of Fault**

**134**  Where two or more parties are found at fault, liability is to be apportioned in accordance with s. 1 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*:

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.

...

**135**  The proper approach to apportionment of fault is set out in *Cempel v. Harrison Hot Springs Hotel Ltd.*, [*[1997] B.C.J. No. 2853*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=). Mr. Justice Lambert, writing for the majority, explained that approach at para. 24:

In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. ...

**136**  In *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=), Finch J.A., as he then was, explained, at para. 46, that blameworthiness evaluates the conduct of the parties and the degree to which each departed from the standard of reasonable care:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**137**  When I apply these principles to the circumstances that led to this accident, I conclude that the majority of the fault must be apportioned to Cst. Gorman because of the degree of risk created by his breach of the standard of care of a reasonable police officer, and the extent to which his actions departed from that standard. His failure to reasonably balance the factors set out in s. 4 of the *Regulation* led him to drive at a speed that was excessive and inconsistent with reasonable care for the public safety. His actions created the serious risk of harm that materialized when Mr. Meghji entered the Intersection. Mr. Meghji's departure from a reasonable standard of care was much less; he failed to proceed with sufficient care as he drove through the Intersection.

**138**  In these circumstances, I conclude that Cst. Gorman is 80% at fault for the accident. Of course, he is not a party to these proceedings and so the Minister of Public Safety and Solicitor General for the Province of British Columbia is liable for Cst. Gorman's ***negligence*** in the course of performing his duties. Liability is thus apportioned 80% to the Minister of Public Safety and Solicitor General for the Province of British Columbia, and 20% to Mr. Meghji.

**139**  In summary, the accident was caused by the ***negligence*** of both Cst. Gorman and Mr. Meghji. Liability is apportioned:

1. 80% to the Minister; and
2. 20% to Mr. Meghji.

G.B. BUTLER J.

**End of Document**

[***Henry v. British Columbia (Attorney General), [2016] B.C.J. No. 1160***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JYW-JPX1-JC0G-61MS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.E. Hinkson C.J.S.C.

Heard: August 31, September 1, 3-4, 8-11, 21-25, 29-30,

October 1-2, 6-9, 13-16, 19-22, 26-28, November

2-3, 5, 9-10, 16, 23-27, December 1,

7-9, 15-17, 2015

Judgment: June 8, 2016.

Docket: S114405

Registry: Vancouver

**[2016] B.C.J. No. 1160** | 2016 BCSC 1038 | 2016 CarswellBC 1543 | 267 A.C.W.S. (3d) 613 | 356 C.R.R. (2d) 31 | 29 C.C.L.T. (4th) 200

Between Ivan William Mervin Henry, Plaintiff, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia, City of Vancouver, William Harkema, Marilyn Sims and Attorney General of Canada Defendants

(474 paras.)

[Editor's note: Supplementary reasons for judgment were released November 15, 2016. See [*[2016] B.C.J. No. 2385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M7G-Y311-JJ1H-X0P6-00000-00&context=).]

**Case Summary**

**Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of person — Right not to be deprived thereof — Principles of fundamental justice — On being charged with an offence — To be presumed innocent — To make full answer and defence — Procedural rights — To make full answer and defence — Remedies for denial of rights — Procedural remedies — Damages — Action by plaintiff against Province and Crown for damages for wrongful conviction and imprisonment allowed — Plaintiff was convicted of ten sexual assaults in 1983, declared dangerous offender, and sentenced to indeterminate period of imprisonment — Following 2010 review arising from new information regarding viable alternate suspect, Court of Appeal quashed convictions and entered acquittals — Crown breached duty of disclosure by intentionally withholding information relevant to plaintiff's ability to make full answer and defence — Information would have affected verdict and sentence — Non-disclosure breached plaintiff's ss. 7 and 11(d) Charter rights — Plaintiff awarded $8.07 million in damages — Canadian Charter of Rights and Freedoms, s. 24(1).**

**Criminal law — Procedure — Crown's duties — Disclosure — Action by plaintiff against Province and Crown for damages for wrongful conviction and imprisonment allowed — Plaintiff was convicted of ten sexual assaults in 1983, declared dangerous offender, and sentenced to indeterminate period of imprisonment — Following 2010 review arising from new information regarding viable alternate suspect, Court of Appeal quashed convictions and entered acquittals — Crown breached duty of disclosure by intentionally withholding information relevant to plaintiff's ability to make full answer and defence — Information would have affected verdict and sentence — Non-disclosure breached plaintiff's ss. 7 and 11(d) Charter rights — Plaintiff awarded $8.07 million in damages — Canadian Charter of Rights and Freedoms, s. 24(1).**

**Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of person — Principles of fundamental justice — Presumption of innocence — Procedural rights — To make full answer and defence — Remedies for denial of rights — Action by plaintiff against Province and Crown for damages for wrongful conviction and imprisonment allowed — Plaintiff was convicted of ten sexual assaults in 1983, declared dangerous offender, and sentenced to indeterminate period of imprisonment — Following 2010 review arising from new information regarding viable alternate suspect, Court of Appeal quashed convictions and entered acquittals — Crown breached duty of disclosure by intentionally withholding information relevant to plaintiff's ability to make full answer and defence — Information would have affected verdict and sentence — Non-disclosure breached plaintiff's ss. 7 and 11(d) Charter rights — Plaintiff awarded $8.07 million in damages — Canadian Charter of Rights and Freedoms, s. 24(1).**

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| --- |
| Action by the plaintiff, Henry, against the defendants, the Province and the provincial Attorney General, for damages based on wrongful conviction and imprisonment. In 1983, the plaintiff was convicted of ten sexual offences involving eight different complainants. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. The police investigation had included a suspect, McRae, now deceased, who physically resembled the plaintiff and was convicted of predatory crimes dubbed the Small Man offences that occurred in the same neighbourhood during the same time period. In 2006, new information regarding McRae caused the Crown to review the plaintiff's convictions due to similarities to the Small Man offences. In January 2009, the British Columbia Court of Appeal reopened the plaintiff's appeal from conviction. In June 2009, Henry was released from custody on bail pending the hearing of his appeal from conviction before the British Columbia Court of Appeal. By that time, Henry had spent over 26 years in custody since his arrest. In 2010, the Court of Appeal quashed all ten convictions and substituted acquittals for each. The Court cited weakness in the identification evidence at trial, the unfairness of a police photograph lineup, errors in the jury instructions, and the failure to sever counts and grant a mistrial. In 2011, the plaintiff brought the predicate action, settling with various defendants save for the Province and the provincial Crown. The plaintiff submitted his wrongful conviction resulted from intentional breaches of his ss. 7 and 11(d) Charter rights.  HELD: Action allowed.  Crown Counsel failed in its duty of disclosure by intentionally withholding relevant information prior to the 1983 trial despite repeated requests by the plaintiff for full disclosure. Crown Counsel knew or ought reasonably to have known that the information it intentionally withheld was damaging to the prosecution and material to the plaintiff's defence, and that the failure to disclose it would likely impact Henry's ability to make full answer and defence. The wrongful non-disclosure breached the plaintiff's right to a fair trial and demonstrated a shocking disregard for his rights protected by ss. 7 and 11(d) of the Charter. Had disclosure occurred, the plaintiff would likely have been acquitted and would have avoided sentencing as a dangerous offender. The Province, rather than the Vancouver Police Department, was liable for the plaintiff's wrongful conviction and lengthy incarceration. No contributory ***negligence*** or failure to mitigate was established. The harm alleged by the plaintiff was self-evident. The appropriate remedy was an award of damages pursuant to s. 24(1) of the Charter totaling $8.07 million comprised of $530,000 in compensatory damages, $56,691 in special damages, and $7.5 million in damages reflecting the vindication and deterrence functions of s. 24(1). |

**Counsel**

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Counsel for the Defendant, Attorney General of Canada: M. Taylor, Q.C., K. Cochrane and S. Pereira.

[Editor's note: A corrigendum was released by the Court June 9, 2016; the changes have been made to the text and the corrigendum is appended to this document.]

[Editor's note: A correction was released by the Court June 13, 2016; the changes have been made to the text and the correction is appended to this document.]

[Editor's note: A correction was released by the Court June 15, 2016; the changes have been made to the text and the correction is appended to this document.]

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5. Joint and Several Liability

**2. Are Damages a Just and Appropriate Remedy for Mr. Henry?**

**3. Are There Countervailing Factors that Defeat the Functional Considerations Supporting an Award of Damages or Render an Award of Damages Inappropriate or Unjust?**

**4. The Quantum of Damages**

A. Compensation

i. Damages for Mr. Henry's Daughters

1. Past Hypothetical Events
2. The Likelihood of Recidivism
3. Past Loss of Opportunity to Earn Income

B. Special Damages

C. Non-Pecuniary Damages

D. Vindication of Mr. Henry's breached Charter rights

E. Deterrence of Future Breaches

***COSTS***

***SUMMARY***

**Reasons for Judgment**

|  |
| --- |
| **C.E. HINKSON C.J.S.C.** |

**1**   In March 1983, having represented himself at trial, the plaintiff, Mr. Henry, was convicted of 10 sexual offences that occurred in 1981 and 1982 involving eight different complainants. He was subsequently declared a dangerous offender and sentenced to an indefinite period of incarceration. He remained imprisoned for almost 27 years. On October 27, 2010, the British Columbia Court of Appeal quashed all 10 convictions and substituted acquittals for each: *R. v. Henry*, [*2010 BCCA 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B30Y-00000-00&context=) [*Henry BCCA*].

**2**  In this action, Mr. Henry seeks damages from Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia (the "Province") for what he asserts were breaches of his rights pursuant to the Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 [*Charter*] that resulted in his wrongful conviction and ensuing imprisonment.

**BACKGROUND**

**1. Assaults**

**3**  In the 18-month period from November 25, 1980 to June 8, 1982, the Vancouver Police Department ("VPD") investigated more than 20 complaints of sexual assaults that occurred in the City of Vancouver. The VPD obtained detailed but unsworn statements from the complainants, collected exhibits from some of the crime scenes, and submitted some of those exhibits for forensic analysis. They also obtained fingerprints and tool markings from some of the scenes and sent them for comparison purposes to the Vancouver City Laboratory (the "Lab").

**4**  During many of the assaults, the perpetrator told the complainants that he had been "ripped off" by someone who owed him money and who was supposed to live at the residence to which he had illegally gained entry. The VPD investigators concluded that each of the assaults had likely been committed by one man, whom they dubbed "the rip-off rapist".

**5**  I will refer to the eight complainants whose complaints underlay the charges faced by Mr. Henry at trial in 1983 as B.Q., P.B., K.K., P.G., H.M., D.I., C.A., and J.F.

**6**  B.Q. was assaulted on May 5, 1981; P.B. on June 16, 1981; K.K. on August 5, 1981; P.G. on October 17, 1981; H.M. on February 22, 1982; D.I. on March 10, 1982; C.A. on March 19, 1982; and J.F. on June 8, 1982.

**2. Investigation**

**7**  The VPD's response to the sexual assaults included the investigation of a suspect named Donald James McRae ("McRae"), alias Donald Hobson. Mr. McRae was charged and pleaded guilty to three of what came to be referred to as the "small man" offences and was sentenced to five years' imprisonment for those offences in 2005. He died some time thereafter. At the time of the offences for which Mr. Henry was convicted, Mr. McRae lived at 225 East 17th Avenue, in the heart of the Mount Pleasant neighbourhood where many of the sexual assaults took place. He had a history of late night predatory sexual behaviour in that neighbourhood and in the other Vancouver neighbourhoods where the sexual assaults for which Mr. Henry was convicted occurred. Mr. McRae resembled Mr. Henry in appearance.

**8**  Mr. Henry became a suspect in the investigation after his ex-wife Jessie Henry ("Ms. Henry") contacted the VPD and provided them with a statement suggesting that Mr. Henry might have been responsible for the sexual assaults. She provided articles of clothing belonging to Mr. Henry and at least one photograph of him to the VPD. Mr. Henry was then placed under surveillance. He was arrested on May 12, 1982 and his personal tools were seized from his vehicle. 11 complainants viewed him in a police line-up that day. Of those 11 complainants, six were named in the indictment that was before the jury that convicted Mr. Henry. Mr. Henry was photographed and released from custody on May 13, 1982.

**9**  On June 19, 1982, a warrant was obtained that permitted the VPD to place a Dial Number Recorder ("DNR") on the telephone at the residence at 248 East 17th Avenue, Vancouver, where Ms. Henry and the children of Mr. and Ms. Henry resided, and where investigators believed Mr. Henry resided. Commencing on or about June 19, 1982, the DNR was installed by VPD investigators. That device remained in place until at least July 23, 1982. No data obtained from the DNR linked Mr. Henry to the commission of any of the sexual assaults.

**10**  On July 9, 1982, a warrant was obtained to place an electronic tracking device (the "Tracking Device") on Mr. Henry's car. The Tracking Device was installed on his vehicle on or about July 9, 1982. No data obtained from the Tracking Device linked Mr. Henry to the commission of any of the sexual assaults.

**11**  On July 23, 1982, Crown Counsel obtained an order from Judge Fisher of the County Court of Vancouver for a wiretap authorization to intercept Mr. Henry's private communications (the "Wiretap Application"). The materials filed in support of the Wiretap Application included evidence that VPD members had conducted constant surveillance of Mr. Henry from May 15, 1982 until June 7, 1982, and again from June 8, 1982 until July 23, 1982, and that 20 sexual assault complainants had participated in the Royal Canadian Mounted Police's ("RCMP") Witness Suspect Viewing System, and had also viewed many photographs in an attempt to identify their assailant.

**12**  On July 27 and 28, 1982, Detective William Harkema of the VPD showed J.F. an array of photographs that included a photograph of Mr. Henry taken by the police while he was in custody in May of that year. Based on the photograph, J.F. made a conditional identification of Mr. Henry as her attacker.

**3. Arrest and Conviction**

**13**  On the strength of J.F.'s identification, Mr. Henry was arrested in 100 Mile House on July 29, 1982 on 17 sexual offence charges involving 15 complainants. He remained in custody until his preliminary hearing. Mr. Michael Luchenko, with whom Det. Harkema dealt during the rip-off rapist investigation, acted as Crown Counsel at the preliminary hearing. The preliminary hearing took place over eight days in October and November 1982 on a new information containing 19 counts naming 17 complainants. Two of the complainants did not testify and Mr. Henry was committed for trial on the 17 counts that related to the remaining 15 complainants.

**14**  Mr. Henry's trial commenced in this Court on February 28, 1983. Crown Counsel at the trial was again Mr. Luchenko, assisted by Ms. Judith Milliken. Prior to the selection of the jury, Mr. Justice Bouck, the trial judge, indicated that he wanted the Crown to proceed with only five of the counts. Mr. Henry asked Bouck J. to require the Crown to proceed on all the counts in the indictment, but Bouck J. ultimately ordered the severance of specific counts.

**15**  Mr. Henry was arraigned on a new 10-count indictment naming eight complainants and consisting of three counts of rape, two counts of attempted rape, and five counts of indecent assault. A jury was selected. Mr. Henry represented himself at the trial, which continued for 12 days. On March 15, 1983, Mr. Henry was convicted on all 10 counts of the indictment.

**4. Dangerous Offender Hearing**

**16**  At the time of his dangerous offender proceedings, Mr. Henry's criminal record was:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | October 31, 1962 | - |  | auto theft (2 counts) |  |
|  | February 11, 1963 | - |  | break and enter and theft |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | May 16, 1963 | - |  | breach of recognizance |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | October 16, 1963 | - |  | break and enter and commit an indictable offence |  |
|  | February 2, 1965 | - |  | possession of stolen property obtained by a crime (2 counts) and fraud. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | March 30, 1965 | - |  | break and enter and theft |  |
|  | March 19, 1966 | - |  | vagrancy |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | June 15, 1966 | - |  | possession of property obtained by a crime |  |
|  | February 22, 1967 | - |  | possession of property obtained by a crime |  |
|  | September 29, 1967 | - |  | break and enter, and theft |  |
|  | October 5, 1967 | - |  | break and enter, and commit an indictable offence |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | March 10, 1970 | - |  | theft over $50 |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | June 14, 1971 | - |  | contempt |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | May 24, 1973 | - |  | possession of a narcotic for purpose of trafficking |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | June 19, 1973 | - |  | possession of a weapon |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | January 21, 1977 | - |  | break and enter and commit an indictable offence |  |
|  | January 21, 1977 | - |  | assault with intent to commit an indictable offence |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | January 21, 1977 | - |  | attempted rape |  |

**17**  On March 28, 1983, the Crown obtained the consent of the Attorney General of British Columbia to apply for Mr. Henry to be sentenced to detention in a penitentiary for an indefinite period of time as a dangerous offender.

**18**  On April 6, 1983, Mr. Henry filed a notice of application for leave to appeal against his conviction to the Court of Appeal.

**19**  On May 9, 1983, Mr. Henry met with Mr. Glen Orris, a barrister and solicitor who was prepared to represent him on a legal aid basis at the dangerous offender hearing, but Mr. Henry declined his assistance.

**20**  On May 20, 1983, Mr. Henry confirmed his intention of proceeding "without any counsel" in a letter to Mr. Luchenko. On June 16, 1983, Mr. Henry again wrote Mr. Luchenko and confirmed his intention of proceeding without a lawyer in the dangerous offender hearing.

**21**  On June 21, 1983, the Federal Court of Canada (Trial Division) struck out a claim brought by Mr. Henry for damages arising from theft of clothing and items in the car which was seized by the RCMP at the time of his arrest.

**22**  On September 16, 1983, Mr. Henry brought a motion in this Court for relief in the nature of *certiorari*, prohibition, *habeas corpus*, and *mandamus*. Then Chief Justice McEachern declined to grant the applications for prerogative relief and Mr. Henry appealed Chief Justice McEachern's decision to the British Columbia Court of Appeal. That appeal was dismissed on November 18, 1983.

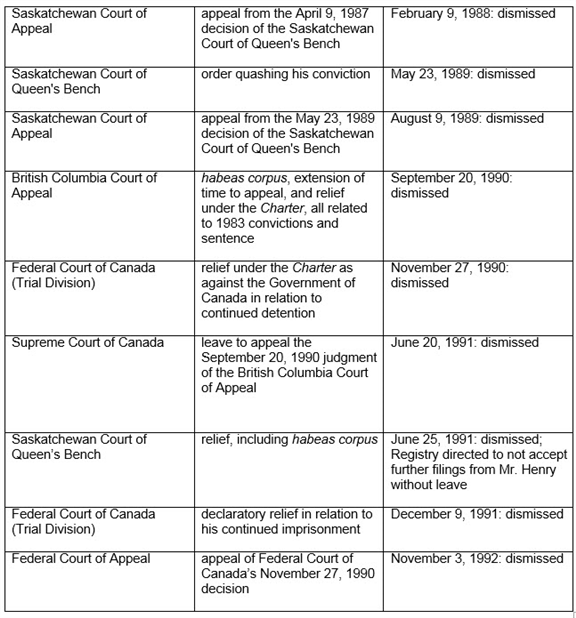
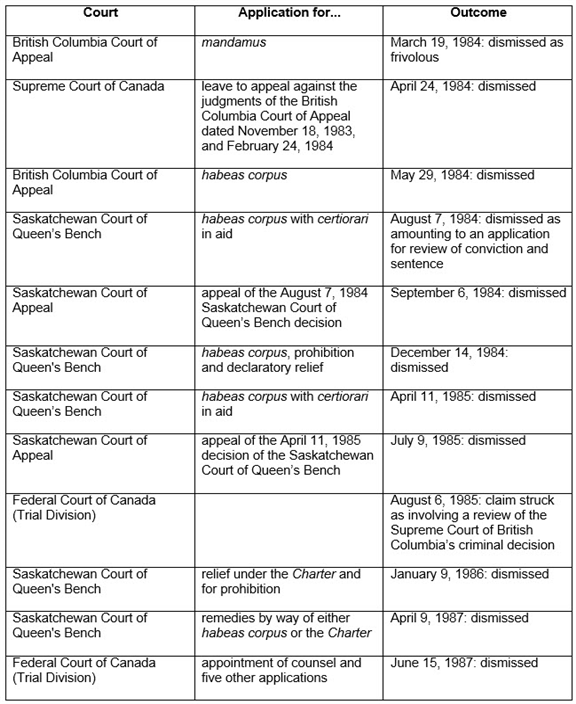
**23**  On November 23, 1983, Bouck J. found Mr. Henry to be a dangerous offender, and pursuant to what was then s. 688 of the *Criminal Code*, sentenced Mr. Henry to an indefinite period of incarceration.

**5. Post-Conviction Appeals**

**24**  On November 29, 1983, Mr. Henry filed a notice of application for leave to appeal against his sentence.

**25**  On February 24, 1984, Mr. Henry's conviction and sentence appeals came before the Court of Appeal on a Crown application to have the appeals dismissed for want of prosecution. Mr. Henry, who was present for the hearing, had not filed, let alone ordered, the necessary appeal books. When Mr. Henry advised the Court that if it wished to obtain the transcripts, he would write some notes in them for the Court, but that he would not get them, that they were "garbage" and he would throw them away, the Court dismissed his appeals for want of prosecution.

**26**  Following the dismissal of his conviction and sentence appeals, Mr. Henry filed numerous applications in several courts. I describe a number of the unsuccessful applications made between 1984 and 1992 in the table below:



**27**  On February 15, 1994, Mr. Henry sent a letter to the Saskatchewan Legal Aid Commission requesting the appointment of counsel. In the letter, he stated that he wanted to take responsibility for a break and enter that occurred in Vancouver on January 14, 1982.

**28**  On October 1, 1997, Mr. Henry filed four documents entitled "Notice of Motion", "Application for an Extension of Time in which to make Application for Leave", "Application for Court Appointed Counsel Pursuant to S. 684 of the Criminal Code", and "Affidavit in Support of Notice of Motion" seeking to re-open the appeal of his convictions that had been dismissed by the Court of Appeal in 1984 and to have counsel appointed to assist him for that purpose. On December 16, 1997, the British Columbia Court of Appeal dismissed this application.

**29**  On April 9, 1998, the Supreme Court of Canada dismissed Mr. Henry's application for leave to appeal the Court of Appeal's decision of December 16, 1997.

**30**  On December 13, 2000, the Supreme Court of British Columbia dismissed Mr. Henry's application for disclosure of medical evidence and police reports from the VPD and Crown Counsel.

**31**  On January 24, 2001, Mr. Luchenko wrote to the VPD requesting that a VPD member review its files for the offences for which Mr. Henry was convicted to determine whether there was any physical evidence remaining.

**32**  On February 13, 2001, Det. Harkema issued a report on his investigation in response to Mr. Luchenko's inquiries as to the availability of any physical evidence. Det. Harkema determined that no physical evidence remained available.

**33**  On February 18, 2003, the British Columbia Court of Appeal dismissed Mr. Henry's further appeal from the December 13, 2000 decision of the Supreme Court of British Columbia.

**34**  On September 18, 2003, the Supreme Court of Canada dismissed Mr. Henry's application for leave to appeal the British Columbia Court of Appeal's February 18, 2003 decision for relief relating to disclosure of documents by the Provincial Crown and the VPD.

**6. Review of Conviction and Appeal on the Merits**

**35**  In January 2005, Provincial Crown Counsel Ms. Jean Connor, Q.C. noticed some similarity between the offences for which Mr. Henry was convicted and the small man offences, and suggested a review of Mr. Henry's file.

**36**  In December 2006, Mr. Len Doust, Q.C. was appointed by the Attorney General for British Columbia as a special prosecutor to conduct an independent review of all of the materials relating to Mr. Henry's conviction to determine whether there had been a potential miscarriage of justice.

**37**  Mr. Henry and the Province agreed to a statement of facts in the proceedings in the British Columbia Court of Appeal, which included the following:

1. Following his appointment [by the Province as an independent special prosecutor to review Mr. Henry's convictions], Mr. Doust conducted a detailed review of Mr. Henry's convictions and the new evidence relating to Mr. McRae. On March 28, 2008, the Criminal Justice Branch issued a Media Release indicating that Mr. Doust had prepared a written report with respect to his review. The Media Release indicated that Mr. Doust "concluded that the Crown ought not oppose any application to re-open Mr. Henry's appeal, should such an application be made." The Media Release, which is attached to the Agreed Statement of Facts as Schedule 3, also stated:

Mr. Doust further recommended that:

1. "the Crown make full disclosure to Henry of the results of the Vancouver Police Department's investigation in Project Smallman, which evidence is in my view relevant and potentially exculpatory and which the Crown is therefore obliged to disclose pursuant to its ongoing disclosure obligations at common law";
2. "the Crown make full disclosure to Henry of the totality of the evidence in its possession relating to the offences for which Henry was charged and/or convicted, so as to ensure that Henry has the benefit of any potentially exculpatory evidence which may or may not have been previously disclosed to him;
3. "the Crown provide a copy of my report to Henry's counsel and make full disclosure to Henry of the documents and information which I collected in the course of my review"; and
4. "the Attorney General appoint a Special Prosecutor independent of my office and the office of Crown Counsel to represent the Crown in response to any application which Henry might bring to re-open his appeal and adduce fresh evidence on the basis of the conclusions in my report."

...

1. The materials that have been gathered by the Crown since Mr. Doust was appointed in late 2006 do not constitute all of the materials that have at one time existed with respect to Mr. Henry's case. In particular:
2. although some physical evidence from the sexual assaults was obtained by the VPD between 1980 and 1982, this evidence can no longer be located (with the exception of the pillow cases referred to at paragraph 73 below);
3. the Sexual Assault Squad's detectives working files, which were maintained by the VPD Investigative Division, appear to have been destroyed in the early 1990s (although microfiche copies of certain investigation or follow up reports were retained and archived by the VPD Information Section); and
4. the VPD advises that there are no longer any notes available from the VPD officers who worked on the Henry investigation.

**38**  On January 13, 2009, the British Columbia Court of Appeal granted Mr. Henry's unopposed application to set aside the Court's February 24, 1984 order dismissing his appeal, and ordered that the appeal from conviction be re-opened for consideration on its merits.

**39**  On June 12, 2009, Mr. Henry was released from custody on bail pending the hearing of his appeal from conviction before the British Columbia Court of Appeal. He has not been incarcerated since that date. By this time, Mr. Henry had spent 26 years, 10 months, and 14 days in custody since his arrest on July 29, 1982.

**40**  As I have indicated above, on October 27, 2010, the British Columbia Court of Appeal allowed Mr. Henry's appeal and quashed the 1983 convictions. In his reasons for judgment, Mr. Justice Low, for the Court, noted that Mr. Henry's appeal was being considered on the merits for the first time. Low J.A. concluded that legal errors were made at trial and that the appeal had to be allowed. All of Mr. Henry's March 1983 convictions were quashed and acquittals were entered on each count.

**41**  The findings made by Low J.A. included the following:

[54] ... the identification evidence was weak. An astute juror would have recognized that to be so. With no evidence to shore up identification on any count, conviction by the jury based on a proper understanding and application of the law of identification was unlikely. The legally wrong instruction on consciousness of guilt provided even the astute juror with a comfortable and perhaps irresistible path of reasoning to guilt.

...

[108] The evidence at trial on each count in the indictment was probably sufficient to put the appellant at risk and for the case to go to the jury with careful and proper instruction. However, in my opinion, the evidence against the appellant on the critical element of identification was not sufficient on appellate review to sustain a conviction on any of the counts in the indictment.

...

[111] [The] identification problems were not overcome by subsequent in-court identification.

...

[135] ... the photographic line-up was unfair. In particular, the photograph of the appellant, from the waist up, shows him standing in front of a jail cell with the arm of a uniformed police officer in the foreground. None of the foils is shown in this manner. The backgrounds in the other photographs are either blank or otherwise neutral. In addition, each of the six foils is, by appearance, at least ten years younger than the appellant. The appellant is the only one with a full moustache, and the appellant is the only one with curly hair. In addition, the foils all have hair length that is at least to the collar and over the ears, by a substantial amount with respect to three or four of them. The appellant's hair is cut back and higher on the forehead.

[136] It appears to me that the photograph of the appellant stands out unfairly and would have focused the viewer of the array on him.

...

[141] The process of identification was polluted so as to render in-court identification of the appellant on each count highly questionable and unreliable on the reasonable doubt standard. I consider the verdicts to be unsafe.

[142] In my opinion, the verdict on each count was not one that a properly instructed jury acting judicially could reasonably have rendered.

**42**  In reasons for judgment in these proceedings indexed at [*2015 BCSC 1798*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H4P-HBF1-JJYN-B297-00000-00&context=), I held that both the plaintiff and the Province were bound by the above findings as well as the finding at para. 154 of the decision of the Court of Appeal that:

1. The trial judge erred by instructing the jurors that they could infer consciousness of guilt from the resistance of the appellant to participation in the line-up conducted by the police on 12 May 1982;
2. The instruction on the element of identification was inadequate;
3. There should have been severance of the counts and a mistrial when the Crown abandoned its application for jury instruction on count-to-count similar fact evidence;
4. Any of these errors, standing alone, would require this court to order a new trial;
5. The evidence as a whole was incapable of proving the element of identification on any of the ten counts and the verdicts were unreasonable;
6. The appropriate remedy under s. 686(2)(a) of the Criminal Code is acquittal on each count.

**THE PRESENT PROCEEDINGS**

**43**  Mr. Henry's notice of civil claim in this action was filed on June 28, 2011. He initially brought this action not only against the Province but against the City of Vancouver, Detective William Harkema, and Detective Marilyn Sims (the "City defendants") as well. Det. Sims was a VPD officer who was involved with Det. Harkema in the investigation of the offences with which Mr. Henry was initially charged. Mr. Henry alleged that the City of Vancouver was vicariously liable for what he asserted was the faulty police investigation of the offences with which he was charged.

**44**  Mr. Henry also brought these proceedings against the Attorney General of Canada (the "Federal Crown") for the reception and treatment of his post-sentencing applications for various relief.

**45**  During the course of the trial of this action, Mr. Henry settled his claims against the City defendants, and later against the Federal Crown. The terms of those settlements were not disclosed, but the action was discontinued as against those defendants, and amendments were permitted to the pleadings of the plaintiff and the Province.

**46**  In an agreed statement of facts in these proceedings dated October 20, 2015, Mr. Henry and the Province agreed in part that:

PART I

1. Between November 25, 1980 and June 8, 1982, the Vancouver Police Department (the "VPD") received numerous sexual assault complaints. These complainants included [V.C., R.T., D.E., G.H., E.M., K.M., B.Q., L.A., C.O., P.B., P.G., K.K., H.M., K.P., D.I., C.A., C.H., C.P., A.D., E.S. and J.F]. At the time, the [Vancouver City Police Department] ("VPD") was of the view, due to perceived similarities in the assaults, that these assaults had been committed by one man (the "Sexual Assaults.")

...

1. Because Mr. Henry refused to cooperate in the line-up, the VPD physically compelled his participation. Mr. Henry was number 12 in the line-up.
2. Eleven women attended the May 12, 1982 line up: [C.A., P.B., P.G., G.H., D.I., K.K., H.M., E.M., K.M., C.P., and B.Q.]

...

1. The [DNR], Tracking Device, surveillance and Witness Suspect Viewing System did not link Mr. Henry to any of the Sexual Assaults.

...

1. Mr. Luchenko passed away on December 15, 2013.

...

1. Seven of the complainants testified at trial. Each identified Mr. Henry in court based on his appearance and/or voice as the person who entered her residence and committed an assault. The only factual issue at trial was the identity of each complainant's attacker.
2. The eighth complainant, [J.F.], did not testify at trial, and the Crown obtained an order, pursuant to s. 643 of the *Criminal Code*, 1982, that permitted her testimony at the preliminary inquiry to be read-in at the trial. At the preliminary hearing, J.F. made an in-court identification of Mr. Henry as the man who sexually assaulted her, and she also testified that she had identified him earlier through a selection from the photo array.

PART II

1. On January 17, 1984, Mr. Stewart filed an application to dismiss Mr. Henry's appeals for want of prosecution, as he had not ordered or filed the transcripts and appeal books.

...

1. On February 24, 1984, the B.C. Court of Appeal dismissed Mr. Henry's appeals from conviction on all counts and application for leave to appeal from sentence for want of prosecution.

...

1. On March 19, 1984, the Court of Appeal of British Columbia dismissed Mr. Henry's application for *mandamus.* See *R. v. Henry,* [*[1984] B.C.J. No. 1546*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M393-00000-00&context=) (C.A.) (Q.L.) (Court File No. CAOO2019).

...

1. On April 24, 1984, the Supreme Court of Canada dismissed Mr. Henry's application for leave to appeal from the judgments of the Court of Appeal of British Columbia dated November 18, 1983 and February 24, 1984..., which the Supreme Court of Canada refused.

...

1. In 2005, Donald James McRae was charged with offences related to the only three Project Smallman sexual assaults in which perpetrator DNA evidence was available. Those offences were associated with the sexual assaults of

[L.W., S.C., and G.J].

...

1. Mr. McRae pleaded guilty to sexual assaults of the three women on May 27, 2005. He was sentenced by Judge Kitchen on June 15, 2005 to five years in jail.

...

1. In January 2005, Jean Connor, Q.C., Administrative Crown Counsel, became aware of the McRae prosecutions being conducted by other Crown Counsel. Ms. Connor was in Mr. Luchenko's office at the time he had conduct of the prosecution against Mr. Henry, and she noted some apparent similarities between the offences for which Mr. McRae was convicted and those for which Mr. Henry was convicted. Because Mr. Henry was incarcerated at the time of Mr. McRae's offences, a meaningful similarity between the two groups could raise the possibility of a miscarriage of justice in Mr. Henry's case.

...

1. Ms. Connor brought her concerns regarding the similarities between the Project Smallman offences and the offences for which Mr. Henry was convicted to Craig Dykes, the Deputy Regional Crown Counsel. On February 17, 2005, Mr. Dykes, Geoffrey Gaul (Director of Legal Services), Ronald N. Hurt (Manager, High Risk Offenders Identification Program), and Terrence A. Schultes (Regional Crown Counsel) met to discuss steps to be taken on the Henry file. It was agreed at this time that a review should be assigned to a Special Prosecutor outside the Criminal Justice Branch.

**THE POSITIONS OF THE REMAINING PARTIES**

**1. Mr. Henry**

**47**  Mr. Henry contends that his wrongful conviction was due to Crown Counsel's intentional breach of his rights under ss. 7 and 11(d) of the *Charter*, specifically by:

1. failing to discharge its duty of disclosure;
2. failing to bring to the attention of the trial judge all information bearing on the reliability of the identification made by complainants; and
3. making statements to the Court and eliciting testimony from complainants on the issue of identification that was materially inconsistent with the information contained in materials that had not been disclosed to him.

**48**  In addition, Mr. Henry alleges that Crown Counsel with carriage of his various post-trial applications, appeals, and other matters breached his s. 7 and 11(d) *Charter* rights by:

1. applying to dismiss his conviction and sentence appeals for want of prosecution at an extraordinarily early stage, without bringing certain matters to the attention of the Court of Appeal; and
2. continuing after his conviction on March 15, 1983, until the appointment of the special prosecutor in November 2006, to fail to bring matters to the attention of the courts that heard his subsequent post-trial proceedings.

**2. The Province**

**49**  The Province contends that if its disclosure was inadequate, the two principal issues to be addressed in determining if liability will attach to the Province are whether it can be reasonably inferred that the inadequate disclosure was intentional, knowing that the inadequacy would likely impinge upon Mr. Henry's ability to make full answer and defence to the charges against him, and whether, if the other requirements of the cause of action are met, Mr. Henry has established that he would not have been convicted, had adequate disclosure been provided to him.

***Limitation Defence***

**50**  The Province took the position that any claims which the plaintiff might now have for damages arising from a *Charter* breach are barred by s. 3 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=). The shortest limitation period mentioned in that section is found in subsection 2, which provides in part:

1. 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:
2. 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;

...

1. for false imprisonment;
2. for malicious prosecution;

**51**  In *Hill v*. *Hamilton-Wentworth*, [*2007 SCC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19N-00000-00&context=) [*Hill*], a case involving allegations against the police for negligent investigation, the Supreme Court of Canada held that the limitation period for claims arising from a negligent investigation begins to run when the cause of action is complete:

[97] ...The wrongfulness of the conviction is essential to establishing compensable injury in an action where the compensable damage to the plaintiff is imprisonment resulting from a wrongful conviction. In such a case, the cause of action is not complete until the plaintiff can establish that the conviction was in fact wrongful. So long as a valid conviction is in place, the plaintiff cannot do so.

**52**  Mr. Henry's cause of action therefore arose in 2010, when he was acquitted by the Court of Appeal. He commenced his action against the defendants on June 28, 2011, within the relevant limitation period. I am therefore unable to see any basis upon which Mr. Henry's claim was barred by the prevailing *Limitation Act* at the time that his action was commenced.

**LEGAL PRINCIPLES RELATING TO CLAIMS FOR *CHARTER* DAMAGES**

**1. Test for Awarding Damages for *Charter* Breaches**

**53**  In *City of Vancouver v. Ward,* [*2010 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1HX-00000-00&context=) [*Ward*], the Supreme Court of Canada considered the questions of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. At para. 4 of her reasons for the Court, Chief Justice McLachlin set out the following four-part test to resolve those questions:

1. the plaintiff must establish that a *Charter* right has been breached;
2. the plaintiff must show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches;
3. the state may seek to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and
4. the quantum of damages must be assessed.

**2. Crown Counsel's Duty to Disclose**

**54**  Clauses 39 and 40 of the *Magna Carta* provide:

1. No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.
2. To no one will we sell, to no one will we deny or delay right or justice.

**55**  The *Charter* was signed into law by Queen Elizabeth II on April 17, 1982, and the principles set out in these clauses are embraced in ss. 7 and 11(d) of the *Charter*. Those sections provide:

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.

...

1. Any person charged with an offence has the right
2. to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

**56**  An important element of the right to a fair trial provided by ss. 7 and 11(d) of the *Charter* is the accused person's right to make full answer and defence, which is facilitated by the Crown's duty to disclose relevant information in its possession: *R. v. Bjelland*, [*2009 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1G3-00000-00&context=).

**57**  I agree with and adopt the observations of the Honourable Peter Cory in his report on the Inquiry Regarding Thomas Sophonow that:

If Crown Counsel, Defence Counsel and the Judiciary fulfill their demanding roles our system should work effectively. Yet I acknowledge that constant vigilance will always be required to ensure that it does. It is essential that the administration of justice does all that is humanly possible to avoid instances of wrongful conviction. It should not happen. If it does, the occasions must be rare. To argue that there are many cases of wrongful conviction is to contend that our system is fundamentally flawed and in disarray and that is not apparent.

**58**  Prosecuting Crown Counsel generally enjoy immunity from civil action because of the important role that they play in the administration of justice. They cannot be sued for recklessness or ***negligence***, even gross ***negligence***, nor for the *bona fide* exercise of prosecutorial discretion.

**59**  Prosecutors' immunity is, however, lost if they deliberately withhold material information from a criminally accused person, and the result of that withholding is the conviction and incarceration of the criminally accused person that would not have occurred if the information had been disclosed.

**60**  Mr. Justice Sopinka commented in *R. v. Stinchcombe*, [1991] 3 S.C.R., 326 at paras. 9, 11 and 12 [*Stinchcombe*] that:

[9] ...the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example*, Cunliffe v. Law Society of British Columbia* [*(1984), 40 C.R. (3d) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F528-G1S3-00000-00&context=) (B.C.C.A.); *Savion v. The Queen* [*(1980), 13 C.R. (3d) 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCG1-F4NT-X16J-00000-00&context=) (Ont. C.A.); *R. v. Bourget* [*(1987), 56 C.R. (3d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6W1-JF1Y-B53J-00000-00&context=) (Sask. C.A.). No case in this Court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 Working Paper") and a 1984 report titled *Disclosure by the Prosecution* (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

...

[11] It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, [*[1955] S.C.R. 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WF-00000-00&context=), Rand J. states, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[12] I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

**61**  In *Henry v. British Columbia (Attorney General)*, [*2015 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBF-Y861-FGRY-B2CX-00000-00&context=) [*Henry SCC*], the Supreme Court of Canada held that Mr. Henry could pursue a claim for damages pursuant to s. 24(1) of the *Charter* against the Crown for prosecutorial misconduct absent proof of malice.

**62**  At paras. 30 - 31, Mr. Justice Moldaver, writing for the majority of the Court, held that:

[30] A constitutional question is posed in this case:

Does s. 24(1) of the *Canadian Charter of Rights and Freedoms* authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

[31] In the context of Mr. Henry's claims, I would answer this question in the affirmative. Where a claimant seeks *Charter* damages based on allegations that the Crown's failure to disclose violated his or her *Charter* rights, proof of malice is not required. Instead, a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.

**63**  At paras. 61 and 67 - 68, Moldaver J. explained:

[61] ... while I recognize that disclosure decisions pose challenges for prosecutors, they do not implicate the high degree of discretion involved in the decision to initiate or continue a prosecution. As described in Crown policy manuals throughout the country, the decision to lay charges is governed by two primary factors: first, whether there is a reasonable prospect of conviction and second, whether the prosecution would be in the public interest. Manifestly, the "public interest" factor puts substantial discretion in the hands of Crown counsel. That discretion gives prosecutors such a high degree of latitude that the only plausible way to contest it is to assess the underlying motives. No such discretion exists in the disclosure context, and it is therefore unhelpful to require proof of an improper purpose in an action alleging wrongful non-disclosure. Given that disclosure decisions are not a matter of discretion, the motives of the prosecutor in withholding certain information from the accused are immaterial.

...

[67] Disclosure is one of the Crown's fundamental obligations in a criminal prosecution. The Crown is duty-bound to disclose relevant information to the defence, and this obligation is a continuing one. This stringent and, at times, heavy burden on the Crown guarantees an accused's ability to make full answer and defence. Indeed, this was precisely the reason that the Court affirmed a constitutional right to disclosure more than two decades ago in *Stinchcombe*:

... [t]here is [an] overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice ... . The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. [Citation omitted; p. 336]

[68] Canadians thus rightly expect that the Crown will fulfill its disclosure obligations with diligence and rigour. By and large, Crown attorneys working on the front lines of our criminal justice system exceed these expectations on a daily basis. I pause here to note that Mr. Henry's allegations of non-disclosure arise, in the main, from events that occurred during the pre-*Stinchcombe* era, when Crown disclosure practices were not as robust as they are today. Nevertheless, our system remains imperfect, and wrongful failure to disclose is not a mere hypothetical -- it can, and does, happen, sometimes taking an extraordinary human toll and resulting in serious harm to the administration of justice.

**64**  In reasons concurring in the result, Chief Justice McLachlin and Madam Justice Karakatsanis observed at paras. 110 - 111 and 113 - 114 that:

[110] For instance, according to Mr. Henry, the Crown withheld a large number of victim statements despite repeated defence requests for full disclosure of these statements. No victim statements, police reports or forensic reports were disclosed prior to the commencement of trial. Many victim statements remained undisclosed throughout the trial and, according to Mr. Henry, contain material inconsistencies that would have been helpful for his defence. Mr. Henry also alleges that forensic evidence relating to the perpetrator's spermatozoa remained undisclosed throughout the trial, again despite repeated specific requests. On the contrary, the Crown adduced evidence to the effect that no forensic evidence was located at any of the crime scenes that could be used to help identify the perpetrator. Further, police reports relating to another suspect were not disclosed. The sole issue at trial was the identity of the perpetrator and the Crown's case rested on victim identifications.

[111] If proven at trial, these facts would indisputably establish a breach of Mr. Henry's disclosure rights under s. 7 of the *Charter*. The government does not appear to dispute the violation of Mr. Henry's *Charter* rights.

...

[113] By any measure, the facts alleged by Mr. Henry are egregious. The Crown allegedly withheld highly relevant and exculpatory evidence, despite repeated and specific defence requests for disclosure. The impact on Mr. Henry's ability to make full answer and defence is obvious. Mr. Henry was convicted on all charges at trial, was declared a dangerous offender, and spent 27 years behind bars. Following his convictions in 1983, Mr. Henry continued to proclaim his innocence and seek review of his case. His pleas were finally heard after the police reopened its investigation into a string of unsolved sexual assaults similar to those for which Mr. Henry was convicted. This investigation resulted in the conviction of a man who had been a suspect in Mr. Henry's case. As a result, a Special Prosecutor was appointed to review Mr. Henry's convictions, leading to the 2008 disclosure of substantial police file materials. In 2010 he was finally acquitted on all counts by the British Columbia Court of Appeal. The court held that no properly instructed jury, acting reasonably, could have rendered a guilty verdict on any of the counts: para. 142.

[114] Mr. Henry was wrongfully convicted and imprisoned by the state for 27 years. On the facts alleged, the fairness of his trial was directly and seriously compromised by the breach of his s. 7 right to full disclosure. In these circumstances, an award of Charter damages under s. 24(1) may provide some compensation for the hardships Mr. Henry has endured. Obviously, no amount of money can restore to him the decades he has spent behind bars. However, a monetary award may offer some compensation for this long period of wrongful imprisonment and the many lost life opportunities it entails.

**65**  These are the passages to which Moldaver J. apparently adverted when he stated at para. 81 of his reasons:

I agree with my colleagues that Mr. Henry alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights.

***Test for Wrongful Non-Disclosure***

**66**  At para. 85, Moldaver J. set out a four-part test for the liability threshold for establishing wrongful non-disclosure in Mr. Henry's claim:

At trial, a claimant would have to convince the fact finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

**APPLICATION OF LEGAL PRINCIPLES**

**1. Were Mr. Henry's *Charter* Rights Breached?**

**67**  As discussed above, the first part of the *Ward* test assessing whether damages should be awarded under s. 24(1) of the *Charter* requires the plaintiff to establish that a *Charter* right has been breached. With regard to the alleged wrongful non-disclosures, the first part of the *Ward* test must be met through the application of the four-part test set out by Moldaver J. at para. 85 of *Henry SCC*, quoted above.

**68**  Before applying Moldaver J.'s four-part test, I will address two preliminary issues regarding Mr. Henry's mental state, and the Province's argument that the Crown's duty of disclosure should be assessed by the disclosure standards of 1982.

***A. Mr. Henry's mental state at the time of the alleged* Charter *breaches***

**69**  In my view, the question of whether Mr. Henry's *Charter* rights were breached must be considered in the light of Mr. Henry's state of mind after his arrest, and he must be taken as he was at that time. This approach is consistent with the approach discussed by Madam Justice Wilson, for a unanimous Court, 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=) at 159 [*Janiak*]:

... 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.

**70**  Dr. Grounds is a forensic psychiatrist and an Honorary Research Fellow in the Institute of Criminology and a Fellow of Darwin College at the University of Cambridge. In the past 30 years, Dr. Grounds has assessed 59 individuals who have been released from imprisonment after findings of their wrongful conviction. He states, and I accept, that he has knowledge of the long-term prognoses of some of the individuals he has so assessed, and is familiar with the range of complex difficulties that can be experienced by wrongly convicted individuals.

**71**  Dr. Grounds described Mr. Henry as having a deprived and unstable upbringing in which he experienced violence, sexual victimisation, poor relationships with peers and a lack of academic success. He opined that Mr. Henry was mentally destabilized when he was making important decisions about trial matters, including legal representation.

**72**  Dr. Grounds testified that after Mr. Henry was charged with the offences, Mr. Henry felt overwhelmed and uncomprehending about the multiple charges against him. Dr. Grounds concluded that Mr. Henry developed complex and abnormal persecutory beliefs while in custody on remand and expressed the view that Mr. Henry's sense of the unfairness of Crown Counsel's non-disclosure, how complainant statements close in time to the assaults seemed not to exist, and how forensic and medical evidence seemed not to exist, fed into his sense of being the victim of a conspiracy.

**73**  Dr. Grounds' view is that Mr. Henry's thinking and ability to organize his thoughts were very compromised at the time of his trial. Dr. Grounds further testified that Mr. Henry's delusional disorder persisted over the years while he was pursuing his appeals.

**74**  Although Mr. Henry was found fit to stand trial, I nonetheless accept the opinions of Dr. Grounds that I have set out in the preceding three paragraphs. They are supported to some extent by the opinion of Dr. Lohrasbe, although he did not see Mr. Henry until 2009 when he interviewed him at the Mountain Institute where he was then incarcerated.

**75**  Based in part on his 2009 interviews of Mr. Henry and his daughter Tanya Olivares, together with a review of various medical records, Dr. Lohrasbe found Mr. Henry to be rigid in his beliefs and expectations, with "only a limited degree of insight into the disjunction between his perceptions and beliefs and objective reality" that traced back to the time of his arrest on the charges of which he was acquitted by the Court of Appeal.

**76**  Dr. Lohrasbe recounted Mr. Henry's account of the circumstances leading up to his trial, conviction, and subsequent designation as a dangerous offender, and conceded that even in 2009, he was unable to follow the account. He listed Mr. Henry's prior mental health problems as including mistrust and paranoia, "fantasy v. reality", hostility toward authority, private logic, paranormal beliefs and phenomena, and personality dysfunction.

**77**  Dr. Paul Janke is a forensic psychiatrist who interviewed Mr. Henry on two occasions in 2014. He described Mr. Henry's psychiatric diagnosis prior to his arrest in 1982 as meeting the criteria for "Conduct Disorder, Severe, Early Onset", and felt that he met the criteria at that time for the diagnosis of "Antisocial Personality Disorder". Dr. Janke's comments do not detract from Dr. Grounds' views set out above.

**78**  I find that Mr. Henry was mentally destabilized at the time he was making important decisions about trial matters, including legal representation.

***B. By what standard should Crown Counsel's duty of disclosure be assessed?***

**79**  The Province concedes that a decision not to disclose information to an accused person is not a decision that engages an act of prosecutorial discretion, but the Province contends that a key question is whether the knowledge imputed to Crown Counsel is to be assessed according to the state of knowledge in 1982 or 2015. I disagree.

**80**  The Province contends that in 1983, the practice of the day was that statements made by the complainants contained in police reports or police notes were not treated in the same way as "true statements", that is, signed statements that the complainants made in their own hand or that were transcribed *verbatim.* The Province further contends that police notes were not viewed as requiring disclosure in the absence of an evidentiary foundation laid by an accused or his counsel at trial.

**81**  The Province referred me to several authorities in support of its position. Among those authorities was the Supreme Court of Canada's decision in *Hill*. There Mr. Hill appealed the dismissal of his civil case against the police board for negligent investigation. The dismissal was upheld by the Ontario Court of Appeal. The circumstances of that case were similar in some respects to the present case. Mr. Hill was arrested on 10 counts of robbery, all of which the police believed to have been committed by the same person. The strongest evidence against Mr. Hill came primarily from eye witness identifications of varying strength. However, there was also exculpatory evidence, and nine of the charges were withdrawn before trial.

**82**  Mr. Hill was convicted on the sole remaining charge because two of the eye witnesses remained steadfast in their identification of him. He was tried and wrongfully convicted. Although he was eventually acquitted, he spent more than 20 months in jail as a result of the wrongful conviction.

**83**  Chief Justice McLachlin, for the majority, determined that the Court should consider the conduct of the investigating officers in the year 1995, the year in which the investigation was conducted, in all of the circumstances. Acknowledging that the standard of care expected of a police officer in 1995 might be different from that expected of a police officer today or in the future, Chief Justice McLachlin emphasized that the Court should not expect perfection and should keep in mind the discretion that police officers must exercise in an investigation.

**84**  Given the guidance provided by Moldaver J. at paras. 60 - 61 and 67 - 68 in *Henry SCC* quoted above, the reasoning of the Chief Justice in *Hill* respecting acceptable police conduct cannot be applied to the disclosure duties of the Crown in 1982. If the practice of the Crown in 1982 was inconsistent with the Crown's legal disclosure obligations, the Crown's practice at the time cannot set the standard for disclosure.

**85**  The Province also referred me to a number of authorities predating the 1983 trial in this action: *R. v. Finland* [*(1959), 125 C.C.C. 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3P7-00000-00&context=) (B.C.S.C.) [*Finland*]; *R. v. Lantos*, [*[1963] B.C.J. No. 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X36D-00000-00&context=) (C.A.) [*Lantos*]; *R. v. Newman*, [*[1979] B.C.J. No. 868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-K054-G17X-00000-00&context=) (S.C.) [*Newman*]; and some postdating that trial: *R. v. Hislop* [*(1983), 43 O.R. (2d) 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-K0HK-22FX-00000-00&context=) (C.A.) [*Hislop*]; and *Cunliffe v. Law Society (British Columbia)* [*(1984), 13 C.C.C. (3d) 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F528-G1S3-00000-00&context=) (B.C.C.A.) [*Cunliffe*].

**86**  *Finland, Lantos*, and *Newman* each deal with disclosure Crown obligations prior to trial, but the Court in those cases recognized that even prior to trial, the Crown's discretion in deciding on disclosure must be exercised fairly.

**87**  In *Finland*, Mr. Justice Wilson, as he then was, was asked to order the production of "[a]ny statements committed to writing made to the police prior to the preliminary hearing by witnesses who were called at the preliminary hearing".

**88**  In declining to do so, he commented at paras. 11 - 12 that in all criminal cases the Crown usually makes complete disclosure so as to avoid taking the accused by surprise at trial. Wilson J. remarked that the Crown has considerable discretion, but when in doubt, this discretion should be exercised in favour of the accused.

**89**  In *Lantos*, at para. 8, Mr. Justice Tysoe, for a unanimous Court, made a similar statement, emphasizing, in part, the timing of the required disclosure and the expectation of fairness from the Crown:

I would add only that, in my opinion, an accused is not entitled, as a matter of right, to have produced to him for his inspection before trial, statements or memoranda of evidence of Crown witnesses or prospective witnesses, whether signed or unsigned. That is a matter within the discretion of the Crown prosecutor who may be expected to exercise his discretion fairly, not only to the accused, but also to the Crown. What might be thought to be proper in one set of circumstances may not be thought to be proper in another.

[Emphasis added.]

**90**  In *Newman*, the Crown had proceeded by way of a direct indictment, so there had been no preliminary inquiry. One of the accused charged with first degree murder sought a pretrial order that the Crown be required to furnish a copy of two statements made by a witness whom the Crown proposed to call at trial. A synopsis of the evidence of this witness had been furnished by the Crown, but defence counsel wished to have the complete statements produced for the purpose of comparing the evidence of the witness with the evidence of another witness whose statement has been furnished. After considering *Finland, Lantos*, and other authorities, Chief Justice McEachern declined to make the order, but held at para. 4 that:

These cases lead me to conclude that the law is reasonably well settled as follows.

1. The accused does not have an absolute right to obtain production of witness statements before trial.
2. The production or non-production of witnesses' statements before trial is, generally speaking, a matter for the discretion of Crown counsel who must keep in mind that his role is not that of an ardent advocate but one who has a duty to ensure that the accused has a fair trial. It seems to me the duty of Crown counsel regarding disclosure may be even higher where the Crown proceeds by way of direct indictment, that it is for crown counsel, in the first instance, to determine how he is to discharge his duty. (See *Richard v. R. (No.1)* [*(1959), 43 M.P.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-JP9P-G032-00000-00&context=)).
3. A trial judge has a general inherent jurisdiction to order production of statements of witnesses or prospective witnesses at any time during the trial and in special circumstances before trial.

[Emphasis added.]

**91**  In *Hislop*, the Court was reviewing the order of a motions court judge which quashed the ruling of a provincial court judge made in the course of a preliminary inquiry. Associate Chief Justice MacKinnon, for the Court, commented at page 11 that:

Counsel for the respondents raised the issue of the applicability of certain provisions of the *Canadian Charter of Rights and Freedoms*. These issues were not pressed before us as it was acknowledged that, at the time of Judge Graham's ruling, the *Charter* had not been enacted and would not have been considered by him. Since the preliminary hearing is to be continued, I content myself with saying that the *Charter* does not alter the statutory role of the provincial judge in a preliminary hearing. The refusal to order the production of the document, under the circumstances of this preliminary inquiry, does not, in my view, offend any principle of fundamental justice.

[Emphasis added.]

**92**  I am not persuaded that the comments relied upon by the Province in *Hislop* represent any omnibus statement about the Crown's disclosure obligations following a preliminary hearing either pre- or post-*Charter*.

**93**  *Cunliffe* was a case where the Court of Appeal considered an appeal by two Crown Counsel from a decision of the Law Society of British Columbia finding them guilty of conduct unbecoming a member of the law society and of professional misconduct in their roles as Crown Counsel in the prosecution of a charge of murder. The Court overturned the finding with respect to one of the two Crown Counsel, but upheld the finding against the other.

**94**  The two Crown Counsel who had conduct of the case for the Crown were Mr. Bledsoe at the first trial, where a mistrial was declared, and Mr. Cunliffe at the second trial.

**95**  Mr. Bledsoe failed to inform defence counsel of four witnesses (referred to as the "Thursday witnesses") who had given evidence at the preliminary hearing that the victim was seen alive after the first of the two dates his murder was alleged to have occurred in the charges against the accused.

**96**  The Province referred me to the following passage from Mr. Justice Hinkson, for the Court, at paras. 45 - 46:

[45] The second issue dealt with by the Discipline Committee was whether there is a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence. On this issue the Discipline Committee found, quite properly:

A review of all the authorities indicates that no hard and fast obligation exists. Crown counsel must have some discretion in that regard. Such an absolute duty does not appear to exist within the scope of the decided cases ...

[46] I respectfully agree with that statement of the law.

[Emphasis added.]

**97**  The isolation of this part of the reasons takes the comments of Hinkson J.A. out of their context. The passage relied upon by the Province must be read in light of the earlier conclusions of Hinkson J.A. at paras. 33 - 38:

[33] The Discipline Committee stated that the following issues arose to be determined:

1. Is there a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?
2. Is there a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?
3. Is there a duty on prosecuting counsel to call witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?

[34] In determining the first issue the Discipline Committee made reference to a number of authorities. It cited with approval the decision in *Boucher v. The Queen* [*[1955] S.C.R. 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WF-00000-00&context=), [*110 C.C.C. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WF-00000-00&context=), [*20 C.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WF-00000-00&context=) where Rand J. stated:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[35] Among other references the Discipline Committee cited the Canadian Bar Association's Code of Professional Conduct at p. 29 as follows:

When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately ... (H)e should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all the relevant facts and witnesses known to him, whether tending towards guilt or innocence.

[36] The Discipline Committee concluded in respect of the first issue:

For the purposes of a defence in such a serious charge as this, and where the evidence of the "Thursday" witnesses is so crucial, Crown counsel had a duty in our opinion to ensure that defence counsel knew of the existence of those witnesses and that the witnesses had made statements in writing shortly after the crime to members of the R.C.M.P.

[37] The Discipline Committee concluded that both Mr. Bledsoe and Mr. Cunliffe failed to fulfil their duty in not disclosing the Thursday witnesses to the defence. The basis for that conclusion was the finding of the Discipline Committee that:

... Mr. Bledsoe knew of the existence of the "Thursday witnesses" but did not ensure that counsel for the defence knew of them. In addition, Mr. Bledsoe did not inform Mr. Cunliffe that counsel for the defence was unaware of the "Thursday witnesses". Mr. Cunliffe knew of the them but did not ensure that counsel for the defence knew of them, did not make their statements available to counsel for the defence, and did not call them as witnesses until so ordered by the court.

[38] Upon the basis of the findings of fact made by the Discipline Committee it is clear that Mr. Bledsoe failed in his duty to advise Mr. Ritchie in a timely manner of the existence of additional Thursday witnesses once he learned of Mr. Ritchie's ignorance of such witnesses. Mr. Bledsoe was clearly in breach of his duty because he never informed Mr. Ritchie that such witnesses existed. Upon becoming aware that Mr. Ritchie was ignorant that such witnesses existed Mr. Bledsoe's first decision was to postpone performing his duty until the weekend when he could consult senior counsel. When the mistrial occurred he then decided to leave it to the prosecutor who would take the second trial to inform Mr. Ritchie. By the time he instructed Mr. Cunliffe on December 16, 1977 he was clearly in breach of his duty but he could have remedied that breach by informing Mr. Cunliffe that Mr. Ritchie was unaware of the existence of the additional Thursday witnesses. Mr. Bledsoe failed to do so therefore he never performed his duty as Crown counsel.

**98**  The unquoted part of para. 46 in the reasons of Hinkson J.A. continued as follows:

... However the Discipline Committee went on to criticize Mr. Cunliffe for the position he adopted in response to Mr. Ritchie's motions on April 18, 1978 because they perceived in his submissions a determination to keep the statements from the defence. They were critical of Mr. Cunliffe having purported to adopt the procedure based on s. 10 of the *Canada Evidence Act*.

**99**  It is followed by further context:

[47] In my opinion the course followed by Mr. Cunliffe on this occasion is above reproach. Rather than asking Mr. Cunliffe for the statements Mr. Ritchie applied to the presiding trial judge for an order that Mr. Cunliffe produce the statements to him. In view of Mr. Ritchie's position Mr. Cunliffe made reference to s. 10 of the *Canada Evidence Act* and immediately produced the statements then in his possession to the presiding trial judge. After perusing them the presiding trial judge directed Mr. Cunliffe to deliver them to Mr. Ritchie, which he immediately did.

[48] In those circumstances it is difficult to appreciate the reasoning of the Discipline Committee which led to its conclusion on the second issue. Counsel for the Law Society threw some light on the matter by contending that it was apparent from the record of proceedings on April 18, 1978 that Mr. Cunliffe was "stonewalling" the defence with respect to the production of the statements in question. It is by reason of the fact that Mr. Cunliffe did not, in response to Mr. Ritchie's application, voluntarily turn over the statements to him immediately, that the Discipline Committee concluded that his conduct evinced a determination to keep the statements from the defence.

[49] In my opinion the record of the proceedings on April 18, 1978 does not support that conclusion. On that day Mr. Cunliffe was met with the motions made by Mr. Ritchie. He dealt with them as best he could and in doing so made reference to s. 10 of the *Canada Evidence Act*. I find no fault whatsoever in the course followed by Mr. Cunliffe on that occasion. Mr. Ritchie was seeking the assistance of the court to obtain the names of the additional Thursday witnesses and copies of their statements and Mr. Cunliffe was meeting the application by immediately producing the statements to the trial judge and making submissions with respect to the production of the statements. As Mr. Ritchie was seeking the assistance of the court it was proper for Mr. Cunliffe to deal with the matter upon the basis upon which he did. The criticism of the Discipline Committee on this aspect of the matter is unfounded.

[Emphasis added.]

**100**  When the passage relied upon by the Province is read in its appropriate context, it does not support the position urged upon me by the Province that in effect, even at trial, if not before, Crown Counsel could withhold disclosure from the accused or his counsel (or to the Court if the accused is not represented) of all of the relevant facts and witnesses known to the Crown, whether tending towards guilt or innocence.

**101**  The Province also relies on a passage from the decision of the Supreme Court of Canada in *Reference re Milgaard (Can.)*, [*[1992] 1 S.C.R. 866*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-606T-00000-00&context=) at 870 [*Milgaard*], where the Court commented:

Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing *at the time*.

[Emphasis added.]

**102**  *Milgaard* was a review of the conviction of a man for murder. The Court concluded that the fresh evidence presented before it, particularly as to the locations and the pattern of sexual assaults committed by a convicted serial rapist, constituted credible evidence which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the jury's verdict. The extent of the disclosure made to Mr. Milgaard was not in issue in the case. In those circumstances, I do not consider that the Court was establishing a test for the required disclosure standard in the passage relied upon by the Province.

**103**  The adversion by the Court to the same phrase in *United States v. Burns*, [*[2001] 1 S.C.R. 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M470-00000-00&context=) at 339 [*Burns*] is no more than a paraphrasing of the comments in *Milgaard*, and of no greater moment than the initial use of the phrase. *Burns* was an appeal from an order requiring the extradition of Mr. Burns and his co-accused to the United States to face murder charges, and the disclosure they had received was not at issue on the appeal.

**104**  I am not satisfied that the authorities cited to me by the Province require me to assess Crown Counsel's conduct in light of the standards for disclosure as opposed to the Crown's duty of disclosure that were in place in 1982. However, even if the Crown's conduct in this case must be assessed in light of the disclosure standards of 1982, I am not persuaded that those standards are materially different from the standards of today. In fact, the evidence given by Crown Counsel who were acting at that time demonstrates that Crown Counsel were keenly aware of their duty to disclose all relevant information to the accused.

**105**  At para. 88 in *Henry SCC*, Moldaver J. held that:

Knowledge of the materiality of the information and the consequences of a failure to disclose can be imputed based on what a reasonable prosecutor would know in the circumstances.

**106**  In portions of her examination for discovery that were read into evidence at the trial before me, Ms. Milliken agreed that in 1982, the Crown owed a duty to Mr. Henry to disclose to him all relevant evidence. It was her evidence that she was not involved in the disclosure to Mr. Henry, and that the disclosure in the case was made, or not made, by Mr. Luchenko.

**107**  Ms. Milliken acknowledged that Provincial Crown Counsel Mr. Ross Tweedale, as he then was, had authored a Handbook for Crown Counsel, British Columbia Department of Attorney General, and that the 1981 version advised under the title "The Role of Crown Counsel in the Criminal Justice System" in the last sentence that Crown Counsel:

... does have a duty to offer all the relevant evidence or make it available to the defence.

**108**  The following exchange took place during Ms. Milliken's evidence at trial:

Q "Provincial Court Criminal Practice Crown Counsel Handbook Second Edition, Ross Tweedale."

A Yes.

Q And the second edition is indicated on the cover page as being November 1983?

A Yes.

Q And page 25 at the bottom right-hand corner, there's -- under paragraph 2?

A Yes.

Q It reads as follows:

Crown disclosure pretrial. Unless you are concerned about the security of a witness or tampering with a witness, the practice is developed whereby the Crown will disclose fully all the evidence in its possession before the preliminary inquiry and trial including, (i) the narrative of the alleged offence from the police report; (ii) all statements given by an accused, inculpatory or exculpatory; (iii) the accused's record. (b) at trial, where witness statements have been withheld because of potential interference with them, disclosure is usually made at trial just before the witness is called. If defence counsel is taken by surprise by an unexpected witness, you can expect an application for an adjournment being granted.

That's in accordance with your understanding of disclosure in the early 1980s?

A Generally, yes.

**109**  Mr. Allan Stewart, Q.C., a Provincial Crown Counsel at the time of Mr. Henry's trial, gave clear evidence that the principles set out in *R. v. Boucher*, [*[1955] S.C.R. 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0WF-00000-00&context=) [*Boucher*], and in particular the passage set out therefrom in *Stinchcombe* referred to above, guided him as a Provincial Crown Counsel at that time.

**110**  The following exchange respecting that passage took place during Mr. Stewart's cross-examination:

MR. BROOKS:

Q The question, Mr. Stewart, is do those paragraphs that I read you, were they -- we'll go back a little bit, the principles enunciated in the Boucher case were they brought to the attention of trial prosecutors, I'm not interested in appellant prosecutors but do you know if this was a matter of policy as it existed at the trial level in 82 and '83?

MR. HUNTER: Well, if the question is whether it was policy, I think I can sit down, but the first part.

MR. BROOKS:

Q Policy is what I'm interested in, whether that was the policy at the Crown's office. Was the policy to comply with the Supreme Court of Canada in the Boucher decision?

A As far as I'm concerned, for every prosecutor, knowing of the thrust of what was said by the Supreme Court of Canada in Boucher and in other cases was like the fish being aware that he's in water. It was everything. We didn't talk to one another over coffee about do your duty. We -- in those days as I say, I was there at creation and the thing grew like topsy. We didn't have policy books floating around, and I think the one time a policy book did show up a couple of us flipped through it and found that it said nothing. These were things that floated in from Victoria. So what I'm trying to say is it was the world -- it was the reason we weren't mere lawyers; okay? That people who were Crown counsel knew that they were in a special position. We didn't have to announce it every morning. People didn't have to give us lectures. It was what you were. Somewhere in here -- I can't remember if it's in here or elsewhere, the Supreme Court of Canada refers to the Crown counsel as being a small minister of justice. In addition to this, there were things that reverberate through the Crown counsel system in British Columbia such as those of us who had worked in the pre-1974 system, even as juniors, which was my role, had encountered people like Al Melvin and Sam Toy and George Murray, and when you sat with them in the old Coffee Garden restaurant at the Georgia at lunchtime, what came through and what they were talking about and what they were doing was a firm and certain understanding that you were to be firm but fair. Anything relevant by way of law, fact to the case, no matter which way it cut, had to be brought to the attention of the court or counsel for the accused. Drawing case law to the attention of the court that bore on whatever was before the court regardless of how it cut was something I was very much alive to because for good or ill I spent a lot of time trying to keep up with what was coming out of the Supreme Court of Canada and the court of appeal. I'm answering this badly, but it's as if you asked me does a baseball -- is a baseball player aware of the fact that he ought to hit the ball. Yeah. It's -- it's the world we lived in.

**111**  Ms. Sandra Cunningham, Q.C. is a Provincial Crown Counsel who was involved with the Henry file prior to Mr. Luchenko. Ms. Cunningham authored a memorandum to another Crown Counsel, Barry Williamson, dated August 8, 1982. In it she wrote in part:

Suggest Re Particulars:

1. [accused's] State[ment]
2. Investigation Report on each count in information
3. General allegations re similar fact

No copies of any victim's stat[ement]s / no verbatim recitation of victim's report to police.

**112**  I accept Ms. Cunningham's evidence that she did not intend to suggest in her memo that victims' statements or verbatim recitations of victims' reports to police be withheld from Mr. Henry or his counsel, but rather that it was her intention to note that such statements or reports were simply not in Crown Counsel's file at that time.

**113**  Ms. Cunningham also explained the difference between the record of a witness interview and a witness statement in her evidence as follows:

Well, a statement in terms of Crown counsel talk, a statement is a handwritten, in those days a handwritten statement of a witness. And an interview is questioned by a police officer and answered by a witness. Not always verbatim. So a police officer can interview someone and then say, talked to so and so on such and such a date he or she said blah, blah, and that's an interview. It isn't necessarily in Crown counsel talk, it isn't a statement of a witness. It may be for all intents and purposes the same thing ultimately, but it's not -- an interview doesn't necessarily mean it is the witness's own words and only their words.

**114**  Ms. Cunningham agreed as follows:

Q I understand. They're both equally as important?

A Yes. Well, except for ones -- ones in the words of a witness and the other could be in the words of a police officer writing down what was told to him or her by a witness.

Q And of course you would agree both group of documents you've just described would be important for defence counsel to have, yes?

A Yes.

**115**  I am prepared to accept that the disclosure obligations of the Crown must be assessed as at 1982 when the disclosure obligations in this case first arose, but I am not persuaded that those obligations were subjective or that they were significantly different then from what they were in 2015.

**116**  I find that in 1982 and now, the Crown has a duty to disclose relevant material, whether or not it intends to introduce it into evidence. Material is considered relevant if it can reasonably be used by the accused either in meeting the Crown's case, advancing a defence, or otherwise making a decision that may affect the conduct of the defence. The Crown must err on the side of inclusion, and bears the onus of disclosing all material that is not clearly irrelevant.

**117**  Acknowledging as did Moldaver J. at para. 68 of *Henry SCC*, that "during the pre-*Stinchcombe* era... Crown disclosure practices were not as robust as they are today", I nonetheless find that the disclosure made to Mr. Henry and his counsel before and at his preliminary hearing, and before and during his trial, failed to comply with Crown Counsel's duty of disclosure as articulated in *Boucher* and expanded upon by Ms. Milliken, Mr. Tweedale, Mr. Stewart, and Ms. Cunningham, which I find was the standard of the Provincial Crown Counsel's office at the relevant times in Mr. Henry's case. That duty was to make timely disclosure to the accused or his counsel (or to the Court if the accused is not represented) of all the relevant facts and witnesses known to him, whether tending towards guilt or innocence as described in para. 35 of *Cunliffe* as set out above.

***C. What evidence did the Crown have before or during Mr. Henry's trial?***

**118**  I accept the uncontradicted evidence of Det. Harkema that he provided certain documents and information to Mr. Luchenko. Regrettably, as set out in the statement of agreed facts to which I have referred above, Mr. Luchenko had passed away before the trial in this action began. He was not deposed or examined for discovery prior to his death. Mr. White, who was Mr. Henry's lawyer at his preliminary hearing, was not called to give evidence. I was not advised that any application was made by the Province to question him, on the basis that Mr. Henry might arguably have be taken to have waived solicitor/client privilege over the disclosure that Mr. White received while acting for Mr. Henry.

**119**  Based primarily upon Det. Harkema's evidence, I will set out what I accept that the Provincial Crown had in its possession by the time Mr. Henry's trial, or before, that was not disclosed to Mr. Henry or his lawyers.

***i. Wire-Tap, DNR, Surveillance, and Tracking Device Evidence***

**120**  The Crown was provided by the VPD with information used for the Wiretap Application. The Crown had records of the results from that wire-tap, the DNR, the Tracking Device and the surveillance of Mr. Henry from May 15 to June 7, and June 8 to July 23, 1982. Crown Counsel also had Ms. Jessie Henry's statement to the VPD and a photograph obtained from her by the police.

**121**  Prior to the dismissal of his conviction and sentence appeals, neither Mr. Henry, nor the lawyers who were engaged on his behalf before the trial from time to time, were provided with notice of the existence of:

1. the application materials, warrant, and resulting data related to the DNR;
2. the application materials, warrant, and resulting data related to the Tracking Device;
3. the application materials and the order related to the Wiretap Application;
4. the VPD police report that detailed the unsuccessful efforts to tie the plaintiff to the sexual assaults through a fluorescent powder test;
5. the VPD reports that showed that 20 sexual assault complainants had been shown numerous photographs and had participated in the RCMP's Witness Suspect Viewing System; and
6. the VPD reports related to the surveillance of the plaintiff by the VPD and its agents from May 15, 1982 until June 7, 1982 and again from June 8, 1982 until July 23, 1982.

**122**  While I find that Mr. Henry was aware that he was under surveillance for at least a part of those time periods, that does not excuse Crown Counsel's failure to disclose the results of that surveillance to him.

***ii. Physical Evidence: Tool Marks, Clothing, Fingerprints and Spermatazoa***

**123**  In a confidential bulletin provided to Crown Counsel prior to Mr. Henry's trial, the VPD advised that on arrest, Mr. Henry's tools should be seized as evidence. Also in Crown Counsel's file prior to Mr. Henry's trial was a police report in which Officer Howland advised that he had searched Henry's car in 100 Mile House and seized his tools.

**124**  The seizure of Mr. Henry's tools from his car took place on May 12, 1982. The tools were seized without a warrant, and later underwent tool mark comparison by the VPD, with "negative" results, which was not communicated to either Mr. Henry or any of his lawyers.

**125**  On April 29, 1982, the Vancouver Police Department seized clothing belonging to Mr. Henry from Ms. Henry's home on East 17th as evidence. Mr. Henry testified, and I accept, that he was never advised either before or during his trial that a warrant had been executed in relation to the residence on East 17th. He was further never shown any other documentation by the Crown indicating what clothing of his was in the possession of the police, including any information regarding efforts made by the VPD to match his personal clothing to the clothing described by the complainants.

**126**  The VPD had Mr. Henry's fingerprints by July 31, 1982. Undisclosed to Mr. Henry and his lawyers prior to the dismissal of his conviction and sentence appeals was the fact that the police obtained fingerprints from a broken glass at P.B.'s suite.

**127**  Despite repeated written requests from Mr. Henry and his counsel for all forensic reports, including medical and serology reports, the Crown did not disclose to Mr. Henry medical, lab and police reports showing that perpetrator spermatozoa had been located for four of the sexual assaults, including the assault of the woman I have referred to as C.A.

***iii. Evidence Relating to the May 12, 1982 Line-Up***

**128**  Six of the trial complainants attended the May 12, 1982 line-up: B.Q., P.B., K.K., H.M., D.I., and C.A.

**129**  P.B. and H.M. did not write down Mr. Henry's number on their ballots. D.I. also did not write Mr. Henry's number on her ballot, but she did write down number 18, which is the number of a foil. K.K. wrote "12/18" on her ballot, which were the numbers, respectively, of Mr. Henry and a foil. C.A. wrote on her ballot, "Number 12 by his voice only". B.Q. wrote "#12 ? right size & build also French accent (slight) noticed".

**130**  The Crown failed to disclose statements that appear to have been made by some of the complainants in relation to the May 12, 1982 line-up, including:

1. C.A.'s explanation of why she wrote Number 12 on her ballot. Among other things, she told police that Number 12 was "talking at the same level of sound" as her attacker, "and it was quite loud";
2. statements made by B.Q. immediately following the line-up;
3. a statement made by H.M. at a September 1, 1982 post-charge re-interview, in which she described the May 12 line-up and explained why she did not identify anyone;

**131**  It was not disclosed to Mr. Henry or his lawyers prior to the dismissal of his conviction and sentence appeals that some of the trial complainants who viewed the May 12 line-up were shown a photo of this line-up at the re-interviews conducted by the Det. Harkema after the plaintiff was charged.

***iv. Complainants' Evidence***

**132**  B.Q., P.B., K.K., P.G., H.M., D.I., C.A., and J.F. were the complainants who Mr. Henry was convicted of assaulting.

**133**  With respect to statements and reports made in relation to the assault of B.Q., Crown Counsel only disclosed the statement B.Q. made at her August 16, 1982 post-charge re-interview.

**134**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of B.Q., none of which was disclosed to Mr. Henry or his lawyers:

1. two police investigative reports dated May 5, 1981, the date B.Q. was assaulted, including B.Q.'s description of her attacker that she provided to the first officer on the scene, PC Gibson;
2. police property and exhibit records dated May 28, 1981 and June 30, 1981;
3. undated notes from an interview of B.Q. by the police, apparently conducted immediately following the May 12, 1982 line-up;
4. the notes of the four police officers who investigated her complaint;
5. a city analyst's undated Lab worksheet;
6. a miscellaneous and supplementary police report dated July 29, 1981;
7. a further investigative police report dated June 16, 1981;
8. notes of B.Q.'s interview by the police of August 16, 1982;
9. a statement by B.Q. to police dated August 31, 1982;
10. an undated statement that provides a perpetrator description;
11. a scenes of crime report dated June 16, 1981; and
12. an undated city analyst's Lab worksheet.

**135**  B.Q. testified that she was shown two photo line-ups shortly after she was attacked on May 5, 1981. She also described attending a live line-up that she believed occurred in October 1981. Neither Mr. Henry nor his lawyers were advised of this information.

**136**  With respect to statements and reports made in relation to the assault of P.B., Crown Counsel only disclosed P.B.'s August 31, 1982 post-charge statement, which provided no physical description of her attacker.

**137**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of P.B., none of which was disclosed to Mr. Henry or his lawyers:

1. an undated miscellaneous and supplementary report;
2. a miscellaneous and supplementary report dated July 29, 1981;
3. police investigative reports dated June 16, 1981, the date P.B. was assaulted;
4. interview notes of P.B. by the police dated August 31, 1982;
5. a VPD property and exhibit record date June 30, 1981;
6. a scenes of crime report with the complete date uncertain;
7. a list of items seized at the location of the assault of P.B.; and
8. notes of two investigating police officers.

**138**  With respect to statements and reports made in relation to the assault of K.K., Crown Counsel only disclosed a statement K.K. made on the day she was attacked, August 5, 1981 and a statement that K.K. made after Mr. Henry was charged with her attack, at her re-interview on August 19, 1982.

**139**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of K.K., none of which was disclosed to Mr. Henry or his lawyers:

1. two investigation reports dated August 5, 1981, the date K.K. was assaulted;
2. a miscellaneous and supplementary report dated August 5, 1981; and
3. the notes of an investigating police officer.

**140**  K.K. testified at the trial that she attended a line-up prior to the May 12 line-up, at which time she picked someone out with a question mark. This information was not disclosed to Mr. Henry or his lawyers prior to the dismissal of his conviction and sentence appeals.

**141**  With respect to statements and reports made in relation to the assault of P.G., Crown Counsel only disclosed a single undated statement that P.G. testified she may have made in November 1981.

**142**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of P.G., none of which was disclosed to Mr. Henry or his lawyers:

1. investigative reports dated October 17, 1981 (the date P.G. was assaulted) and May 13, 1982;
2. three miscellaneous and supplementary reports dated October 17, 1981;
3. another police investigative report dated May 13, 1982;
4. notes of P.G.'s interview by the police of September 8, 1982;
5. a statement by P.G. to the VPD dated November 12, 1982, made immediately after testifying at the preliminary hearing;
6. undated notes of another interview of P.G. by the VPD;
7. notes of two investigating police officers; and
8. a statement taken from P.G.'s boyfriend on the day of the offence.

**143**  P.G. testified that she attended a live line-up in November 1981 with 11 or 12 other women, who viewed the line-up in two separate groups and had the opportunity to hear the men's voices. She marked down a number as looking similar to her assailant but said that he was not the man. She also testified that on the Monday after she was attacked she attended the courthouse at 222 Main Street for the purpose of seeing whether she could identify anyone in the audience in a couple of court rooms but she picked no one out. This information was not disclosed to Mr. Henry or his lawyers prior to the dismissal of his conviction and sentence appeals.

**144**  With respect to statements and reports made in relation to the assault of H.M., Crown Counsel only disclosed H.M.'s February 24, 1982 statement, which contains no description of her attacker other than that he had a big tongue.

**145**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of H.M., none of which was disclosed to Mr. Henry or his lawyers:

1. two police investigative reports dated February 22, 1982, the date H.M. was assaulted, in which H.M. describes her assailant;
2. a miscellaneous and supplementary report of the same date;
3. notes of H.M.'s interview by the police of February 24, 1982 and September 1, 1982;
4. a police property office query;
5. a VPD property and property and exhibit record;
6. notes of two investigating police officers;
7. a Lab worksheet dated February 22, 1982;
8. a memorandum from the Lab dated February 25, 1982; and
9. a composite sketch based upon H.M.'s description of her attacker, made on February 29, 1982, which includes a written description and interview notes made by Crown Counsel prior to trial.

**146**  With respect to statements and reports made in relation to the assault of D.I., Crown Counsel only disclosed a statement D.I. made on March 10, 1982, the day of her attack, and another made at a post-charge re-interview on August 17, 1982.

**147**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of D.I., none of which was disclosed to Mr. Henry or his lawyers:

1. an undated statement by D.I. to the police;
2. a composite drawing of the so-called rip-off rapist;
3. police investigative reports dated March 10, 1982;
4. miscellaneous and supplementary police reports dated March 10, March 23, and April 3, 1982;
5. a statement by D.I. to the police dated March 11, 1982; and
6. notes of the investigating police officers.

**148**  With respect to statements and reports made in relation to the assault of C.A., Crown Counsel only disclosed C.A.'s August 13, 1982 statement.

**149**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of C.A., none of which was disclosed to Mr. Henry or his lawyers:

1. undated notes of an interview of C.A.;
2. two investigative reports dated March 19, 1982, the date C.A. was assaulted;
3. a miscellaneous and supplementary report dated March 19, 1982;
4. a scenes of crime report dated March 19, 1982;
5. a statement by C.A. to the police dated March 29, 1982;
6. a Lab worksheet dated March 24, 1982;
7. a property office record dated March 25, 1982;
8. a Lab exhibit report dated April 1, 1982;
9. a police property receipt dated December 2, 1983; and
10. notes of the investigating police officers.

**150**  With respect to statements and reports made in relation to the assault of J.F., Crown Counsel only disclosed the statement J.F. made to police on July 28, 1982. This statement includes no physical description of her attacker.

**151**  By the time of Mr. Henry's trial, Crown Counsel had the following additional evidence respecting the assault of J.F., none of which was disclosed to Mr. Henry or his lawyers:

1. VPD investigation reports dated June 8, 1982, the date J.F. was assaulted;
2. miscellaneous and supplementary police reports;
3. one undated and two dated June 8, 1982;
4. a Lab worksheet dated June 11, without any year indicated;
5. a transcript of J.F.'s interview under hypnosis by a police officer dated October 25, 1982;
6. an undated report of the surveillance of Mr. Henry; and
7. a police report to Crown Counsel dated July 29, 1982.

***v. Evidence Relating to Other Suspects***

**152**  Undisclosed to Mr. Henry or his lawyers prior to the dismissal of his conviction and sentence appeals were VPD reports showing that McRae and a "Mr. Richards" were VPD suspects in the sexual assaults, and that in May and July 1982, McRae had been arrested for late-night predatory behaviour in two of the neighbourhoods where the offences were occurring.

***vi. Other Evidence***

**153**  Other records in the possession of Crown Counsel by the time of Mr. Henry's trial included:

1. similar records and statements relating to 15 additional complainants;
2. additional surveillance notes;
3. ballots from the some complainants who attended the police line-up that Mr. Henry was forced to participate in;
4. medical reports relating to P.B., D.I., C.A., and four other complainants whose complaints did not underlie the charges faced by Mr. Henry at trial;
5. VPD property office and identification documents;
6. application materials for a wiretap order obtained by the VPD; and
7. other police documents pertaining to the so-called rip-off rapist.

**154**  The Crown did not disclose a memorandum that had been prepared by VPD S/Sgt. K. Miles sometime between July 6 and August 5, 1981 (the "Miles Memo"). The Miles Memo discussed 10 sexual assaults that the VPD believed had been committed by the same person, and indicated that the police were conducting surveillance of two suspects identified only as "Hobson" and "Richards". "Hobson" is an alias that was used by Mr. McRae. Mr. Henry was ultimately tried for two of the complainants whose sexual assaults were discussed in the Miles Memo.

**155**  The Crown also did not disclose to Mr. Henry or his lawyers that Det. Harkema did not believe the right person was being charged with the assault of C.A. Det. Harkema testified that he told Mr. Luchenko that he did not believe that Mr. Henry had committed the assault against C.A., but Mr. Luchenko "was the one making the decisions".

***D. Was disclosure intentionally withheld from Mr. Henry by Crown Counsel?***

**156**  After his arrest, Mr. Henry was represented by a series of lawyers, who made numerous written requests to Crown Counsel for disclosure of a number of items, including:

1. all statements made by the victims and reduced to writing in a VPD member's notes or otherwise, including but not limited to statements made to the first VPD member on the scene;
2. copies of all particulars regarding any line-ups held in the matter; and
3. copies of all medical reports or other reports, such as serology and hair and fibre reports.

**157**  By letter of August 9, 1982, Mr. Murray L. Smith asked for particulars of the charges and:

... copies of statements made by witnesses to the police.

**158**  The broadest demand came in a letter from Mr. Ken Young dated August 12, 1982, stating:

Further to our meeting with your Mr. Sweeney of the morning of August 12, 1982, we write to confirm that we have now, hopefully firmly, put this matter over for Preliminary Hearing, unto 10:00 A.M. MONDAY, NOVEMBER 1, 1982 (Court Room 512), and for the two weeks then following.

We have, further, arranged a meeting (9:00 A.M. WEDNESDAY, AUGUST 25, 1982) with the Chief Administrative Judge, for the purpose of securing from him, a further block of time either prior/subsequent to the date presently scheduled.

In the circumstances, it is our view that, in order to make the case (at this stage, at least) as easy of management and economical of time as can be, it would be in the interests of both the Crown and the administration of justice, generally, that the Defence be provided 'contrary to the customary policy of your offices), with the following pertinent information and materials:

1. Copies (by way of copies of the Policemen's notes or otherwise) of all statements, by way of description, offered to the first attending Policeman/person in authority by all Complainants.
2. Copies of all statements of Complainants, generally, as reduced to writing.
3. Copies of all statements of Witnesses (other than Complainants) relative to description/descriptions offered of the vehicle/vehicles observed.
4. Copies of all statements of the accused (whenever taken and in whatever circumstances).
5. Copies of all medical and other technical reports (viz: serology, alcohol, hair and fibre etc.).
6. Copies of all particulars re: line ups, generally (and inclusive, specifically of line up photographs, line up sheets, line up ballots).

Provided that the materials to which we have referred are, in due course, delivered to us, it is our view that the length of the proceedings presently scheduled shall, to some significant degree, be reduced.

The extent policy of your office entirely aside, surely, the Crown either has a case or it does not. The provision of the materials to which we have referred (to all of which, at some stage or other of the proceedings we are entitled, on application) shall not increase or diminish that "case" assuming it exists at all, in any measure.

Accordingly, we thank you, in anticipation, for your assistance and co-operation and leek forward to your reply.

**159**  On September 10, 1982, Mr. White wrote to the Crown. His letter stated in part:

I would ask at this time that you forward to me full and complete particulars on each and every count of the Indictment re the above. I would ask that you forward to me copies of photos of any line-ups which may have been held, particulars of recent complaints, and in summary, complete particulars on all evidence which you intend to adduce.

**160**  As was the practice at the time, particulars summarizing the charges were provided to Mr. Young's office by telephone.

**161**  On October 6, 1982, Mr. White wrote to the Crown. His letter stated:

On September 10, 1982 I wrote to you requesting further particulars, with reference to all the counts re the above. In view of the seriousness of the charges and the varying allegations, I would ask that you forward these to me forthwith.

**162**  Mr. Henry discharged Mr. Young before his preliminary hearing, but thereafter filed a variety of court applications in which he made requests for disclosure adopting the language used by Mr. Young in his requests.

**163**  None of the materials detailed in Mr. Young's letter were provided, nor was Mr. Henry advised whether any such materials or information existed or not.

**164**  After the preliminary hearing began on October 27, 1982, but before his trial, Mr. Henry sought the same disclosure as had Mr. Young, with a similar result.

**165**  Mr. Henry filed an application for *habeas corpus* dated November 19, 1982.

**166**  Mr. Henry wrote a letter to Mr. Luchenko on November 21, 1982 stating, in part:

haven't any counsel anymore.

...

Further to the prelim, I have sent in copy form alibi's for myself.

...

So what I would ask from your dept is these materials

Copies of all medical and technical reports - (hair, serology, fibre's- etc.)

Lineups held, where held. Who was the officer's in charge. Who was in charge of photographs.

All arresting officers. Gilly and Marine Drive - May 12-82, Pickup - July 29 - all officers names -

Statements, complaints reduced to writing.

Policemen's notes or otherwise by way of description, offered by the first attending officers of these assaults of rapes!

**167**  Mr. Henry wrote a letter to Mr. Luchenko received in the Crown Counsel office on November 26, 1982 in which he referred to having sent in alibi information, and also asked for disclosure including of complainant statements and "copies of all medical and technical reports - hair, serology, fibers, etc."

**168**  On November 30, 1982, Mr. Henry filed an application in this Court, seeking "productive statements of all complainants" and "medical and technical reports".

**169**  On December 7, 1982, several court applications brought by Mr. Henry were heard by Mr. Justice MacDonnell, including:

1. A demand for particulars for:
2. Productive statements of all complainants.
3. Exhibit A. Photograph Lineup.
4. Medical and technical reports, (viz: serology hair fibre etc.)
5. Transcript of evidence from preliminary hearing;
6. An application for a writ of habeas corpus dated November 30. 1982; and
7. A motion to quash, Court file no. CC821716.

**170**  The transcript of the hearing before MacDonnell J. is unavailable, but the hearing took place *ex parte* Mr. Henry. The hearing of the applications occupied but some three minutes, and at its conclusion, Mr. Henry's applications were dismissed.

**171**  On December 13, 1982, Mr. White advised Crown Counsel that he was no longer acting for Mr. Henry. Mr. Henry declined the appointment of Richard Peck as his counsel on January 13, and again on January 23, 1983.

**172**  On January 19 and again on February 23, 1983, Mr. Henry was found fit to stand trial in the opinion of Dr. Joseph Noone, a psychiatrist.

**173**  On February 10, 1983, Mr. Henry wrote a letter addressed to Mr. Luchenko and the Registrar of this Court, which also states that it is copied to Mr. Luchenko, which stated, in part:

Further to all requests made to you and the Honourable Court with regards to transcripts etc. - now my concern is

Copies) [sic] by way of copies of policeman's notes or otherwise, of all statements by way of descriptions of first attending police

all statements by complainants, production statements in own writing of the crime, if possible in their own writing.

medical evidence Spermology, hair, fibre and physical evidence.

all evidence generally given to defence counsel in their defending clients.

We look forward to your reply.

**174**  Mr. Henry wrote another letter to Mr. Luchenko, dated February 11, 1983. The letter is date stamped as received by the Crown Counsel office on February 14, 1983. The letter concludes with the following statement:

In conclusion all material, statements, all medical, physical evidence should and must be sent to me directly. No legal aid involved.

**175**  By letter dated February 21, 1983, Mr. Henry was provided notice that the Crown intended to read in J.F.'s preliminary inquiry evidence at the trial.

**176**  By letter dated February 23, 1983, Mr. Luchenko provided Mr. Henry with a copy of a photograph that was taken of the physical line-up held on May 12, 1982.

**177**  On the morning of February 28, 1983, the trial commenced and Mr. Henry requested that Crown Counsel disclose the trial complainants' statements to him. In response, Mr. Luchenko provided him with approximately 11 of the statements made by the eight trial complainants.

**178**  By the time that his trial had begun, Mr. Henry had been provided with 66 pages of disclosure materials consisting of 11 statements to the police by the eight complainants whose complaints underlay the charges faced by Mr. Henry at trial, statements to the police from other complainants, his own statement to the police, a photo of the line-up that he was forced to attend and particulars provided by telephone. Much of what was in the possession of the Provincial Crown Counsel by the time of Mr. Henry's trial was never disclosed to him or his lawyers prior to the dismissal of his conviction and sentence appeals, nor were copies of these documents provided to him.

**179**  By way of contrast, Dr. Noone, the psychiatrist who assessed Mr. Henry's fitness to stand trial, was provided with some 170 typewritten foolscap pages of police reports.

**180**  Nothing that might be described to as forensic evidence was provided to Mr. Henry or his counsel. Indeed, when the case against Mr. Henry was reviewed by Det. Harkema in 2001, he commented that:

... the biggest concern that I have now, and had originally, is the appalling attitude of **SOME** of the forensic people in dealing with "Rape" scenes. There was little forensic evidence collected, and if there was any, it was disposed of in a hap-hazard manner by the technicians who were the receivers of the evidence. I believe that the V.P.D. would do well to review the **DISPOSAL OF FORENSIC EVIDENCE** policy in place at that time to ensure there is some form of ownership of the actual destruction of these items and scientific material. I also found that whatever "Latent Prints" there may have been, were disposed of without knowing what the results were, or at least no documentation is available to show what happened to them. The question is, "Were the Latents ever compared to Ivan Henry's prints?" I believe they were, but there is no record of this so it is a non factor.

[Emphasis by Det. Harkema.]

**181**  Mr. Henry filed numerous court applications and represented himself until approximately 2008 in all post-conviction and sentence proceedings concerning his case that I have referred to above.

**182**  In *Henry SCC* at para. 86, Moldaver J. explained the evidentiary burden on a plaintiff alleging the intentional withholding of information by Crown Counsel:

Nothing in the formulation of this test alters the methods by which finders of fact assess intent. The common sense inference that individuals intend the natural and probable consequences of their actions applies: *R. v. Walle*, [*2012 SCC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20Y-00000-00&context=), [*[2012] 2 S.C.R. 438*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20Y-00000-00&context=), at paras. 58-63, citing *R. v. Daley*, [*2007 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1B3-00000-00&context=), [*[2007] 3 S.C.R. 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1B3-00000-00&context=). As a result, the evidentiary burden on the claimant is not a high one. To demonstrate that the Crown intentionally withheld information, a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it. Alternatively, a claimant could show that prosecutors were put on notice of the existence of the information and failed to obtain possession of it, in contravention of their disclosure obligations: see *R. v. McNeil*, [*2009 SCC 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DV-00000-00&context=), [*[2009] 1 S.C.R. 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DV-00000-00&context=), at para. 49. In both of these circumstances, the intention to withhold may be inferred. This inference is available to the finder of fact, but is not mandatory. Furthermore, it is always open to the Crown to lead rebuttal evidence to show that the withholding was not intentional.

**183**  I find that Mr. Henry has proven that he put the Crown on notice of what he wished disclosed to him and that Mr. Luchenko was in possession of that information, but failed to disclose it.

**184**  I am satisfied on the balance of probabilities that the information that I have discussed at paras. 122 to 156 above were in Mr. Luchenko's possession prior to and during Mr. Henry's trial. Accepting the evidence of Ms. Milliken that she played no role in the fulfillment of the Crown's disclosure duties, I find that Mr. Luchenko made intentional decisions on more than one occasion not to provide disclosure of the documents or the information I discussed in those paragraphs to Mr. Henry or his lawyers.

***E. Did Mr. Luchenko know or ought he reasonably to have known that the information was material to the defence and that the failure to disclose it would likely impinge on Mr. Henry's ability to make full answer and defence?***

**185**  The second element of the four-part test articulated by Moldaver J. in *Henry SCC* is explained by him at paras. 87 - 90 of his reasons:

[87] The next element of the test relates to the Crown's knowledge of the materiality of the information and the consequences of withholding it. Under this element, to be material, the information must be relevant and "directed at a matter in issue in the case": *R. v. B.(L.)* [*(1997), 35 O.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5KY-B473-00000-00&context=), at p. 44. That said, the mere fact that information is material to the defence does not necessarily mean that the failure to disclose it will likely impinge on the accused's ability to make full answer and defence. While related, the two concepts are distinct, and each must be established.

[88] Knowledge of the materiality of the information and the consequences of a failure to disclose can be imputed based on what a reasonable prosecutor would know in the circumstances. Once it is found that information was intentionally withheld which any prosecutor, acting reasonably, should have disclosed, I see no reason why an accused who has suffered harm should be denied a cause of action. I stress, however, that by incorporating a reasonableness aspect into the knowledge element, I am not endorsing a ***negligence***-based standard as the applicable liability threshold. Taken together, the two elements I have described -- intent, and actual or imputed knowledge -- rise above a purely objective "reasonableness" or "marked departure" standard grounded in a duty of care paradigm.

[89] The purpose of the intent and knowledge elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, these elements are designed to set a sufficiently high threshold to address good governance concerns, while preserving a cause of action for serious instances of wrongful non-disclosure. As pleaded, the facts of Mr. Henry's case would meet this threshold.

[90] One final point on the liability threshold bears mentioning. It is not uncommon in the course of a criminal prosecution for disclosure decisions to be challenged, and for a court to determine the lawfulness of the Crown withholding certain information. If a court rules that information sought by the defence need not be disclosed, then the Crown's failure to disclose will have the benefit of a judicial imprimatur. It would not be accurate to say, in these circumstances, that the Crown intentionally "withheld" information from the accused. Even if the judicial determination is later overturned, no liability for Charter damages will lie for non-disclosure.

**186**  The importance of the right to disclosure and the Crown's duty to disclose has been emphasized in a number of the authorities, and in inquiry reports relating to wrongful conviction: see *Re Cunliffe and Law Society of British Columbia, supra*; *Hoem v. Law Society of British Columbia* [*(1984), 20 C.C.C. (3d) 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61K5-00000-00&context=) at 253 (B.C.C.A.); *R. v. C.(M.H.)* [*(1988), 46 C.C.C. (3d) 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M48Y-00000-00&context=) at 154-156 (B.C.C.A.), per McEachern J.A. (in dissent), rev'd [*(1991), 63 C.C.C. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNM1-F7ND-G0WY-00000-00&context=) at 393-395 (S.C.C.); *McTaggart v. Ontario*, [*[2000] O.J. No. 4766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDC1-FK0M-S3P3-00000-00&context=) at paras .36-68, 96-97 (Sup .Ct. J.); *R. v. Denbigh*, [*1990 CanLII 526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X3D9-00000-00&context=) (B.C.S.C.); *R. v. Burr and Burr*, [*1985 CanLII 2637*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6V1-JJD0-G25N-00000-00&context=) (S.K.C.A.); *R. v. La*, [*[1997] 2 S.C.R. 680*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3V1-00000-00&context=); and the *Sophonow Inquiry Report*, pp. 77-78, 80-81.

**187**  The Canadian Bar Association's *Code of Professional Conduct*, c. VIII, para. 7, adopted by its Council in August of 1974, while not binding on me, is also instructive regarding the perceived duties of Crown Council at that time:

When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. He should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and to the extent required by law and accepted practice, he should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence.

[Emphasis added.]

**188**  In determining whether Mr. Luchenko knew or ought reasonably to have known that the undisclosed information was material to the defence, the impact that the undisclosed information might have had if it had been disclosed to Mr. Henry or his counsel must be assessed.

***i. Wire-Tap, DNR, Surveillance, and Tracking Device Evidence***

**189**  Ms. Henry's statement to the VPD was not disclosed to Mr. Henry. It included details relating to Mr. Henry that were inconsistent with at least part of the profile of the so-called rip-off rapist. Her statement included the following:

1. He will not shave off his moustache because he is very conscious of his teeth. He has a gap between his two (2) upper front teeth, and one (1) tooth is loose. ..
2. He has several tattoos on his arms...
3. He likes to keep himself clean. He is not greasy...
4. He does not own any underwear. He sometimes wears Y.M.C.A. shorts. He is circumcised...
5. He does not own a turtleneck sweater to my knowledge, but he could have owned one. The one that the police got from my place is mine...
6. I have never seen him wearing a belt...

**190**  The Harkema MCS Report is significant not just for the surveillance details, but as an overview of a variety of matters in the investigation, including the warrants, that were never disclosed to Mr. Henry or his lawyers.

**191**  A reasonable prosecutor would have known or ought reasonably to have known that this information was material to the defence and that the failure to disclose would likely impinge on the ability to make full answer and defence.

***ii. Physical Evidence: Tool Marks, Clothing, Fingerprints and Spermatazoa***

**192**  Mr. Henry's defence was based in part on the absence of physical evidence linking him the crimes. On March 8, 1983, in making submissions on his directed verdict motion, Mr. Henry referred to the absence of physical evidence connecting him to the offences, stating:

... they have no fingerprints. Out of so many charges we should have fingerprints. Out of so many charges we should have fibres. Out of so many charges we should have anything, I mean just anything, because then it would take me off the hook. And I'm the guy that has to prove I'm innocent to you people, and that's not fair.

**193**  However, as the undisclosed materials reveal, there was physical evidence, and it did not link him. His tools were tested and excluded. Had it been disclosed, this would have been damaging to a Crown case that was based on the fallacious assertion to the jury (Court?) "we tried our best but could not find any physical/forensic evidence that could assist in identifying a perpetrator." A reasonable prosecutor would have known or ought reasonably to have known that this information was material to the defence and that the failure to disclose would likely impinge on the ability to make full answer and defence.

**194**  At the time of Mr. Henry's trial, serology testing held the potential to exclude him as the perpetrator of the four assaults. There is no evidence that the police or Crown conducted serology testing regarding the four assaults where evidence of semen was found. Had the evidence of the recovery of semen been disclosed at trial, Mr. Henry could have asked the Crown to conduct such testing. If the evidence had been disclosed even earlier, Mr. Henry's counsel could have made such a request. If the Crown refused, Mr. Henry or his lawyers could have applied to the Court to have serology tests performed or asked the jury to draw an adverse inference from the Crown's failure to do so.

**195**  The fact that an accused's prints do not match known crime scene prints, in particular an object the perpetrator may have touched, is information that a reasonable prosecutor would have known or ought reasonably to have known was material to the defence and that the failure to disclose would likely impinge on Mr. Henry's ability to make full answer and defence.

***iii. Evidence Relating to the May 12, 1982 Line-Up***

**196**  The undisclosed evidence included B.Q.'s comments regarding the May 12 line-up that Number 12 (i.e., Mr. Henry) was "the only one that was the right size and build". This comment exposed a frailty in the line-up, namely, the fact that all of the foils were taller than Mr. Henry and the perpetrator, most considerably so.

**197**  H.M.'s explanations for why she did not select anyone in the line-up varied significantly between her undisclosed statement of September 1, 1982 and her testimony at trial. At trial she testified that, among other things, she felt that she had to be absolutely certain before identifying anyone, she did not think the line-up was being taken seriously, she got no good look at Mr. Henry's face, and his voice was muffled. In contrast, in her September 1, 1982 statement, H.M. indicated that she was under pressure, was upset and nervous, and did not think Mr. Henry was her assailant, but "realized later that a part of [her] didn't allow [herself] to make an I.D.".

**198**  The undisclosed statement made by H.M. could have been used at trial to undermine her testimony as to her reasons for not selecting Mr. Henry in the line-up.

**199**  If disclosed, C.A.'s statement that she wrote Number 12 on her ballot because of the loudness of his voice could have been used to attack the reliability of her tentative May 12 identification, given that in all of her other statements she indicated that her assailant spoke in a whisper or half whisper.

***iv. Complainants' Evidence***

**200**  Identification was the most critical issue at Mr. Henry's trial. The many inconsistencies in the undisclosed evidence relating to each of the complainants had the potential to seriously undermine the identifications they made at and before trial. I will discuss several examples of these inconsistencies below.

**201**  B.Q.'s identification of Mr. Henry was based on voice. Had B.Q.'s undisclosed statements been disclosed, they could have been used to undermine her voice identification. There were inconsistencies in B.Q.'s description of the perpetrator's voice among the statements she made to police, the testimony she gave at the preliminary inquiry, and the testimony she gave at trial. There were also elements of B.Q.'s description of her attacker's voice that were inconsistent with Mr. Henry, such as her indication that her attacker had a French accent, which Mr. Henry does not have.

**202**  P.B. identified Mr. Henry based on appearance and voice. As noted above, the only statement made by P.B. that was provided to Mr. Henry contained no physical description of her attacker. However, in PC Kean's report there was a description of P.B.'s attacker that she gave on the night of the offence, which was not disclosed to Mr. Henry.

**203**  The non-disclosure of P.B.'s various statements adversely impacted Mr. Henry's defence. There were significant inconsistencies between the description of the perpetrator that P.B. gave to PC Kean and the evidence P.B. gave at trial, including her description of the attacker's voice, facial structure, and hair.

**204**  P.B.'s August 31, 1982 statement states that on July 29, 1981 she went on a walk-about with police on Main St. and saw no one she thought was her attacker. She also testified to that effect at trial, and further testified that she did not see anyone who she felt was familiar. However, PC Kean's report made on July 29, 1981 reveals that the walk-about was intended to provide P.B. with an opportunity to view a suspect who worked at Main Electronics. The report goes on to say that P.B.'s reaction at Main Electronics was quite different from her reaction at other stores, and that P.B. indicated to PC Kean that the young man who worked at that store was "the type", and something happened when she looked at him, although she could not make a positive identification.

**205**  There were also apparent inconsistencies between PC Kean's report and the evidence P.B. gave at trial with regards to the circumstances of the attack, including the question of whether a glass on which fingerprints were found was broken during the attack, whether the attacker put his hand over her mouth, and when and how the perpetrator discontinued the assault.

**206**  K.K. identified Mr. Henry based on voice. With respect to her attacker's voice, the statement of K.K. that was disclosed to Mr. Henry includes, "His voice was usually muffled as he usually kept his arm in front of him".

**207**  The Crown also disclosed the statement that K.K. made after Mr. Henry was charged with her attack, at her re-interview on August 19, 1982. It states that "He still had his arm in front of his face and his voice was low and muffled. His voice was husky and medium in range, like the way they sometimes portray 'bad guys' on t.v.". At trial, she testified to the same effect as her post-charge statement, except that she did not mention that the man's arm muffled his voice.

**208**  As mentioned above, K.K.'s evidence that she participated in another line-up before the May 12 line-up in which she picked out with a question mark a suspect who was not Mr. Henry, was not disclosed to Mr. Henry or his lawyers and could have been used to undermine her identification of Mr. Henry.

**209**  P.G.'s identification of Mr. Henry was based on appearance and voice. The undisclosed documents relating her assault include a conversation between P.G. and VPD members in which she tentatively identified another man who had recently been selling tickets at her apartment as her attacker, based on his lisp.

**210**  The undisclosed documents contain details inconsistent with or not found in P.G.'s trial testimony, including details regarding the perpetrator's lisp, his hair, and his facial appearance.

**211**  The Crown also failed to disclose a statement that P.G. made on November 12, 1982, just after she finished testifying at the preliminary hearing, in which she said that she recognized Mr. Henry as her attacker upon entering the courtroom because of his mouth, which had a large lower lip. In none of her statements or testimony other than her statement of November 12, 1982 did P.G. mention a large lower lip or anything else about the appearance of her attacker's mouth, nor did she ever indicate that her identification of Mr. Henry was based on recognizing his mouth as that of her attacker. The inconsistency between her November 12, 1982 statement and her other statements and testimony could have been used to undermine her identification evidence.

**212**  P.G.'s boyfriend told PC Wolff that when he arrived at P.G.'s suite, at about 6:55 a.m., she told him that she did not get a good look at her attacker. PC Wolff's report suggests that P.G. was present when the boyfriend was interviewed, and thus would have heard this part of the exchange. Her statement that she did not get a good look at the man could have been used to undermine the reliability of her identification evidence at trial.

**213**  H.M.'s identification of Mr. Henry was based on appearance and voice. As discussed above, the Crown only disclosed H.M.'s February 24, 1982 statement to Mr. Henry, in which her attacker was only described as having a large tongue. Several of the undisclosed documents contained more detailed descriptions of H.M.'s attacker, descriptions which were inconsistent with what she provided at trial, including with regards to her assailant's hair, facial hair, and voice.

**214**  For example, she testified at trial that she recognized Mr. Henry's voice as being that of her attacker and that the voice was distinctive, although she did not say why. On the day of the incident she told police that her attacker sounded American and to Crown Counsel she added that he "seemed to have trouble talking - slur/accent". There is no evidence that Mr. Henry had an accent, spoke with a slur or otherwise had trouble talking. Had H.M.'s four statements been disclosed, she could have been cross-examined to bring out the inconsistencies between her earlier statements and her trial description of her attacker.

**215**  D.I.'s identification of Mr. Henry on trial was based on appearance and voice. The Crown disclosed two of D.I.'s statements, but as indicated above, did not disclose two police reports, which revealed that, within three weeks of her attack, D.I. at least once and arguably twice identified another man as her attacker. On both occasions, D.I. contacted police about a possible suspect. On one occasion, the suspect was arrested.

**216**  Had they been disclosed, the police reports of D.I.'s identification of men other than Mr. Henry as her attacker may have been employed to seriously undermine the reliability of her trial identification evidence. They show that she misidentified someone on one or two occasions as well as at the May 12, 1982 line-up, when she wrote only a foil's number on her ballot.

**217**  The undisclosed reports also weaken D.I.'s claim at trial to possess, through her job, a special skill in remembering people, and to have studied her attacker's face so as to remember it forever. The undisclosed reports also reveal that the men she believed to be her attacker differed in appearance from Mr. Henry in that they had brown or dark brown hair, not red, and the man arrested on April 3, 1982 was considerably younger than Mr. Henry.

**218**  A number of other inconsistencies exist between the information in these reports and D.I.'s trial testimony. One of the two undisclosed March 10, 1982 reports by PC Wood, the officer who attended at D.I.'s apartment within minutes of her assault, contained her narrative of the attack, and the other her description of the perpetrator.

**219**  The inconsistencies between the information in PC Wood's reports and D.I.'s later statements and testimony include details relating to the perpetrator's facial hair, facial features, age, body odour, genitalia, physical strength, and whether the perpetrator's collar was pulled up over his face when D.I. first encountered him.

**220**  C.A.'s identification of Mr. Henry was based on voice. She testified that her attacker spoke in a "very slow, gruff, and quite controlled' voice. The Crown disclosed only her August 13, 1982 statement, in which she described the man's voice as "a gruff, harsh whisper". The Crown did not disclose the police report made the day of the attack, in which she described her assailant without mentioning anything about his voice. Nor did the Crown disclose her signed statement, made 10 days later, in which she described the perpetrator's voice as "a half-whispering voice, sounded very nervous".

**221**  The undisclosed statements by C.A. could have been used to show that she materially changed the description of her attacker's voice after hearing Mr. Henry speak at the May 12, 1982 line-up. Indeed, the description provided in her undisclosed signed statement - "a half-whispering voice, sounded very nervous" - is substantially inconsistent with the three distinctive elements mentioned in her trial testimony (slowness, gruffness and control).

**222**  J.F. identified Mr. Henry based on appearance. This was not, however, until she underwent a hypnosis session conducted by Det. Barnard on July 26, 1982, the day before she first viewed the photo line-up. An audiotape of the session was transcribed, but neither the transcript nor tape was disclosed at trial.

**223**  The transcript of J.F.'s hypnosis session reveals that Det. Barnard repeatedly told her that an image of her attacker existed in her "mind's eye", "like a camera will zoom in and freeze it like a photograph", and that she could report what she saw in this "photograph" as if reading a story-book. J.F. was then asked whether she would be able to identify the attacker if she saw him again. Her response was "I don't know. I think so."

**224**  This excerpt had the potential to support an argument that prior to viewing the photo line-up the next day, J.F. had some doubt as to her ability to identify her attacker.

**225**  As noted above, the only statement of J.F.'s that the Crown provided to Mr. Henry contained no physical description of her attacker. The Crown did not disclose the report of PC Andrews, to whom J.F. provided a description about 18 hours after the assault. That report states that J.F. was trembling and shaking, and notes: "She also feels that she may be subconsciously blocking out some of susp.'s description as she knows she stared at him, but had difficulty describing him. She testified she has been in a state of numbed shock for several hours".

**226**  PC Andrews' report is inconsistent with J.F.'s trial testimony in several respects, including J.F.'s description of the attacker's age, his hair, and facial features.

**227**  The materiality of the notes of the first responding officers, who recorded in their notes statements of the complainants, is very apparent: the notes could have formed a basis for confirmation of the details of perpetrator description provided by complainants in the earliest stages.

**228**  Although I accept that Crown Counsel did not have a duty to disclose relevant evidence to Mr. Henry before trial, it had the option to do so. If the evidence of the complainants' other statements had been provided to Mr. Henry's lawyers while they were still acting for him, I find that competent counsel would have been apprised of the fact that the police believed that only J.F. could visually identify Mr. Henry, and would have sought severance of the counts. Mr. Henry's counsel would also have been in a better position to provide advice to Mr. Henry and to challenge the complainants' testimony in the preliminary inquiry.

**229**  The information I have described at paras. 190 to 229 above was material and a reasonable prosecutor would have known that failure to disclose it would impinge on full answer and defence.

***v. Evidence Relating to Other Suspects***

**230**  Had details of McRae's predatory actions at night as reflected in police reports, at locations so close to so many of the assaults been disclosed, Mr. Henry could have brought this evidence to the attention of the jury and its impact could have been powerful. Further, Mr. Henry could have cross-examined police investigators involved in the McRae surveillance as to features and characteristics of McRae (his body odour, hand size) with a view to establishing doubts concerning the identification evidence.

**231**  The Miles Memo related to McRae could, if disclosed, have led Mr. Henry to appreciate that the man who lived across the street from him was a suspect in the offences and had a history of sexually-related crimes. This information could in turn have been very significant for the jury.

**232**  A reasonable prosecutor would have known or ought reasonably to have known that the information about other suspects was material to the defence and that the failure to disclose would likely impinge on Mr. Henry's ability to make full answer and defence.

***vi. Other Evidence***

**233**  Mr. Henry could have utilized the undisclosed police reports to cross-examine on the fact that for reasons unknown (and still unknown) police were taking active steps to investigate him at a time that appears to pre-date Ms. Henry having contacted them about her husband.

**234**  That a lead investigator does not believe that the right person is charged with an offence is quite obviously material. Had Mr. Henry known this at trial, he could have questioned Det. Harkema concerning it, and the jury would have learned the reasons why the lead investigator held that view. It would have been highly damaging to the Crown case on that count, and to the credibility of the Crown in the eyes of the jury.

**235**  A reasonable prosecutor would have known or ought reasonably to have known that he should not be proceeding on this count at all in these circumstances. Further, the information was material to the defence and failure to disclose would obviously impinge on the ability to make full answer and defence.

**236**  As for the police notes of investigators Sims, Campbell and Harkema, they would have filled the many missing gaps for Mr. Henry and would have brought home to him those aspects of the investigation that had been withheld from him, including other suspects, warrants, the forensic dust, tool marks, etc.

**237**  A reasonable prosecutor would or ought reasonably to have known that the information in the notes and reports was material to the defence and failure to disclose would impinge on the ability to make full answer and defence.

***F. Judicial* Imprimatur**

**238**  The Province asserts that if Crown Counsel failed to disclose information or documents sought by the plaintiff, such failure was validated by judicial decisions that such disclosure was not required. Particulars of such validation are alleged to include the following:

1. The plaintiff's pre-trial application for production of statements was dismissed by Mr. Justice MacDonnell on December 7, 1982; and
2. Bouck J. ruled at trial that the Crown was not required to disclose medical or other reports which it did not intend to rely upon.

**239**  At para. 91 of *Henry SCC*, Moldaver J. addressed the situation where the Court has made a determination that the Crown need not make certain disclosure. He wrote:

One final point on the liability threshold bears mentioning. It is not uncommon in the course of a criminal prosecution for disclosure decisions to be challenged, and for a court to determine the lawfulness of the Crown withholding certain information. If a court rules that information sought by the defence need not be disclosed, then the Crown's failure to disclose will have the benefit of a judicial *imprimatur*. It would not be accurate to say, in these circumstances, that the Crown intentionally "withheld" information from the accused. Even if the judicial determination is later overturned, no liability for *Charter* damages will lie for non-disclosure.

**240**  The Province contends that the rulings of Mr. Justice MacDonnell and the trial judge fall within what Moldaver J. described as a judicial *imprimatur.*

**241**  I do not consider that MacDonnell J.'s refusals of Mr. Henry's requests, in Mr. Henry's absence, rise to the level of a judicial *imprimatur* as discussed by Moldaver J. The application before MacDonnell J. occupied but three minutes and there is no statement by the judge that even suggests that he was advised by Mr. Luchenko of what had and had not been provided to Mr. Henry, and certainly no discussion of the lawfulness of the Crown withholding any particular information.

**242**  I find that before the trial judge's refusal to order the production of the names of the doctors who treated the complainants, Crown Counsel did not advise Bouck J. that he was in possession of any medical information. This failure caused Bouck J. to consider Mr. Henry's request in the abstract, rather than with the benefit of knowing what information Crown Counsel possessed.

**243**  The refusal of Bouck J. to order further disclosure at Mr. Henry's request was similarly informed by Mr. Luchenko's advice that Mr. Henry had "not requested anything further that has not been provided to him..."; a position that, as I will discuss further, was manifestly incorrect. As such, I do not consider that Bouck. J.'s refusal can be considered to be a judicial determination of the lawfulness of the Crown withholding information from Mr. Henry.

**244**  I find that Mr. Luchenko knew or ought to have known that the information he intentionally withheld from Mr. Henry and his lawyers was information that was material to Mr. Henry's defence and that his failure to disclose it would likely impinge on Mr. Henry's ability to make full answer and defence to the charges that he was facing. I further find that Mr. Luchenko's decisions to withhold that information was not validated by judicial *imprimatur*.

***G. Did the withholding of information violate Mr. Henry's* Charter *rights?***

**245**  I have found that material information and evidence was intentionally withheld from Mr. Henry, and that the withholding of that information jeopardized Mr. Henry's ability to make full answer and defence to the serious allegations against him. Crown Counsel's actions in this regard infringed on Mr. Henry's fair trial rights, guaranteed by ss. 7 and 11(d) of the *Charter*.

**246**  I therefore find that Mr. Henry's allegations, described by both the majority and the minority in *Henry SCC* as "serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights", have been made out as against the Province through Mr. Luchenko.

**247**  Mr. Henry has also alleged that Crown Counsel breached his *Charter* rights by applying to dismiss his conviction and sentence appeals for want of prosecution at an extraordinarily early stage, without bringing certain matters to the attention of the Court of Appeal. As noted above, on January 17, 1984, Mr. Stewart filed an application with the Court of Appeal to dismiss Mr. Henry's appeals for want of prosecution, as he had not ordered or filed the transcripts and appeal books.

**248**  Insofar as the claim arises from Mr. Stewart's alleged failure to advise the Court of Appeal, I reject it. I find that Mr. Stewart properly sought a remedy in the Court of Appeal as a result of Mr. Henry's failure to order appeal books, and that his conduct in so doing did not violate Mr. Henry's *Charter* rights.

***H. The Element of Harm***

**249**  The fourth element of proof identified by Moldaver J. in *Henry SCC* is the requirement that a claimant seeking *Charter* damages must prove that as a result of wrongful non-disclosure, he or she suffered a legally cognizable harm. At para. 96 he offered examples of how a legally cognizable harm could be shown:

... A historical wrongful conviction would certainly qualify*. Charter* damages would also be available where the wrongful non-disclosure led to a conviction at trial that was later overturned on appeal, and ultimately replaced by an acquittal -- either entered directly on appeal or following a new trial. Even if the claimant was acquitted at trial, a *Charter* damages award would be available where it could be shown that the charges would have been dismissed or withdrawn at an earlier stage of proceedings had proper disclosure been made. In such a case, damages might serve to compensate for time wrongfully spent in custody and any consequential harm suffered as a result of the criminal proceedings.

**250**  The harm alleged by Mr. Henry is self-evident: his wrongful conviction and lengthy incarceration. Indeed, as referred to above, Moldaver J. described such a consequence, if attributable to wrongful conviction as "an extraordinary human toll" and Chief Justice McLachlin and Madam Justice Karakatsanis considered the facts alleged by Mr. Henry as "egregious". To succeed in visiting the consequences of that harm on the Province, Mr. Henry must prove on the balance of probabilities that he would not have been convicted and incarcerated, but for the wrongful non-disclosure of information by Crown Counsel.

**251**  I have already referred to para. 108 of the reasons for judgment of Low J.A. in *Henry BCCA,* where he held that the evidence at trial on each count in the indictment was probably sufficient to put the appellant at risk and for the case to go to the jury with careful and proper instruction. That finding was, however, without any discussion of the evidence that had been withheld from Mr. Henry. It is thus necessary to consider the evidence withheld from Mr. Henry to determine if the non-disclosure of that evidence in fact caused harm to Mr. Henry.

***i. Causation***

**252**  At paras. 97 - 98 of *Henry SCC*, Moldaver J. set out the test for proof of causation in a case where *Charter* damages are claimed:

[97] Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that "but for" the wrongful non-disclosure he or she would not have suffered that harm. This guarantees that liability is restricted to cases where the intentional failure to disclose was actually the cause of the harm to the accused.

[98] The "but for" causation test may, however, be modified in situations involving multiple alleged wrongdoers. For example, where the claimant alleges that a wrongful conviction was caused in part by the failure of police to provide material information to prosecutors, and in part by the Crown's failure to disclose, then a showing of "but for" causation will not be necessary. In this scenario, the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered: *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=), [*[2012] 2 S.C.R. 181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=).

[Emphasis added.]

**253**  The Province contends that the ***negligence*** of the VPD in their investigation of the so-called rip-off rapist and their treatment of Mr. Henry were causative factors in any harm that Mr. Henry suffered. I will address this submission further when I deal with the Province's submissions on contributory ***negligence***, but even if the VPD were negligent, that does not excuse the consequences of Crown Counsel's non-disclosure on the "but for" analysis as explained by Moldaver J. at para. 98 in *Henry SCC*, set out above.

**254**  I find that Crown Counsel's failure to disclose the information to which Mr. Henry was entitled negates any shortcomings on the part of the VPD that might be attributed to them in their investigation of the so-called rip-off rapist and in their treatment of Mr. Henry. Any failings in their investigation would have been known to Crown Counsel, or could have been learned from inquiries of the VPD. But for the failure on the part of Crown Counsel to make appropriate disclosure, the harm experienced by Mr. Henry would not have ensued.

**255**  The Province raises the issue of causation, contending that the Court of Appeal made no finding that non-disclosure led to Mr. Henry's convictions, although an argument to that effect was raised in that Court. This submission is unhelpful. The fact that the Court of Appeal chose not to address the argument is in no way tantamount to a rejection of the argument.

**256**  The Province also contends that Mr. Henry's conviction was caused by a combination refusing the assistance of publically funded counsel, misconducting himself in his self-representation at trial and judicial error during the course of the trial.

**257**  The Province also contends that if any documents or information can be shown to have been knowingly withheld from Mr. Henry, it cannot be established that the disclosure of that information would have resulted in the trial having a different outcome because Mr. Henry would not have benefitted from the disclosure that he did not receive, as he would have been unable to make effective use of it. The Province points to one example of Mr. Henry's misapprehension of the term "statement", which he conceived of as sworn statements by the complainants, as opposed to police reports of interviews with the complainants.

**258**  Mr. Henry's misapprehension of that term cannot assist the Province. I find that Mr. Luchenko did not misapprehend what he had and should not have misapprehended what Mr. Henry ought to have received either as a result of his unrepresented status, or due to the demands made by his various counsel when he was represented.

**259**  The Province also argues that because Mr. Henry failed to use the victim statements that he was given in an effective way, and seek their admission into evidence, greater disclosure would have changed nothing.

**260**  As I have already stated, Mr. Henry's trial commenced on February 28, 1983. Only 35 days earlier, the appointment of Richard Peck, Q.C. as Mr. Henry's trial counsel was raised by Chief Justice McEachern.

**261**  Although I acknowledge that Crown Counsel did not necessarily have a duty to provide disclosure to Mr. Henry before the trial, had the Crown chosen to do so as late as 35 days before his trial began, Mr. Peck may well have been able to assist Mr. Henry in appreciating the use to which that disclosure might have been put. Mr. Peck would also likely have engaged in a dialogue with Mr. Luchenko to point out the frailties in the case against Mr. Henry, in addition to those identified by the Court of Appeal in October 2010.

**262**  If this disclosure had been made even earlier, it would likely also have assisted Mr. White in defending Mr. Henry at the preliminary inquiry, and in providing advice to Mr. Henry.

**263**  Mr. Henry may well have used the disclosure to which he was entitled at trial, as he used some of what he did have to cross-examine complainants, or to lead evidence from police officers to support his submissions to the jury that the forensic evidence should have raised a reasonable doubt as to his guilt.

**264**  Mr. Luchenko did take some steps during the trial which were of assistance to Mr. Henry. He interjected and proposed that the trial judge conduct a *voir dire* when Mr. Henry sought to call his parole officer. That witness held the concern that Mr. Henry, if at large, would engage in further criminal acts. While such a view was of questionable admissibility, if given, it would have been prejudicial to Mr. Henry.

**265**  Similarly, when Mr. Henry sought to call other complainants whose complaints were not the subject of the charges upon which he was being tried, Mr. Luchenko urged the trial judge to conduct a *voir dire* which resulted in the avoidance of one of those witnesses identifying Mr. Henry as their assailant.

**266**  While these interventions by Mr. Luchenko were of assistance to Mr. Henry, I find that Mr. Luchenko's failure to make appropriate disclosure was compounded by his conduct at trial in at least four respects.

**267**  First, when Ms. Milliken sought to adduce the evidence of J.F. by the introduction of her evidence from the preliminary hearing, the Court was not advised that only some of her statements had been provided to Mr. Henry, and that Mr. Henry had not been advised that J.F. had been hypnotized before purporting to identify him.

**268**  In that Mr. Henry was self-represented at trial, Mr. Luchenko should have been scrupulous in advising the trial judge of the entirety of J.F.'s evidence before asking for the admission of her evidence from the preliminary hearing. Had he done so, the trial judge might well have refused to permit the use of her preliminary hearing evidence, weakening the case against Mr. Henry considerably, as J.F. was considered by the police to be the only witness who could identify Mr. Henry by his physical appearance.

**269**  Secondly, the following exchange took place during the trial:

MR. LUCHENKO: Further to Mr.- Henry's request to the Crown this morning I can advise the Court I have now given him copies of statements of these persons: [A. D., K. P., and V. N., also known as "C.", R. T., and P. R. G.] I do not have a written statement from [C. A.] as that woman is still in Ontario. I have advised Mr. Henry of that situation.

In addition to what he requested of me I have provided him with two further statements and those are the statements of [K. M.], one of the counts in the original indictment, and [C. H.], who is one of his subpoeaned witnesses.

THE COURT: All right.

MR. LUCHENKO: In addition, my lord, Mr. Henry has indicated to me he does not intend to call evidence, The reason I am raising that at this time is, of course, the Crown had taken the position we would produce a certain number of people he would wish to call. I do not intend to de-notify them at this time but I did wish to advise the Court Mr. Henry has given that indication to me within the past five minutes. Perhaps that could be confirmed by him on record.

THE COURT: Have you anything you would like to say about any of this?

THE ACCUSED: I really don't know what to say. I cannot defend myself properly the way I have been given things, I don't think there is any point. If you boys want to put me in the joint, go ahead, enjoy it, have a good time.

MR. LUCHENKO: I am concerned with that comment. Mr. Henry has not requested anything further that has not been provided to him. If he wishes more I would ask him to say now so that the Crown can take whatever steps he wants.

[Emphasis added.]

[Ex. 19, T. p. 284-285, ll. 39 - 29.]

**270**  It is manifestly incorrect that Mr. Henry had "not requested anything further that has not been provided to him...". I find that had Mr. Luchenko correctly advised the trial judge of the extent of the unfulfilled requests for disclosure by Mr. Henry and his lawyers, an order for the disclosure of the many of the various things Mr. Henry and his lawyers had repeatedly asked for would likely have been made.

**271**  Thirdly, in his opening address to the jury, Mr. Luchenko stated with respect to one count that "the police on attending found no physical traces to identify the man". Ms. Milliken conceded in her evidence that the comment was inaccurate and unfortunate.

**272**  Fourthly, Mr. Luchenko led the following evidence from Bruce Campbell, one of the investigating police officers:

Q In your investigations of the matter before the Court you have testified that there were no fingerprints that had ever been obtained, to your knowledge?

A To my knowledge there were none that were identified.

Q No identifiable tool marks, is that right, sir?

A Not to my knowledge.

Q And to be an identifiable tool mark you would have to have a tool against which to compare it, is that correct?

A That is correct.

Q And you had no tool that could be identified with any of these particular incidents?

A No.

Q Were you working on this matter with any other police officer?

A With my partner, Detective Marilyn Sims.

Q Were you assigned solely to this case or did you have to deal with your usual bulk of cases as well as this?

A No. We had to deal with all the other cases as well.

Q Now, when you didn't have any forensic - is that the right term? - forensic evidence, that is fingerprints, fibers, tool marks, you attempted to get a common denominator amongst these various victims, is that correct?

A That is right.

[Ex. 19, T. p. 426, ll. 17-44]

**273**  In my view this exchange was an unfair representation of the evidence of fingerprints and of the evidence of tool marks which were compared with the tools seized from Mr. Henry were not a match.

**274**  I find that if Crown Counsel had provided Mr. Henry with the documents in their control to which he was entitled, and refrained from the four inappropriate acts discussed above, that on the balance of probabilities, Mr. Henry would not have been convicted of the various counts of which he was convicted on March 15, 1983.

**275**  I conclude that had Mr. Henry received the disclosure that I have found he was entitled to, and raised it with the trial judge, as I find he would have done, the trial judge would likely not have permitted the transcript of J.F.'s evidence from the preliminary hearing to have been read in at trial. Further, the trial judge would likely have severed the various counts faced by Mr. Henry, and the likely result would have been his acquittal, and certainly the avoidance of his sentencing as dangerous offender.

**276**  The Province contends that it is not possible to find that the provision of the withheld evidence to Mr. Henry, if used by him at trial, would have outweighed any adverse impression derived by the jury from the evidence it in fact heard. I am unable to accept the Province's submission that the inscrutable nature of the jury verdict precludes such findings.

***ii. Errors Attributed to the Trial Judge***

**277**  In its pleadings, the Province contends that errors by the trial judge in the course of the trial caused or contributed to Mr. Henry's conviction. The Province contends that even if the information that was withheld from Mr. Henry had been provided to him, it would not have caused Mr. Justice Bouck to sever the various counts faced by Mr. Henry, or to declare a mistrial or give different instructions to the jury than those he gave.

**278**  The authorities that address appellate review of a jury verdict for reasonableness were summarized by Mr. Justice Cromwell in *R. v. W.H.*, [*2013 SCC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X230-00000-00&context=) at paras. 26 - 29:

[26] A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not reasonably have rendered*: R. v. Yebes*, [*[1987] 2 S.C.R. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23FB-00000-00&context=), at p. 185; *R. v. Biniaris*, [*2000 SCC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44K-00000-00&context=), [*[2000] 1 S.C.R. 381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44K-00000-00&context=), at para. 36. While the same test was traditionally applied to verdicts by both juries and trial judges, the more recent jurisprudence from the Court has expanded somewhat the scope of review for unreasonableness in the case of verdicts reached by trial judges: *R. v. Beaudry*, [*2007 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18C-00000-00&context=), [*[2007] 1 S.C.R. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18C-00000-00&context=); *R. v. Sinclair*, [*2011 SCC 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XH-00000-00&context=), [*[2011] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XH-00000-00&context=). This development recognizes a practical distinction between reasonableness review of a trial judge's verdict and of a jury verdict: judges, unlike juries, give reasons for their findings which the appellate court may review and consider as part of its reasonableness analysis. However, this expanded reasonableness review of verdicts entered by trial judges does not apply to reasonableness review of a jury verdict.

[27] Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the [page191] trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.

[28] On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris*, at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.

[29] While it is not possible to catalogue exhaustively the sorts of cases in which accumulated judicial experience may suggest that a jury's verdict is unreasonable, a number of examples may be offered. Circumstances in which a special caution to the jury is necessary about a certain witness or a certain type of evidence are reflective of accumulated judicial experience and may well factor into an appellate court's review for reasonableness. Some examples include the evidence of jailhouse informants and accomplices, and eyewitness identification evidence. Other circumstances that generally do not require, as a matter of law, any particular warning to the jury may nonetheless, in light of accumulated judicial experience, contribute to a conclusion of an unreasonable verdict, for example the risks of accepting bizarre allegations of a sexual nature and the [page192] risk of prejudice in relation to psychiatric defences: *Biniaris*, at para. 41. What all of these examples have in common is that accumulated judicial experience has demonstrated that they constitute an explicit and precise circumstance that creates a risk of an unjust conviction.

**279**  The errors attributed to the trial judge, as identified by the Court of Appeal in Mr. Henry's criminal appeal, were not tortious. Judicial immunity precludes any finding of liability on the part of Mr. Justice Bouck for errors made in the course of the Henry trial. His rulings cannot be considered ''***negligence***" or wrongful in the tort analysis sense: *Morier and Boily v. Rivard*, [*[1985] 2 S.C.R. 716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-238R-00000-00&context=).

**280**  The Province cannot avoid liability in whole or in part because of factual circumstances in the background of causation where those circumstances are of a non-tortious nature, such as the trial rulings of Mr. Justice Bouck: *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. *22.*

**281**  To the extent that the trial judge was found to have fallen into error by the Court of Appeal, his errors were arguably errors that Crown Counsel caused or contributed to by not seeking severance of the various counts alleged after abandoning their similar fact application, and arguing that the evidence met the standard for conviction. Mr. Henry quite properly concedes that Crown Counsel cannot be held liable for those alleged errors or omissions due to its immunity from claims of that nature.

**282**  The Province asserts that Mr. Henry's incarceration after February 1984 was caused by his decision not to file the necessary materials to pursue his appeal from conviction. The Province submits that but for the conduct of Mr. Henry in refusing to file the materials necessary to pursue his appeal, the Court of Appeal would have reviewed his conviction on the merits in 1984 instead of 2010 and would have set aside the conviction on the grounds on which the conviction was set aside in 2010.

**283**  As I understand the argument, the Province contends that any chain of causation stemming from the non-disclosure by Crown Counsel was broken by Mr. Henry's failure to follow through with the appeal that was available to him. The Province asserts that had Mr. Henry followed through with his appeal in 1984, it is likely that the result would have been the same or similar to the result on October 27, 2010. I am unable to accept this argument for three reasons.

**284**  First, as I have indicated above, the argument ignores Mr. Henry's compromised thinking and ability to organize his thoughts stemming from his arrest and the charges that led to that arrest. This prevented Mr. Henry from properly advancing his appeal, and cannot break the chain of causation stemming from the non-disclosure by Crown Counsel.

**285**  Second, the evidence with respect to the small man investigation would not have been available by 1984. This evidence and Mr. McRae's convictions were a powerful basis for Mr. Henry's acquittal in 2010.

**286**  Third, even after Mr. Henry's conviction, the Province had an ongoing obligation to disclose to Mr. Henry the relevant information that it had in its possession, which it failed to disclose to Mr. Henry prior to the trial. The Province's failure to disclose that information to Mr. Henry significantly reduced his likelihood of success on his 1984 appeal.

**287**  I find that, but for the *Charter* breaches committed by the Province, it is likely that Mr. Henry would have been acquitted at trial, and he thus would have avoided his wrongful conviction and subsequent designation as a dangerous offender and lengthy incarceration.

***iii. Contributory Negligence***

**288**  In *Cempel v. Harrison Hotsprings Hotel Ltd.*, [*1997 CanLII 2374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (B.C.C.A.) Mr. Justice Lambert held at para. 24:

In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

***a. Mr. Henry***

**289**  The Province took the position that if any of its employees committed any of the acts or omissions in the notice of civil claim, any harm resulting to Mr. Henry was also caused or contributed to by his own ***negligence***. The Province pleaded the provisions of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*. The particulars of the plaintiff's alleged ***negligence*** include dismissing his legal counsel, the conduct of his criminal trial and post-conviction proceedings, his failure to present a competent defence, and his failure to pursue a timely appeal on the merits in accordance with the law.

**290**  The Province contends that Mr. Henry's conduct at trial and in the Court of Appeal in 1984 amounts to either contributory ***negligence***, failure to mitigate, or both. The Province relies upon the decision of the Court of Appeal in *R. v. Crichton*, [*2015 BCCA 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60J6-00000-00&context=) at para. 26, where Madam Justice Bennett, writing for the Court, commented:

There are then, in some sense, competing rights? The right to counsel in contrast with the right to represent oneself and not have counsel forced upon one. It cannot be, then, that an accused is deprived of the right to a fair trial solely because he or she is unrepresented, regardless of the complexity or seriousness of the case, if he or she chooses to be self-represented. Thus, if a person does not receive a fair trial because he or she chose to represent him or herself, even when counsel was available, then the fault lies with the accused and no remedy is available.

[Emphasis added.]

**291**  However, in that case, Bennett J.A. was not addressing a claim for *Charter* damages. Her comments pertain to an application for state-funded counsel and a stay of proceedings pending government funding of counsel, and the consequences for an accused who represents him or herself at trial, and then seeks to appeal a conviction based upon that self-representation.

**292**  As I have already found, Mr. Henry's thinking and ability to organize his thoughts was much compromised at the time of his trial, and his delusional disorder persisted over the years during his pursuit of his appeals. Following the direction in *Janiak* referred to above, he should be treated as falling within the thin skull category and should not be made to bear the consequences of his conduct once it is established that he was wrongfully injured.

**293**  One of Mr. Henry's defences at trial was identity. His ability to pursue this defence was compromised by the lack of disclosure of a number of the complainants' statements and those he did have post-dated, in some cases by years, their assaults.

**294**  Another of Mr. Henry's defences at trial was an alleged alibi for some of the nights that the sexual assaults occurred. Mr. Henry's failure to establish this defence to some of the charges does not diminish the liability of Crown Counsel in failing to disclose material information to him.

**295**  Amongst the materials that were not disclosed to Mr. Henry were documents that showed he was under police surveillance for a number of weeks, over a period of time when at least one sexual assault occurred. The non-disclosure of the results of the surveillance can thus reasonably be said to have impeded Mr. Henry's ability to establish an alibi.

**296**  Crown Counsel apparently disregarded the details of the alibis that Mr. Henry provided pre-trial and did not ask Det. Harkema to investigate them. Officer Barnard testified that investigating suspects' alibis and eliminating them on the basis of alibis was part of what he did as an investigator of sexual assaults in the neighborhood where several of the assaults for which Mr. Henry was convicted had occurred, and the police reports filed as exhibits corroborate his testimony in that regard.

**297**  I am unable to accept that an unrepresented accused who is not provided with appropriate disclosure can then be faulted for not advancing the arguments that would be open to him or her, or enhanced if appropriate disclosure had been provided, or for advancing defences that might not have been advanced if appropriate disclosure had been provided.

**298**  In my view, in a case in which there has not been appropriate disclosure and a conviction results, the Crown should not be able to avoid liability by disparaging the defences that were advanced.

**299**  The Province's claims that Mr. Henry was contributorily negligent would require a finding by this Court that contributory ***negligence*** principles apply to claims for *Charter* breaches. While causation principles are to be applied to a claim for damages stemming from a breach of *Charter* rights, there is no authority for the proposition that contributory ***negligence*** should apply to such a claim. The application of contributory ***negligence*** principles do not fit with *Charter* considerations generally, or the framework of constitutional tort analysis established by the Court in *Ward*. The focus in judicial examinations of *Charter* breaches generally, and in the test set out in *Ward*, is on the actions of the state that may impede on rights, and on public policy considerations.

**300**  It also cannot be logically said that Mr. Henry's decisions contributed to the *Charter* breach itself.

**301**  Mr. Henry's choice to represent himself at trial cannot be considered a legally relevant (tortious) aspect of causation that somehow negates the causative role of the Crown's non-disclosure. It also cannot be considered contributory ***negligence***: were it otherwise, then in every case where the Crown breached a disclosure duty to a self-represented accused and a wrongful conviction resulted, the Crown could avoid or diminish its own responsibility for its breach of the accused's *Charter* rights.

**302**  The fact that Mr. Henry was self-represented at trial heightened rather than diminished the responsibility of the Crown to provide him with the disclosure he had a right to receive in order to make full answer and defence. Mr. Henry cannot be held, through his no doubt unwise decision to represent himself, to have negated or diminished the liability of the Crown for the breach of its duty to disclose. The result would be a license to breach disclosure duties to accused persons who are unrepresented, vulnerable, or who have poor ability to make effective decisions on their own behalf. This would be contrary to basic constitutional principles.

**303**  As an unrepresented person charged with very serious offences, Mr. Henry was entitled to represent himself and to expect that his *Charter* rights would be respected. At his trial, he used what statements that he had been given from P.B., H.M., D.I., P.G., B.Q., and J.F. in his attempts to cross-examine those complainants.

**304**  In my opinion, the contention that Mr. Henry could be found to have contributed to the breach of his *Charter* rights is untenable. He, like every other accused person in Canada, was entitled to the presumption of innocence. He had no obligation to prove that he was not guilty of the charges for which he was ultimately acquitted by the Court of Appeal. He was entitled to his liberty unless deprived thereof in accordance with the principles of fundamental justice. The submission that he is to share in the liability for the breach of that right encourages the impoverishment of the values enshrined in the *Charter* and cannot be supported.

**305**  The doctrine of mitigation prevents a plaintiff from recovering for losses that could have been reasonably avoided. As the party claiming a failure to mitigate, the Province bears the burden of proving Mr. Henry's failure to mitigate on a balance of probabilities: *Southcott Estates Inc. v. Toronto Catholic District School Board*, [*2012 SCC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X219-00000-00&context=).

**306**  Even if this concept, which arises from the private law of tort and contract, can be applied to a claim for *Charter* damages, I am not satisfied that this onus has been met by the Province. As I have found above, Mr. Henry's mental state at the time of his conviction and early appeals was much compromised. His decision-making abilities were accordingly limited, and his actions cannot be said to be unreasonable in this context.

***b. Settling Parties to the Action***

**307**  The next aspect of the Province's argument on the issue of contributory ***negligence*** is with respect to the settling parties to this action. The plaintiff initially claimed damages against three parties, settled with two, and then waived any claims against the Province for "any portion of his damages or costs which may be attributable to any fault" of the VPD or the Federal Minister.

**308**  The Province contends that the damages claim brought against the three parties was "indivisible" in the sense that the same damages relating to his conviction and incarceration were claimed against each of the parties. The "B.C. Ferries" settlement the plaintiff made required waivers so that the settling parties could be clear of any possible claims over.

**309**  In B.C. Ferries, the plaintiffs entered into agreements with several third parties, in which the plaintiffs agreed that they would not seek to recover from the defendants any portion of the losses they claimed in the action, for which a court or any other tribunal might attribute to the fault of the third parties. Counsel advised the trial court that the plaintiffs expressly waived any right to recover from the defendants any portion of the loss which they claim and which the court may attribute to the fault of any respondent third party with whom such an agreement has been struck. The third parties then moved, pursuant to Rule 18A, for summary judgment dismissing the defendants' claims both for contribution or indemnity and for damages equal to an amount required to indemnify them for their out of pocket costs of defending the plaintiff's claim. The judge in this Court dismissed the defendants' claim for declaratory relief against the third parties.

**310**  The reasons on the B.C. Ferries appeal are indexed at *British Columbia Ferry Corp. v. T&N plc*, [*[1995] B.C.J. No. 2116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1W0-00000-00&context=). At para. 15 of those reasons, Mr. Justice Wood expressed the principle in this way:

In order to avoid any uncertainty that may arise with respect to the need for a determination at trial of the degree of fault, if any, attributable to non-defendants, I am of the view that the express waiver should properly form part of the pleadings in this action, and that a further amendment should be made to the Statement of Claim, wherein the substance of that waiver is clearly set out. When that is done, there will be no doubt as to the limits of the plaintiffs' claim for damages, nor will there be any uncertainty as to the obligation of the trial judge to determine what fault, if any, for the plaintiffs' loss is attributable to others than the defendants.

**311**  At para. 30, Wood J.A. explained:

... While it is true to say, as did the judge below, that the suit between the plaintiffs and the defendants will require a determination of the fault of the defendants limited as it may be by the fault, if any, of other persons or companies, the fact is that unless those others are joined as parties the ability of the defendants to demonstrate such fault on their part will be adversely affected - perhaps severely so - by the defendants' inability to invoke those procedures under the Rules designed to enhance the ability of one party to an action to prove its case against another. One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the *Guaranty Trust Company of New York* case.

[Emphasis added.]

**312**  In *Sable Offshore Energy Inc. v. Ameron International Corp.*, [*2013 SCC 37*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X23H-00000-00&context=), the Supreme Court of Canada described the essence of a comparable agreement, described as a Pierringer Agreement, in this way:

Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

**313**  The concept of determining proportionate fault against a settling defendant does not require third party proceedings. This point was made by the Court of Appeal in *Canada Post Corp*. *v. Wiebe*, [*2006 BCCA 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3GR-00000-00&context=), at para. 52:

There is no dispute that under the Act, no recovery for damages could be made against the appellant and, as a result, he could not properly be joined as a defendant in the action. However, it was unnecessary to join the appellant as a third party in order to make a finding about the degree of the appellant's fault. ... there is no doubt that a trial judge may make an assessment of fault against a non-party, a point referred to by Wood J.A. in *British Columbia Ferry Corp. v. T & N pic, supra,* at paragraph 15 of his reasons.

**314**  In *Drucker, Inc. v. Gui*, [*2009 BCSC 542*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M24M-00000-00&context=), Mr. Justice Meyers commented at paras. 96 - 98:

[96] The "B.C. Ferries" form of settlement is meant to accomplish two main goals. The first is to allow a plaintiff to settle with one joint tortfeasor without releasing the remaining joint tortfeasors. The second object is to prevent the non-settling tortfeasors from bringing the settling tortfeasors back into the action through a third party claim for contribution and indemnity.

[97] In order to avoid releasing the non-settling joint tortfeasors, no release is given. Rather, the plaintiff covenants not to sue the settling defendant. Further, no consent dismissal order is made. Instead, the plaintiff discontinues its action against the settling defendant.

[98] In order to prevent the non-settling tortfeasors from being able to claim contribution and indemnity from the settling tortfeasors, the plaintiff covenants to only claim against the non-settling tortfeasors for their share of fault pursuant to s. 4 of the ***Negligence*** Act, *R.S.B.C. 1996, c. 333*. That being the case, there is nothing for the non-settling tortfeasors to claim contribution or indemnity for.

**315**  In the event that the Province had no liability, it would be unnecessary to consider the fault of the other defendants, but as I have found that the Province is liable to Mr. Henry, the Province correctly submits in the alternative that any portion of his damages which may be attributable to any fault of past or present members of the City defendants and the Federal Crown cannot be recovered against the Province.

**316**  The consequence of a B.C. Ferries agreement makes it necessary to determine whether any of the damages claimed against the non-settling defendant are attributable to the settling defendants.

**317**  The plaintiff had asserted that the City defendants and the Federal Crown were at fault, but his assertions are not enough to establish liability against these former Defendants. It was for Mr. Henry to establish the liability of the City defendants and the Federal Crown, and as a result of the settlement between these parties, for the Province to do so before any apportionment of fault and consequent liability must be undertaken by this Court.

***c. The Province's Position on the Liability of the City Defendants***

**318**  The Province amended its pleadings to claim that the plaintiff's convictions were "caused or contributed to" by the former City defendants, but chose not to call any witnesses to the issue of potential City liability. The Province asserts that if it bears any liability to Mr. Henry, the City defendants are at least equally liable for the plaintiff's damages. The Province contends that the City defendants are mainly liable to the plaintiff for their loss of evidence, the live line-up and their failure to disclose the similar sexual assaults that continued to occur after Mr. Henry was arrested.

**319**  Mr. Henry concedes that there is an evidentiary basis on which findings of some fault on the part of the City defendants could be made for negligent investigation related to the May 12 line-up, the J.F. photo line-up, Det. Harkema's re-interviews of the complainants, and failing to investigate the similarities between the small man offences and the offences of which Mr. Henry was convicted.

**320**  The test for liability of police officers was discussed in the decision of the Supreme Court of Canada in *Hill*. *Hill* establishes that police owe a duty of care to suspects whom they are investigating, and that the standard of care is that of a reasonable police officer in similar circumstances. At para. 73 of her reasons, for the majority, Chief Justice McLachlin held:

This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of ***negligence*** does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care (*Lapointe v. Hopital Le Gardeur,* *[1992] 1 S.C.R. 351*; *Follandv. Reardon* [*(2005), 74 O.R. (3d) 688*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B30G-00000-00&context=) (C.A.); Klar, at p. 359.)

**321**  The Province relies on the written opinion of Mr. Davis, a retired Toronto police officer, with respect to the issues relating to the liability of the City defendants. Although the City defendants took issue with Mr. Davis' reasoning for a number of reasons, his evidence was admitted.

**322**  After Mr. Henry was arrested, there were a series of rapes that continued to occur in the same geographic area, with a *modus operandi* similar to that alleged to have been employed by the perpetrator of the offences for which Mr. Henry was convicted and for which similar suspect descriptions were given. Those offences were investigated by the VPD, including by members of the Sexual Offence Squad. Details of these offences were put to Det. Harkema in cross-examination, which he agreed had some similarities to the offences for which Mr. Henry was convicted.

**323**  The Province asserts that these later offences had such similarities to the offences for which Mr. Henry was convicted, that the VPD should have viewed them as related offences. Mr. Davis concluded in his report that the VPD did not exercise reasonable care, skill and professional judgment in investigating the November 1982 to1983 sexual assaults or the 1984 to 1988 offences, and considering the possibility that these offences had been committed by the same perpetrator as the sexual assaults with which Mr. Henry was convicted. Further, he concluded that the "VPD did not exercise reasonable care, skill and judgment in failing to disclose the circumstances of the 1984 - 1988 sexual assaults to Crown Counsel".

**324**  Det. Barnard was one of the lead investigators into the small man assaults. He claimed to have no knowledge of the offences for which Mr. Henry was convicted and said that he believed it was the responsibility of the supervisor to make connections between investigations. He gave evidence that Sergeant Howland would read incoming files and distribute them.

**325**  Det. Harkema testified that he is now aware of the small man assaults, which bear similarities to the offences for which Mr. Henry was convicted. One of the similarities included that a later offence occurred at the same address as one of the offences for which Mr. Henry was convicted. Det. Harkema could not recall anyone bringing the similarities in offences to his attention.

**326**  Det. Harkema gave evidence that he spoke to Det. Barnard about the *modus operandi* of the rip-off rapist because of Det. Barnard's involvement with the investigation, but did not recall any further conversations about it. He attributes the lack of communication to a manpower shortage and states that it was "a crazy time". This seems unlikely given the media attention.

**327**  Gordon Elias, a former VPD member who was involved in the small man investigation, testified that he would not have thought the offences for which Mr. Henry was convicted were committed by the same person as the offences which he investigated. He gave evidence about the investigation into the small man assaults, and specifically about investigating Donald McRae and 14 sexual assault reports. He developed a matrix which "drew a very clear picture that these 14 were all related". The commonalities included geographic location, *modus operandi* and similarities in the description of the perpetrator.

**328**  The Province argues that the small size of the Sexual Offence Squad and the fact that Sergeant Howland and Det. Barnard had both worked on the investigation of the assaults for which Mr. Henry was convicted indicate that they knew of the similarities in the offences, and should have realized that the offences may have been related. These were very high profile offences and there was a group of four detectives and a sergeant responsible for investigating these types of crimes. The Province contends that is not reasonable or credible that they would not all be aware of the general information about the sexual offences for which Mr. Henry was convicted and the small man assaults. If they were not aware, they were negligent in their lack of awareness or were willfully blind. If they were aware, they were negligent in their failure to disclose those facts to Crown Counsel.

**329**  The difficulty with this submission is that if it is correct, it must apply equally to the Province and its Crown Counsel who were involved in Mr. Henry's prosecution and that of Mr. McRae. In my view, the application of the standard of care discussed by Chief Justice McLachlin in *Hill* does not raise the failure of the members of the VPD nor the Provincial Crown to the level of error necessary to support an allegation of liability for the failure to connect the offences for which Mr. Henry was convicted with the offences that were attributed to Mr. McRae. The investigation of the small man offences, in my view, fell within the range of reasonableness and should not be judged from the vantage of hindsight.

**330**  Ms. Cunningham and Ms. Milliken testified that they believed that the police were responsible for charge approval in 1982, although, Ms. Cunningham qualified her evidence by preceding it with the observation that this was "to the best of [her] recollection". Det. Harkema testified that Mr. Luchenko was responsible for charge approval in Mr. Henry's case. I prefer the evidence of Det. Harkema on this point, as neither Ms. Cunningham nor Ms. Milliken were involved with the charge approval process in Mr. Henry's specific case, whereas Det. Harkema was.

**331**  Crown Counsel had the benefit of being able to review the evidence relating to the investigation that had been conducted by the VPD, and knew or ought to have known that the investigation had serious flaws and deficiencies. Crown Counsel was therefore in a position to refuse to proceed with the charges against Mr. Henry.

**332**  The fact that when Crown Counsel became aware of the later assaults in 2005, they asked the VPD to review the evidence of the offences for which Mr. Henry was convicted, does not persuade me that such conclusions should have been reached by either the VPD or Provincial Crown Counsel when the investigations were ongoing, including the investigation of small man assaults at earlier dates.

**333**  The Province alleges that the City defendants failed to properly handle the exhibits collected during the course of their investigation and trial of Mr. Henry.

**334**  Between 1980 and 1982 the VPD identification squad attended crime scenes to look for and preserve fingerprints, tool marks, and biological matter. The constables and follow-up investigators took this evidence, depending on the time of day, either directly to Lab or to the science locker at the police station for later pick up by the Lab's technicians. Any bodily fluid deposited at the scene of a sexual assault by a perpetrator would have been processed by the Lab.

**335**  Shortly after the Lab was shut down in 1995, three of its freezers and a refrigerator were moved into a secure room at the police station located at 312 Main Street. The evidence contained in those appliances stayed there, except as items were removed from time to time for trial. The freezers and the refrigerator eventually broke down and had to be thrown out. At some point, Mr. Modie, one of the Lab workers, took it upon himself to clean out the freezers and refrigerator and to reorganize its contents. He logged the exhibits, one at a time, based on the information on the tags, where sufficient information existed.

**336**  Det. Harkema looked for exhibits related to the Henry investigation in 2001. He stated that if he could find just one of the semen samples obtained from the 17 complainants and could test it for DNA, he could get a definitive result as to Mr. Henry's guilt or innocence.

**337**  Mr. Modie was also asked to assist with searches for exhibits related to the Henry investigation starting from 2006 onward. However, the freezers were frozen solid and the exhibits encased with frost. The Lab's records were never forwarded to the VPD and therefore the exhibits were not properly inventoried. Mr. Modie cleaned out the freezers and refrigerators in 2006 or 2007 and tried to take inventory of what was inside, roughly 3000 exhibits, however, 10-20 percent were destroyed or had no information. There was no paperwork for any of the exhibits.

**338**  The Province alleges that the City is exclusively responsible for its failure to properly handle the evidence and for the loss of evidence that could have significantly contributed to the harm suffered by Mr. Henry. Assuming that this evidence could have proven Mr. Henry's innocence and exonerated him as early as 1984, had it been preserved and tested in conjunction with the small man investigation, the fact remains that I have found that it was or should have been known to and available to the Provincial Crown Counsel before and during Mr. Henry's trial. In a perfect world, it might have been kept forever, but I see no particular reason why, in 1983, following the expiry of Mr. Henry's appeal period, its destruction does not fall within the range of reasonableness for police practice.

**339**  The Province alleged, in the further alternative, that the Court should allocate fault to the City defendants due to their negligent investigation, including the May 12 line-up, the photo line-up and the re-interview of complainants after the May 12 line-up.

**340**  Mr. Davis expressed his opinion that the City defendants were negligent throughout their investigation of the offences for which Mr. Henry was convicted on the basis that, early on, they conducted a brainstorming session that compromised or tainted the witnesses' evidence, and that the VPD officers, including Detectives Sims and Campbell, negligently failed to collaborate when they handed the investigation over to Det. Harkema.

**341**  Detectives Sims and Campbell decided to hold brainstorming sessions with the investigating officers and multiple complainants at the same time. This they should not have done.

***d. Conclusion on the Liability of the City Defendants***

**342**  The checks and balances of the charge approval system should have dissuaded the Province from proceeding in the charges against Mr. Henry where the evidence was inadequate or deficient. I find that Crown Counsel's failure to disclose the information, to which Mr. Henry was entitled, broke the chain of causation and negates any finding of contributory ***negligence*** on the part of the VPD for any failings that might be attributed to them in their investigation of the so-called rip-off rapist and in their treatment of Mr. Henry.

***e. The Province's Position on the Liability of the Federal Crown***

**343**  The Province contends that although the Federal Crown bears less liability than the City defendants and the Province, it is liable for its failure to meaningfully review Mr. Henry's appeals and applications for mercy under what was then s. 690 and is now s. 696.1 of the *Criminal Code.*

**344**  Mr. Henry contends that there is no evidentiary basis for any finding of ***negligence*** on the part of the Attorney General for Canada, relying on *Wells v. McBrine*, [*[1988] B.C.J. No. 2366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1VH-00000-00&context=) (C.A.).

**345**  In order to succeed in establishing fault on the part of the Federal Crown, the Province, as the party claiming against the Federal Crown, must establish that the Federal Crown did not perform a "meaningful review" of Mr. Henry's applications. The legal test for liability against the Federal Crown is a very high one. Causation must also be proven in order to establish liability: *Hinse v*. *Canada (Attorney General),* [*2015 SCC 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HSK-VDB1-JPP5-22FF-00000-00&context=) [*Hinse*].

**346**  In *Hinse*, the Supreme Court of Canada considered the standard of care required for consideration of an application for mercy. The Court determined that the Minister had a duty to conduct a meaningful review of the application. In order to lose his or her qualified immunity, a Minister's decision must demonstrate bad faith, including serious recklessness "that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed".

**347**  The Province asserts that in this case, the Minister's repeated lack of meaningful review and consideration of Mr. Henry's applications for mercy amounts to serious recklessness, and leads to an inference of an absence of good faith. While it is clear that Mr. Henry brought a number of applications over the years, commencing as early as 1984, to various Ministers of Justice in an effort to have his wrongful conviction reviewed pursuant to the *Criminal Code*, there is no evidence of bad faith or recklessness on the part of any Minister or Minister's delegate. I am invited by the Province to infer bad faith or recklessness from the written material filed in the evidence before me.

**348**  Mr. Henry's first application was made on February 27, 1984; three days after the Court of Appeal dismissed his appeal and dealt for the most part with his complaints regarding the trial, including fraud and perjury, problems with the appeal and lack of evidence. The response from a special assistant to the Minister of Justice indicated that his claims were not substantiated and that Mr. Henry should provide the transcript of the trial. I am not prepared to infer bad faith or recklessness or lack of a meaningful review on the part of the Federal Crown from this response.

**349**  Mr. Henry's second application was made on September 27, 1985, and was in large measure a repetition of the concerns from his previous letter, with a particular focus on the line-up photo and fabricated evidence. The Minister responded and again denied Mr. Henry's application. Mr. Henry indicated that he believed the Minister had cut and pasted his response from the earlier letter. I am not prepared to infer bad faith or recklessness or lack of a meaningful review on the part of the Federal Crown from this response.

**350**  From December 10, 1998, and thereafter, Mr. Henry's daughter, Kari Rietze, was in contact with the federal Department of Justice, asking, among other requests, to re-open Mr. Henry's appeal, referencing new information, including that the VPD Sexual Offence Squad continued to treat complainant C.A.'s case as an open file.

**351**  Mr. Henry was repeatedly advised by federal Department of Justice officials that he must provide "new information" in order to justify consideration and review. The December 10, 1998 letter was the first time the federal Department of Justice was arguably put on notice that Mr. Henry had new information.

**352**  On June 13, 2001, Mr. Henry submitted a largely repetitive 44-page application under section 690 for review of his convictions. This application arguably contained new information and material related to the claim that the sexual assaults continued after Mr. Henry's arrest and conviction.

**353**  Ms. McFadyen, senior counsel with the Department of Justice Criminal Conviction Review Group, sent Mr. Henry a letter acknowledging receipt of the application and new information and acknowledging the need to review it.

**354**  On April 19, 2002, Ms. McFadyen wrote a memo to Mr. Henry's file indicating that "[Mr. Henry] has now provided new assertions. A preliminary assessment has to be completed on this file." The onus is on the Province to establish bad faith or recklessness or lack of a meaningful review. The evidence before me does not show whether Ms. McFadyen or her successors conducted any review of this new material, but as the claim against the Federal Crown was settled before it had any opportunity to call evidence with respect to the review, if any, that it conducted, it would be sheer speculation for me to find that no such review occurred. Such speculation cannot, in my view, form a foundation for a finding of bad faith or recklessness or lack of a meaningful review.

**355**  After this exchange, there was a further series of similar responses to Mr. Henry until April 4, 2003, when acting senior counsel, Kerry Scullion, denied his application. I am not prepared to infer bad faith or recklessness or lack of a meaningful review on the part of the Federal Crown from this response.

***f. Conclusion on the Liability of the Federal Crown***

**356**  The Province bears the burden of establishing liability on the part of the Federal Crown. I find that the Province has not discharged this burden. I am not prepared to infer from the evidence before me that the Federal Crown failed to conduct a meaningful review of Mr. Henry's applications for mercy or that the Federal Crown behaved recklessly or in bad faith.

***iii. Joint and Several Liability***

**357**  The liability of multiple tortfeasors is joint and several if a plaintiff is not contributorily negligent, and several if a plaintiff is contributorily negligent: ss. 1 and 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*. Mr. Henry contends that the amendments made to his notice of civil claim as a consequence of the settlements with the City of Vancouver and the Attorney General of Canada ("the Attorney") sever any joint and several liability that may otherwise have existed among the former defendants and the Province.

**358**  In *Leischner v. West Kootenay Power & Light Co*., [*1986 CanLII 889*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) (B.C.C.A.), the trial judge had found the plaintiff 10 percent at fault and the defendant city of Kelowna 45 percent at fault. He found no fault on the part of the defendant West Kootenay Power, but attributed the remaining 45 percent of fault to an individual who was not a defendant, but rather a third party. The Court of Appeal upheld the finding of fault against the third party in a situation where the plaintiff was contributorily negligent. The Court held at p. 174 that "where the fault of the plaintiff and of two or more tortfeasors contributed to the plaintiff's loss, the tortfeasors are liable only severally, not jointly. This is so whether all tortfeasors are sued as defendants or not."

**359**  Mr. Henry agrees that the effect of the settlements and resulting amendments to the notice of civil claim is to render the Province severally liable to the plaintiff should damages be apportioned. Mr. Henry also agrees that the liability of the non-parties has been raised in the Province's pleadings through its recent amendments. Mr. Henry agrees that there may be some evidentiary basis for assessment of wrongdoing on the part of the VPD, but contends that because the claims are not all in ***negligence***, the apportionment provisions of the ***Negligence*** *Act* may not apply.

**360**  In his text, *Constitutional Damages Worldwide*, at pp. 221 - 222, Professor Cooper-Stephenson notes that in the international context it appears to be an open question as to whether legislation that apportions liability in tort is applicable to constitutional damage claims.

**361**  At the time of enactment of the ***Negligence*** *Act* in 1925, the *Charter* had not come into existence and constitutional torts were unknown. The legislators cannot have intended that the apportionment provisions of the ***Negligence*** *Act* would apply to unforeseen constitutional torts.

**362**  As I have found that Mr. Henry was not to blame for the breach of his *Charter* rights, even if contributory ***negligence*** principles could be applied, there is no basis for a finding of several liability amongst the original defendants in this action.

**363**  As I have found that the chain of causation stemming from any shortcomings on the part of the City was broken by the conduct of the Provincial actors, and found that the Province has not discharged its burden of establishing liability on the part of the Federal Crown for the consequences of its own breach of Mr. Henry's *Charter* rights, there is no basis upon which to attribute liability between the Province and the other original defendants, and I decline to do so.

**2. Are Damages a Just and Appropriate Remedy for Mr. Henry?**

**364**  I turn again to the observations of the Honourable Peter Cory in his report on the Inquiry Regarding Thomas Sophonow, with which I agree, and which I adopt, that:

Imprisonment, when it is wrongful constitutes a very serious, injurious act that should not be lightly regarded. Certainly capricious imprisonment at the whim of the State has not been tolerated for centuries. The great Writ of Habeas Corpus was used to combat just such imprisonment. It is truly the writ of freedom and the writ of the people. Wrongful conviction may not be as grave as capricious imprisonment but its consequences for the prisoner are equally destructive.

As well, society needs protection from both the deliberate and the careless acts of omission and commission which lead to wrongful conviction and prison. These acts could all too easily lead to the abuse of individuals and groups deemed to be troublesome to the government of the day. One of the best methods of controlling that abuse is by ensuring that there is no cap imposed on the damages flowing from a wrongful conviction. A cap could all too easily become the license fee payable for wrongful convictions. It cannot be forgotten that a wrongful conviction is as much a wrong to the administration of justice and to our society as it is to the individual prisoner. Wrongful imprisonment is the nightmare of all free people. It cannot be accepted or tolerated.

In those exceptional cases, where wrongful conviction is established, the damages flowing from it must be significant not only to provide compensation for the individual wronged but also for the benefit of all citizens by serving as a curb on the excesses of the State. However, the damages must be based on clear principles and must always be appropriate, taking into account the circumstances of the conviction and imprisonment and the wrongfully convicted individual.

**365**  The Province contends that should the Mr. Henry succeed in establishing a violation of ss. 7 or 11(d) of the *Charter* by Crown Counsel, damages are not an "appropriate and just" remedy under s. 24(1). In the further alternative, the Province asserts that damages are not an appropriate and just remedy under s. 24(1) because Crown Counsel did not engage in the degree of blameworthy conduct that warrants an award for damages, other than a nominal one, as the actions of the Crown Counsel were not motivated by any ill-will toward Mr. Henry, and Crown Counsel did not treat him differently than any other accused.

**366**  In *Ward*, Chief Justice McLachlin explained that *Charter* damages will be deemed appropriate and just "to the extent that they serve a useful function or purpose. The Chief Justice went on to explain the three interrelated purposes that *Charter* damages may serve:

1. compensation, which is in most cases the most prominent of the three functions, recognizes that the *Charter* breach may have caused the plaintiff to suffer physical, psychological and pecuniary losses that should be remedied. The plaintiff should be returned to the position they would have been in had the *Charter* breach not occurred, insofar as it is possible to do so. Compensation should also be provided for intangible harm that the *Charter* breach caused the plaintiff, such as embarrassment, humiliation, or distress;
2. vindication, which focuses on the harm that the *Charter* breach has caused to society and acts as an affirmation of constitutional values; and
3. deterrence, which also has a societal purpose, and seeks to secure the government's future compliance with the constitution.

**367**  Even if a claimant establishes that damages are functionally justified, the state may still establish that other considerations render s. 24(1) damages inappropriate or unjust. At this point, however, the burden shifts to the state to demonstrate that countervailing factors should militate against an award of damages. The complete catalogue of countervailing considerations remains to be developed as the law in this area matures, but two considerations were found by the Court in *Ward* to be apparent: the existence of alternative remedies and concerns for good governance.

**368**  If the state establishes that an award of *Charter* damages would interfere with good governance, damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

**369**  In *Ward* at paras. 50 - 54 and 57, the Chief Justice explained:

[50] In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

[51] When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

[52] A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, [*2009 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1FW-00000-00&context=), [*[2009] 2 S.C.R. 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1FW-00000-00&context=). Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

[53] Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair -- or "appropriate and just" -- to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

[54] Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and deter future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in *Ramanoop*, at para. 18, "this measure is no more than a guide because ... the violation of the constitutional right will not always be coterminous with the cause of action at law".

...

[57] To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

**3. Are There Countervailing Factors that Defeat the Functional Considerations Supporting an Award of Damages or Render an Award of Damages Inappropriate or Unjust?**

**370**  The Province contends that vindication is an irrelevant consideration as the Court of Appeal entered acquittals on each of the charges of which Mr. Henry was convicted in 1983. Such a submission, if accepted, would impoverish the aspirations of the *Charter* expressed in *Ward*. Mr. Henry spent almost 27 years in prison as a convicted serial rapist, enduring the wrath and scorn of fellow inmates, and living without any real privacy or dignity. His 2010 acquittals do not vindicate that reality, and it is what he endured for 27 years that must be the subject of vindication.

**371**  Next, the Province contends that deterrence is an unnecessary object, as the practices of 1982 have been replaced by a robust disclosure practice post-*Stinchcombe.* This narrow view of deterrence fails to appreciate its stated object as explained by Chief Justice McLachlin in *Ward*: to regulate government behavior, generally, in order to achieve compliance with the Constitution, and influencing government behavior in order to secure state compliance with the *Charter* in the future.

**372**  Finally, the Province contends that the fact that it was through the efforts of the Criminal Justice Branch that Mr. Henry's appeal from conviction was re-opened to be heard on its merits should be considered in the assessment of damages. I do not accept that these efforts mitigate Mr. Henry's damages. At best, they brought about the end of his incarceration and his acquittal of the charges of which he was convicted in 1983, but they cannot lessen the damages to which he is entitled for the 27 years of incarceration that he did suffer described, as I have referred to above by Moldaver J. as "an extraordinary human toll" demonstrating, if true, "a shocking disregard for his Charter rights", and by Chief Justice McLachlin and Madam Justice Karakatsanis as "egregious".

**373**  I find that Mr. Henry has established that damages would be a just and appropriate remedy in these circumstances. As I will discuss in greater detail, the three objectives of compliance, vindication, and deterrence will be furthered through an award of damages for the consequences of the *Charter* breaches that Mr. Henry suffered. The Province has not persuaded me of the existence of countervailing factors that would justify a refusal to award damages in this case.

**4. The Quantum of Damages**

**374**  In August 1976, Canada ratified the *International Covenant on Civil and Political Rights* [*Covenant*]. Article 14(6) of the *Covenant* provides:

When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact is wholly or partly attributable to him.

**375**  In June 1988, the federal and provincial Ministers of Justice formulated the *Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* [*Guidelines*]. The *Guidelines* required, amongst other requirements, that the person who was allegedly wrongfully convicted show that he or she was factually innocent of the crime with which he or she was charged. The *Guidelines* also required that:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who was wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4. As a condition precedent to compensation, there must be a free pardon granted under section 748(2) of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice pursuant to section 696.3.
5. Eligibility for compensation would only arise when sections 696.3 and 748 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), a further criteria would require:

1. If a pardon is granted under section 748, a statement on the face of the pardon based on an investigation that the individual did not commit the offence; or
2. If a reference is made by the Minister of Justice under section 696.3, a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to section 696.3(2), to the effect that the person did not commit the offence.

It should be noted that sections 696.3 and 748 may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal had been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

**376**  The *Guidelines* are not binding legislation and have never been treated as such: *Hinse* at para. 85. As Mr. Sydney L. Robins, Q.C. noted in his advisory opinion on the compensation of Steven Truscott, most contemporary compensation awards have departed in some respects from the *Guidelines*: S.L. Robins, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation*, March 28, 2008, online, Chapter 5.

***A. Compensation***

***i. Damages for Mr. Henry's Daughters***

**377**  Mr. Henry has advanced a claim for emotional distress and loss of his guidance, on behalf of his daughters, and for the time and money that they spent caring for him.

**378**  If she were able to advance such a claim, the fact that she unfortunately predeceased him would preclude Mr. Henry's daughter Kari from recovery for emotional distress and loss of his guidance.

**379**  As the Supreme Court of Canada said in *Ryan v. Moore*, [*2005 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B14C-00000-00&context=) at para. 18: "...it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* [a personal action dies with the person]...".

**380**  Furthermore, neither of Mr. Henry's daughters have a right of action for damages for loss of love, guidance and affection, because the harm caused to Mr. Henry did not result in his death. This principle was explained by Mr. Justice Macfarlane, for the Court, in *Porpaczy (Guardian ad litem of) v. Truitt*, [*[1990] B.C.J. No. 2018*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2PK-00000-00&context=) (C.A.) [*Porpaczy*]. There, Macfarlane J.A. approved of the following passage from the trial judgment:

In British Columbia, compensation to family members can only be awarded if the injuries to a person result in death. The *Family Compensation Act*, R.S.B.C. 1979, c. 120, states this in s. 3. In the case of a severely brain damaged person totally unable to carry on a normal family role, one might be tempted, by analogy to the statute, to award compensation to another family member. In *Dhaliwal v. Morrisette* [*(1981), 32 B.C.L.R. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2TR-00000-00&context=) at 227, Munroe J. was "of the opinion that no logical distinction can or should be drawn between the death of a mother and her being rendered physically and mentally incapable of raising her child in a normal fashion". He awarded the infant plaintiff the sum of $5,000 for loss of care and guidance of his mother. With respect, I feel I am bound by the decision of the British Columbia Court of Appeal in *Beecham,* [*Beecham v. Hughes* [*(1988), 27 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2B9-00000-00&context=)] *supra*, and by the express provisions of the *Family Compensation Act*.

**381**  Although the claim for non-pecuniary damages for Mr. Henry's daughters was advanced in trust by him, I see no reason to depart from the reasoning in *Porpaczy* and decline to do so. To the extent that a part of his in trust claim for his daughters is for out of pocket expenses or assistance provided to him, such a claim is one for which damages could be recovered: *Feng v. Graham*, [*[1988] B.C.J. No. 514*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-604Y-00000-00&context=) (C.A.).

***ii. Past Hypothetical Events***

**382**  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 470 - 471, the Supreme Court of Canada established that:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970 A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *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=). For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* [*(1977), 18 O.R. (2d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0SJ-00000-00&context=) (C.A.); *Graham v. Rourke* [*(1990), 74 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) (Ont. C.A.).

By contrast, past events must be proven, and once proven they are treated as certainties. In a ***negligence*** action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, supra, *Malec v. J.C. Hutton Proprietary Ltd.*, supra; Cooper-Stephenson, *supra*, at pp. 67-81.

***iii. The Likelihood of Recidivism***

**383**  The first consideration to be brought to bear on Mr. Henry's claim for compensation is the Province's contention that even if Mr. Henry had not been incarcerated for the offences of which he was acquitted by the Court of Appeal, based upon his criminal record and activities prior to those conviction, and the balance of probabilities, it is likely that he would have committed other criminal offences and been convicted of and incarcerated for those other offences.

**384**  Dr. John Stephen Wormith was asked to provide his opinion on the risk of Mr. Henry reoffending had he not been convicted as he was in 1983. Dr. Wormith is a registered psychologist in both Saskatchewan and Ontario, and has been a professor in the Department of Psychology at the University of Saskatchewan for the past 16 years. He has served, amongst other endeavors as an Institutional Psychometrist in the Province of Ontario, an Institutional Psychologist with the Corrections Services of Canada, a Senior Officer (Solicitor General), Director of Research for the Corrections Services of Canada, Deputy Superintendent-Treatment for the Province of Ontario, a Consulting Psychologist with the Corrections Services of Canada, a Psychologist-in-Chief in the province of Ontario, and the Chief of Risk Management in the province of Ontario.

**385**  In order to provide his opinion, Dr. Wormith completed a statistical information form on recidivism created for the federal government, referred to as the GSIR. The form includes 15 items, and he scored Mr. Henry at -9, based upon the criteria utilized in that form. That score placed Mr. Henry at the outer limit of the group from which only one out of every three offenders would not commit an indictable offence after their release. The group, scored -8 to -5 on the form, are considered to represent those where two out of every five offenders will not commit an indictable offence after their release. Overall, Dr. Wormith assessed the likelihood of Mr. Henry "recidivating" within three years of release from custody in 1980 at 70%.

**386**  In cross-examination, Dr. Wormith agreed that there are limitations on retrospective risk assessments and that there is a known and significant decline in recidivism at age 40 that begins even before that age.

**387**  Dr. Paul G. Janke is a general and Forensic Psychiatrist who practices in Vancouver, British Columbia. He examined Mr. Henry on two occasions and reviewed his medical and other records. Using a variety of statistical risk assessment tools, Dr. Janke reached the conclusion that in May of 1980, Mr. Henry represented an extremely high risk for what he termed "further violent criminal reoffending", and that he would have "continued to engage in criminal behaviour that would have brought him into conflict with the law, resulting in an ongoing pattern of repeated incarceration".

**388**  I have serious reservations about the validity of applying statistical analyses to the risk that Mr. Henry would have committed other criminal offences had he not been convicted of the offences for which the Court of Appeal acquitted him. Such blunt instruments may be useful for predicting the behavior of large groups, but I am not persuaded that they offer reliable predictability for individuals. If the same instruments were applied to Mr. Henry upon his release in 2009, he would have been expected to further reoffend. His track record since his release to some extent belies such an expectation.

**389**  Dr. Grounds was of the opinion that determining the prospects of Mr. Henry reoffending required pure speculation, which he refused to engage in, but he thought it was feasible that Mr. Henry would not reoffend given the number of optimistic signs.

**390**  That said, based upon his criminal record prior to 1982, and affording some credence to the risk assessment tools employed by Drs. Wormith and Janke, I conclude that even if Mr. Henry had not been incarcerated for the offences for which he was acquitted by the Court of Appeal, it is probable that he would have experienced some periods of incarceration for other offences during the period of time that elapsed between his convictions and his release.

**391**  Prior to the 1982 convictions, Mr. Henry had spent roughly half of his adult life in custody. He testified that he was released from his final custodial sentence on May 21, 1980. Between 1980 and 1982, Mr. Henry was on parole under the supervision of Mr. Phillipson. Mr. Phillipson's reports indicate that he initially expected that Mr. Henry would reoffend in relatively short order. However, Mr. Phillipson's reports show that he was surprised to discover that, other than a relatively minor marijuana charge that did not result in a custodial sentence, Mr. Henry had not reoffended by early 1982. Mr. Phillipson was optimistic about Mr. Henry's potential, although he acknowledged that Mr. Henry would likely experience some "highs and lows" in the future.

**392**  The optimism expressed by Mr. Phillipson and the fact that Mr. Henry remained out of custody between May 21, 1980 and his arrest on the 1982 charges suggest that he would perhaps not have spent as much time in custody between 1982 and 2009 as he had in the past. However, because of the step-up principle of sentencing and the likelihood, expressed by Mr. Phillipson, that Mr. Henry would experience some "lows" in the future, I find that had Mr. Henry not been convicted in 1982, it is probable that he would have continued to offend with some frequency as a relatively petty criminal, and found himself incarcerated at various intervals for approximately one-third of the time that he did spend in custody between 1982 and 2009.

***iv. Past Loss of Opportunity to Earn Income***

**393**  The next consideration that must be brought to bear on Mr. Henry's claim for compensation is the income that he would probably have earned during the years he was incarcerated for the offences which he was later acquitted.

**394**  Despite the evidence that his jail time was apparently incident and discipline free, I am not prepared to find that his progress in custody provides confirmatory evidence of Mr. Henry's essential character. Although he went, as his counsel described, from pariah to president of a prisoners' committee while in prison, that environment was little different from that he experienced during prior periods of incarceration, which had little effect upon his activities, once he was released in May of 1980.

**395**  Mr. Henry contends that the only period that can be usefully referenced for the determination of this traditional tort head of damages is the period when he was on parole from May 1980 until July 1982, which he terms "the transition period". In that time, he had a number of jobs, but experienced difficulty in maintaining steady and uninterrupted job tenure.

**396**  Dr. Janke expressed the view that:

Mr. Henry, by his self-report and in the materials provided to me, would continue to meet the criteria for Antisocial Personality Disorder. He was unable to maintain himself in any form of steady employment. He was not able to maintain himself in any form of stable accommodation. He was in a highly unstable relationship with his then wife. He by self-report and the materials provided to me continued to engage in illegal activities through this time frame.

**397**  Even if one were to accept, as Mr. Henry contends, that it is reasonable to predict that with time the stability of his employment record would improve, his employment prospects remained very limited even if he had not been incarcerated for the offences for which he was acquitted by the Court of Appeal.

**398**  Robert Carson is an economist. He prepared a report for Mr. Henry, assessing his potential past income had he not been incarcerated from July 1982 to the date of the trial of this action. His assessment is based upon reported past earnings of British Columbia males similar in age to Mr. Henry. Mr. Carson's evidence is that the sum of all past earnings for a male with less than grade 9 education during this time period would have been $1,013,920, increased by non-wage benefits to $1,115,300. For a male with a high school diploma, the net of the effects of unemployment and part-time work would be $1,391,136. Non-wage benefits increase this to $1,530,300.

**399**  Mr. Douglas C. Hildebrand is also an economist. He was retained by all of the original defendants to provide his assessment of Mr. Henry's potential past income had he not been incarcerated from March of 1983 until his 65th birthday on October 22, 2011. Mr. Hildebrand's assessment is based upon the extrapolation of Mr. Henry's reported employment and earnings summaries from his Canada Pension Plan Statement of Contributions from 1966 to 1982.

**400**  I do not fault Mr. Hildebrand for using this approach, as I expect he did so on instructions, but I do not find it to be of assistance. The nature of the work that Mr. Henry engaged in prior to 1982 was, as he himself conceded, sporadic and unsteady. I have no difficulty in accepting that he was paid in cash for at least some of that work, and that he likely chose not to report his cash income. I find it likely that he did not report all of his non-cash income either, although the report relied upon by Mr. Hildebrand appears to have been generated in large part, if not entirely, from information provided by Mr. Henry's employers. Nonetheless, I find that his reported employment and earnings summaries from 1966 to 1982 are unlikely to represent the income he actually earned in that time period.

**401**  As Mr. Hildebrand recognized, Mr. Henry was incarcerated for various intervals between 1966 and 1982, resulting in periods of time when he would have been unable to earn income, and periods of time when he would have had to seek employment with no recent history to support a job application.

**402**  I find that it is reasonable to conclude that Mr. Henry would at best have achieved an income level equal to that of a high school graduate for some part of the period of time when he was incarcerated for the offences for which the Court of Appeal acquitted him. I recognize that he would have faced periods of time when he would have been unable to earn income, and periods of time when he would have had to seek employment with no recent history to support a job application due to further periods of incarceration. I also find that based upon his reported work history, Mr. Henry would not have been employed full-time during the periods when he would not have been incarcerated for offences, had he not been convicted as he was in 1982.

**403**  Factoring in these findings, I conclude that a reasonable assessment of Mr. Henry's past loss of income earning opportunity should be based on the assumption that he would have been employed for one half of the period between the date of his conviction on March 15, 1983 and the date of his acquittals by the Court of Appeal on October 27, 2010. This is a shorter period of time than that assumed by Mr. Carson, but using his table for the incomes of B.C. males with high school graduation certificates, for this shorter period, and including an allowance for non-wage benefits, I assess Mr. Henry's past loss of income earning opportunity at the sum of $530,000.

***B. Special Damages***

**404**  Dr. Lohrasbe diagnosed Mr. Henry as having several personality disorders, with the dominant features of paranoid personality disorder and schizotypal personality disorder. He expressed the opinion that the intensity of Mr. Henry's dysfunction would decrease over time, and that he could be managed in the community with supportive and directive psychotherapy with someone he trusts.

**405**  Dr. Grounds expressed his opinion that Mr. Henry has already shown remarkable resilience, and encouraged the continued development of a therapeutic relationship between Mr. Henry and Dr. Nader.

**406**  Mr. Henry and the Province agreed on the following special damages, which I award:

1. Treatment of Mr. Henry by Dr. Nader in the amount of $13,692.50;
2. Mr. Henry's legal expenses in the amount of $450/year for 23 years (1983-2006) = $10,350;
3. Ms. Olivares' mileage in the amount of $489.30;
4. Ms. Olivares' parking in the amount of $260.00;
5. Ms. Olivares' housing and utility expenses: 50% of 40,800 = $20,400; and
6. Ms. Olivares' wage loss in the amount of $11,500.

Total: $56,691.80

***C. Non-Pecuniary Damages***

**407**  As Mr. Justice Dickson, as he then was, explained in *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 261 - 262 [*Andrews*]:

... The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

It is also the area where there is the clearest justification for moderation. As one English commentator has suggested, there are three theoretical approaches to the problem of non-pecuniary loss (Ogus, 35 M.L.R.1). The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot," or tariff system, which prevailed in the days of King Alfred, when a thumb was worth thirty shillings. Our law has long since thought such a solution unsubtle. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach, accepts the personal premise of the second, but rather than attempting to set a value on lost happiness, it attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way. As Windeyer J. said in *Skelton v. Collins*, 39 ALJR 480 supra, at p. 495:

... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction. ... But the money is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

**408**  In my opinion, it would be duplicative to award both non-pecuniary damages and to also award damages to vindicate Mr. Henry's breached *Charter* rights, and to deter similar breaches of *Charter* rights. Given the stated purpose of an award of non-pecuniary damages, I prefer to consider what Mr. Henry might recover on a tort law basis for non-pecuniary damages when addressing the second and third *Ward* objectives.

***D. Vindication of Mr. Henry's breached Charter rights***

**409**  In *Ward,* the Court made several references to the utility of international comparators in considering the approach to be taken to the assessment of constitutional damages.

**410**  In the United Kingdom, a maximum compensation award of GBP 1,000,000 (approximately $2 million Cdn.) is available for individuals who have been imprisoned for more than ten years.

**411**  In the United States, the compensation schemes often compensate on the basis of per year of incarceration. The amounts fluctuate but the maximum appears to be $80,000 per year in Texas. Other states have simply a maximum compensation cap. The highest cap appears to be $1 million in Tennessee. U.S. federal law provides compensation of up to $50,000 per year of wrongful imprisonment and $100,000 per year on death row.

**412**  Although several foreign jurisdictions have enacted compensation schemes for persons who have been the subject of miscarriages of justice, Canada has not chosen to do so. Foreign schemes have generally required conclusive proof of factual innocence before compensation will be provided. In the result, I do not find foreign legislative schemes to be of assistance.

**413**  I reject the "one size fits all" approach to compensation for wrongful conviction and resultant incarceration, for the same reasons that I have rejected Mr. Henry's proposal to gross up amounts provided *ex gratia* to individuals who have been wrongfully convicted, which I will discuss in further detail. Moreover, this type of approach is inconsistent with the functional approach in *Ward*, and was cautioned against by the Supreme Court of Canada in *Hinse*.

**414**  In *Taunoa v. Attorney General,* [2008] 1 N.Z.L.R. 429 (S.C.) [*Taunoa*], a judgment cited in *Ward*, a similar approach was taken by the Supreme Court of New Zealand. There, the five plaintiffs were prisoners at Auckland Prison and were subjected to a "Behaviour Management Regime" ("BMR") operated by the Department of Corrections between 1998 and 2004. BMR was designed to adjust the behaviour of disruptive prisoners through a program that entailed segregation and the substantial isolation of prisoners in separate cells for all but one or two hours of the day. The severe restrictions were gradually lifted if there were improvements in behaviour. The movement of the prisoners to less restrictive conditions was entirely at the discretion of correctional officials with no administrative rights of review or challenge.

**415**  The five members of the New Zealand Supreme Court in *Taunoa* wrote five separate judgments, but certain principles emerge from the judgments. The Court was in fundamental agreement that the New Zealand *Bill of Rights Act* [*BORA*] damages do not fill the same function as common law damages. *BORA* damages are a public law remedy to be awarded at the discretion of the Court where necessary to fulfill the objective of "vindication" of a breach of rights. The goal of such an award is less to compensate the plaintiff than to ensure an end to the breach and securing future compliance.

**416**  Given the public nature of the remedy of damages for human rights violations, and the primary importance of vindication rather than compensation as a remedial goal, a majority of the Court in *Taunoa* (Blanchard, Tipping and McGrath JJ.) viewed damages as not only a discretionary remedy but an extraordinary one. The Court found that in most cases, a declaration will suffice to meet the goal of vindication by giving express recognition to the importance of the right while at the same time deterring future breaches:

The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiffs right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

*Taunoa* at para. 368 per McGrath J.

**417**  Although damage awards were made, they were made in very modest terms. I am unable to find much assistance from this case. Mr. Henry's circumstances cannot be said in any way to be one where no damage has been suffered, nor is it a case where this Court's finding of a breach of rights and a declaration to that effect is appropriate or sufficient relief to vindicate the violation of his *Charter* rights.

**418**  It is perhaps a good thing that there are so few Canadian judicial authorities that offer guidance in the assessment of damages for wrongful convictions, as such cases should be rare. There have been prior cases where such convictions have occurred, and compensation sought that have been resolved by way of settlement or *ex gratia* payments.

**419**  Dealing firstly with the tort concept of capped non-pecuniary damages, the current maximum for non-pecuniary damages under the cap arising from the trilogy of cases in which the cap was created by the Supreme Court of Canada (*Andrews*; *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=); *Thornton v. School District No. 57 (Prince George)*, [*[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=)) is roughly $360,000.

**420**  The application of the cap for cases involving allegations of sexual assault was considered by the British Columbia Court of Appeal in *S.Y. v. F.G.C*., [*[1996] B.C.J. No. 1596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=) [*S.Y.*]. At paras. 29 - 31, Macfarlane J.A. held:

[29] The policy reasons underlying the "cap" were discussed by Cory J. in *Hill v. Church of Scientology of Toronto* [*(1995), 126 D.L.R. (4th) 129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at 177-179, where the appellants argued for a cap on general damages in defamation cases. Cory J. said this:

The appellants contend that there should be a cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy" of *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=), [*[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=), [*3 C.C.L.T. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=); *Arnold v. Teno* [*(1978), 83 D.L.R. (3d) 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=), [*[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=), [*3 C.C.L.T. 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=); and *Thornton v. School District No. 57* [*(1978), 83 D.L.R. (3d) 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=), [*[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=), [*3 C.C.L.T. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=), it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than $100,000.

In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicle and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.

[30] I am not persuaded that the policy reasons which gave rise to the imposition of a cap in "the trilogy" have any application in a case of the type at bar. In my opinion the differences described by Cory J. exist in this case as well. The policy considerations which arise from ***negligence*** causing catastrophic personal injuries, in the contexts of accident and medical malpractice, do not arise from intentional torts involving criminal behaviour. There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums. Insofar as damage awards may be so high as to be wholly erroneous, or wholly disproportionate, an appellate court may intervene to correct disparity, and to foster consistency.

[31] In contrast, sexual abuse claims do not usually result in awards guaranteeing lifetime economic security. In the catastrophic personal injury cases, awards under other heads of damages are so high that there may be a lesser need for general damages to provide solace and to substitute for lost amenities. In some cases, sexual abuse victims may require and deserve more than the "cap" allows, due to the unpredictable impact of the tort on their lives. Judges, juries and appellate courts are in a position to decide what is fair and reasonable to both parties according to the circumstances of the case.

**421**  In my opinion, if tort principles were to be applied to Mr. Henry's claim, for the reasons discussed by Macfarlane J.A. in *S.Y.*, the cap in "the trilogy" should not be applied. I will return to discuss the trilogy later in these reasons for judgment.

**422**  Moreover, as Chief Justice McLachlin pointed out in *Ward*, tort law is less useful when considering the objectives of vindication and deterrence. I am satisfied that this case is one of exceptional circumstances as described by Chief Justice McLachlin at para. 50 in *Ward*.

**423**  Dr. Grounds summarized the effect of Mr. Henry's 1983 convictions and resulting incarceration in his report dated June 8, 2015 as follows:

1. Mr. Henry's loss of liberty for 27 years entailed the loss of a substantial proportion of his expected normal life-course. His personal and family circumstances prior to conviction, and his future expectations at that time, cannot be restored to him. His life expectancy post-release is substantially reduced. The consequent personal losses can be difficult to face and accept. As noted above, however, Mr. Henry is unusually resilient and positive in his outlook. His 27 years in prison was also associated with adaptation to the prison environment and learning habits and modes of interaction characteristic of prison life. In consequence, he experienced some upsetting and embarrassing difficulties in social and family relationships after release.
2. Mr Henry's loss of reputation arising from his wrongful convictions, and his experiences of humiliation and disgrace arising from his convictions and subsequent imprisonment, have preoccupied Mr. Henry, and have contributed to his symptoms of social anxiety and his worries and apprehensions about how others view him in the community. In addition, whilst in prison he experienced chronic fear of being at risk of serious assault because of the nature of the convictions. Furthermore, the convictions negatively influenced the perceptions, assessments and judgments of his character and his risk by clinicians, corrections staff, and parole authorities. These appraisals are exemplified in the 2004 Psychology assessment and the 2006 Parole panel assessment, and were determinative in relation to normal release prospects. He was perceived as lacking in insight and refusing to progress. Psychologically, this is stressful because he would have been isolated, not believed and unsupported in his claims he was innocent.
3. During his period of imprisonment Mr. Henry experienced loss of privacy, deprivation of normal day to day life experiences, and could not enjoy the developmental experiences he otherwise would have had (such as education, work, civil rights and social interaction with family, neighbours and friends). The aspect of these losses that is likely to have been most significant in relation to his state of mind and psychiatric well-being was the loss of the ongoing relationship with his children and family. He experienced an episode of significant depression in late 1982 after learning his ex-wife had another partner. He was distressed in prison by the loss of contact with his daughters. Since release he has experienced continuing emotional estrangement in the quality of his relationship with his older daughter. He also feels substantial guilt about the death of his younger daughter and the difficulties she experienced during her life without him.
4. Mr. Henry was also subjected to prison life, discipline, extraordinary punishments and prison diet for 27 years whilst knowing that they were (un)justly imposed. I think this context contributed to the content and maintenance of his persecutory delusions during his sentence. He believed he was being provoked and subjected to interference by prison staff and inmates in order to prevent him pursuing his case. In addition, there are vivid memories of prison that contribute to his intrusion/re-experiencing symptoms of post-traumatic stress disorder.

**424**  Mr. Henry's treating psychologist, Dr. Rami Nader, began seeing Mr. Henry following his release from custody in 2009 and had seen him some 120 times by the trial of this matter. He summarized Mr. Henry's prison experiences as follows:

From early on in therapy, Mr. Henry reported that he felt his "spirit is contaminated" by the time that he spent in prison and some of the things that he experienced and witnessed during the course of his incarceration. He stated that he felt dehumanized by what he experienced during his 27 years in prison. He reported that he has ongoing, disturbing memories of events that took place in prison and has only ever talked about them in minimal detail over the course of the therapy sessions. Some of the disturbing memories he identified included being strip searched multiple times, being physically assaulted multiple times, spit on, had his bed defecated on, ridiculed by guards and other prisoners for his ongoing proclamations of innocence, being repeatedly told he was a rapist and dangerous offender, and witnessing and hearing about people being killed and suicides taking place in the prison. Mr. Henry explained that due to the nature of the charges that he was convicted of, he felt constantly at risk during his time in prison, fearing that if other inmates found out that he was in prison for multiple rapes, he would be killed. He reported fearing for his life because of this on an almost daily basis when he was in prison. Mr. Henry described feeling especially scared for his life during a prison riot in 2008, when he feared that people were going to break into his cell and kill him. He stated that he felt he always had to be on guard and vigilant to threat while he was in prison and this hypervigilance has continued into his life outside of prison. He explained that one of his biggest fears during the course of his time in prison was that he was going to die in prison, not having been able to clear his name or prove his innocence of the charges that he was convicted of. He reported that he continues to get nightmares about being in prison and not being able to get out.

**425**  Dr. Nader commented that while improving, Mr. Henry continues to suffer from anxiety and relationship difficulties, and difficulty adjusting to life after his lengthy incarceration. Dr. Nader concluded that Mr. Henry still fears the police, and still engages in unusual/paranoid thinking. He recommended that Mr. Henry receive regular therapy sessions with him, but, since March 2014, Mr. Henry has not chosen to see Dr. Nader nearly as frequently as Dr. Nader proposed.

**426**  For his part, Mr. Henry seeks to have his non-pecuniary damages assessed by reference to one group of judicially-determined damage assessments for individuals who were charged with murder and who sought damages for malicious prosecution and false imprisonment after the charges were stayed; and a number of other cases where settlements reached between state actors and others who have been wrongly convicted, sentenced, and incarcerated.

**427**  The first group of cases is indexed at *Klein v. Seiferling*, [*[1999] S.J. No. 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-JYYX-63K4-00000-00&context=) (Q.B.) [*Klein*]. In *Klein*, four plaintiffs, Klein, Ransom, Moore, and Kozar, brought an action for malicious prosecution and false imprisonment against the Attorney General of Saskatchewan, two police officers, and two informants. The plaintiffs had been arrested in connection with a death that had occurred in 1991. The first informant died before the trial. The action against the second informant and the Attorney General was dismissed; however, the plaintiffs succeeded in their claims against the two police officers. The Court found that the police officers had acted recklessly and unreasonably, and were more motivated by the prospects of receiving personal recognition for solving an old homicide than by the desire to carry out a responsible investigation.

**428**  The plaintiffs Klein, Kozar, and Moore were incarcerated for 14 days. The plaintiff Moore was not arrested by the officers. Mr. Klein was found to have suffered emotional stress, humiliation and loss of reputation. His non-pecuniary damages were assessed at $50,000.00. He was additionally awarded pecuniary damages for loss of wages and holiday pay, loss of business income, and legal fees paid for his bail application and defence.

**429**  Mr. Kozar was found to have suffered depression, humiliation and a loss of reputation to the extent that he consulted a psychiatrist and required medication for his condition. He was awarded $35,000.00 in non-pecuniary damages, with pecuniary damages for lost wages and commissions, and legal fees paid for his bail application and defence.

**430**  Mr. Ransom was found to continue to experience emotional stress and loss of reputation because of the police officers' culpable conduct and was awarded non-pecuniary damages of $25,000.00, and pecuniary damages for lost wages and holiday pay, legal fees paid for his bail application and defence, and other expenses.

**431**  Mr. Moore was found to have experienced a high level of emotional anxiety and stress for which he consulted a medical doctor and a psychiatrist. He was awarded non-pecuniary damages of $30,000.00, and pecuniary damages for legal fees paid for his bail application and his defence.

**432**  Mr. Henry invites me to use the awards in *Klein* to determine his damages by multiplying them by a factor representing the portion of time the *Klein* plaintiffs spent in custody, grossed up to the amount of time that Mr. Henry spent in custody. Given the relatively short periods of incarceration experienced by these men, I find their damage awards of no real assistance, and I decline to do so. .

**433**  The settlements in the second set of cases that Mr. Henry relies upon were reached following the advice of eminent lawyers and former judges, and were not the result of litigation. These settlements include those for Guy Paul Morin, Gregory Parsons, David Milgaard, Thomas Sophonow, and Steven Truscott.

**434**  In 1986, Mr. Morin was acquitted of the first degree murder of a nine-year-old girl. The Ontario Court of Appeal ordered a new trial, and that decision was upheld by the Supreme Court of Canada. Mr. Morin was convicted at the second trial in 1992, and appealed that conviction. He was granted parole pending his appeal, but before the appeal concluded, DNA evidence established that he could not have been the murderer. The Attorney General for Ontario apologized to Mr. Morin and conceded his appeal.

**435**  In all, Mr. Morin was incarcerated for 15 months and 26 days. In 1997, he was given an *ex gratia* payment of $1.25 million for his wrongful conviction.

**436**  In 1994, Mr. Parsons was convicted of the second degree murder of his mother and sentenced to life imprisonment without parole for 15 years. He appealed his conviction and was granted parole pending his appeal. His appeal concluded some two years after his conviction, and his conviction was quashed and a new trial was ordered. He remained on bail pending a second trial. He was exonerated pending his second trial when DNA evidence established his innocence, and the murderer of his mother was found.

**437**  In all, Mr. Parsons served 60 days in intermittent custody, and was on restrictive bail conditions for some seven years. His circumstances were the subject of a Commission of Inquiry conducted by the Honourable Antonio Lamer. In 2002, he was provided with an *ex gratia* payment of $650,000, and a further $650,000 in 2005, together with almost $200,000 for legal expenses, based upon Mr. Lamer's recommendations.

**438**  Mr. Milgaard was convicted of sexual assault and murder in 1970. He served 22 years, two months and one day in custody before he was eventually exonerated by DNA evidence, and the actual perpetrator of the offences was found and convicted. Despite the absence of any apparent police or prosecutorial impropriety, in the face of two civil claims by Mr. Milgaard, in 1999, he was paid the sum of $10 million, inclusive of a sum of $750,000 to his mother, as an *ex gratia* payment, following a Commission of Inquiry into his wrongful conviction.

**439**  Mr. Sophonow was charged with the murder of Ms. Stoppel, which occurred on December 23, 1981. Following a preliminary inquiry in 1982, he was tried before a judge and jury. The jury was unable to agree upon a verdict and was discharged. A second trial was held in early 1983. At that trial, a jury convicted Mr. Sophonow. An appeal from that conviction was allowed on the ground of misdirection and a new trial ordered. The third trial took place early in 1985. After the discharge of one juror, the remaining eleven jurors returned a verdict of guilty. On appeal, the Alberta Court of Appeal acquitted Mr. Sophonow based upon his exculpatory alibi and other frailties in the trial process.

**440**  The Honourable Peter Cory conducted an Inquiry into Mr. Sophonow's case, and based in part upon Mr. Sophonow's own agreement, found that he was in part to blame for his wrongful conviction, as he had withheld from or given false information to the police and his own counsel, and failed to disclose his full alibi. Nonetheless, Mr. Cory found that Mr. Sophonow's errors paled in comparison to the misconduct of the state operators, and if assessed in a ***negligence*** case, warranted only 10% responsibility.

**441**  In all, Mr. Sophonow served 45 months in custody. In 2001, he was given an *ex gratia* payment of $300,000 for income loss and care costs, together with $1.75 million for non-pecuniary damages, with interest. Mr. Sophonow's settlement followed the recommendations of Mr. Cory, who considered the *Guidelines* that I will discuss below, including factors with respect to non-pecuniary losses, some of which also apply to Mr. Henry:

1. the loss of privacy, even for the most basic physical function of emptying the bowels or bladder;
2. accepting and adjusting to prison life, including lost freedom and other civil rights, and the risk of prison discipline;
3. a myriad of instances of personal humiliation demonstrated by the constant presence of guards, transportation in handcuffs, and often degrading searches required on family visits;
4. the atmosphere of high tension and stress and the ever present danger of physical attack, particularly in a maximum security facility but often equally in over-crowded and understaffed remand centers;
5. the loss of liberty and the ability to do everyday activities that bring joy and satisfaction, such as associating with friends and family, working in a garden, doing home improvement, assisting family and neighbors, attending a show or play, or teaching a child to skate or swim;
6. other foregone developmental experiences;
7. even on release, loss of reputation, ongoing difficulty with obtaining employment, and a resultant loss of income, job training, promotions, and pension benefits, much of which may never be recouped;
8. a possibility, as a result of the wrongfully convicted person's time in prison, of suffering a lifetime of psychiatric disability; and
9. the effect of post-acquittal statements by public figures.

**442**  Mr. Truscott was 14 years of age when a 12-year-old girl was murdered on the R.C.A.F. base at Clinton, Ontario. In 1959, he was tried for murder as an adult, was convicted by a jury and sentenced to death. When his appeal was dismissed in 1960, his sentence was commuted to life imprisonment.

**443**  On August 28, 2007, the Ontario Court of Appeal concluded that Mr. Truscott's conviction was a miscarriage of justice and had to be quashed, but declined to hold that Mr. Truscott was innocent of the crime. Following the delivery of the Court of Appeal decision, the Attorney General for Ontario announced the appointment of Mr. Robins to advise the provincial government on the issue of compensation for Mr. Truscott.

**444**  Mr. Robins considered various approaches to compensation including what he referred to as the standardized approach of basing the compensation on the number of years spent in custody. He rejected that approach, and also rejected a tort-based approach.

**445**  The standardized approach treats all those who were wrongfully imprisoned in the same manner, generally allowing a specific sum of money for each year of imprisonment. It is my view that such an approach is inapt, as it fails to focus on the individual and exactly what he or she has endured.

**446**  Mr. Robins listed what he considered to be the purposes of an *ex gratia* payment for wrongful conviction and incarceration as follows:

1. to provide Mr. Truscott with the financial security needed to live the rest of his life in comfort and dignity, with the ability to provide for his family as he sees fit;

(2) to provide a measure of compensation to Mr. Truscott

for his emotional suffering and his economic loss; and

1. to provide a public recognition of the seriousness of the wrong suffered by Mr. Truscott.

**447**  Mr. Robins recommended that Mr. Truscott receive $250,000 per year for the 10 years he spent in jail and $100,000 per year for the 40 years he spent on parole. Mr. Henry argues that this figure is a helpful one, but not wholly so as it does not consider vindication and deterrence as discussed in Ward. He contends that the settlement figures in these various cases should be used on a grossing up basis to account for the disparities in the times spent in custody by those wrongfully convicted individuals and his own time in custody.

**448**  I reject this means of arriving at an appropriate figure for damages for Mr. Henry. As I mentioned above, this type of an approach is inconsistent with the functional approach of *Ward,* and was cautioned against by the Supreme Court in *Hinse.*

**449**  In *Hinse,* the accused had received a 15-year sentence for armed robbery, of which he had served five years in prison and 10 years on parole. In 1997, 33 years after he was first sentenced to imprisonment, the Supreme Court of Canada acquitted him on the basis that no reasonable and properly instructed jury could have found him guilty on the evidence at trial. He sued various governmental agencies for compensation and reached a settlement with the province of Quebec and a municipality for $5.5 million, of which $1.1 million was allocated for non-pecuniary damages. The Court commented in *obiter* that an order that Canada pay an additional amount under this head of damages would be "disproportionate".

**450**  In seeking a larger amount, Mr. Hinse relied on the same advisory body recommendations relied upon by the plaintiff in the case at bar. The Court stated that:

... the amounts granted in the Marshall, Sophonow and Truscott cases were made further to the recommendations of advisory bodies. They did not result from judicial awards and were based on considerations that were very different from those on which damages are based.

**451**  Mr. Henry contends that the first and obvious problem in assessing his entitlement to compensation is how to determine the appropriate compensation for his being locked in a cell, 23 hours a day, seven days a week for years, believing that such incarceration would last for the rest of his life. Clearly, 27 years in jail constitute exceptional circumstances.

**452**  As Mr. Cory noted in Mr. Sophonow's case, during Mr. Henry's wrongful incarceration, his liberty was severely restricted and he was unable to engage in the kind of everyday activities that bring joy and satisfaction. Even now that he has been released, Mr. Henry cannot regain the lost opportunities that those years may have brought. Further, he had to acclimatize to prison life, including, for much of his incarceration, only being allowed out to eat in the canteen or to exercise in the yard for one hour, and always being under the supervision of the guards no matter how private or personal his activity was.

**453**  For many of those years, Mr. Henry believed, with justification, that he was in danger of being attacked by other inmates, because he was at the bottom of the prisoners' social scale. Mr. Henry further contends that he suffered from the inability to prove his innocence.

**454**  The functional approach referred to in the trilogy discussed by Cory J. in *Hill* refers to the calculation of damages to notionally put the victim (in that case, a quadriplegic) "functionally" back in the condition he was in prior to his accident; for example, by providing attendant care, a wheelchair, and a wheelchair accessible house, communication technology, and other assistance. In *Hill*, it was possible to specifically calculate the amount of money needed to help with functions that the plaintiff had lost. Mr. Henry contends that a conventionally determined award based on the functional approach cannot be used in his case because has not lost any "function", but can never be put back to his pre-jailed state.

**455**  I do not agree that this distinction precludes the application of a functional approach. A quadriplegic cannot be returned to his or her pre-injury state any more or less than Mr. Henry can be returned to his pre-jailed state, but such an individual's damages must nonetheless be assessed using this functional approach, at least insofar as the compensation criterion discussed in *Ward* is concerned.

**456**  I accept Mr. Henry's description of himself as a typical product of an impoverished, dysfunctional, unsupervised and abusive family devoid of caring or love and exposed to bouts of indiscriminate violence.

**457**  I also accept his submission that he was in and out of foster homes for years, having first asked the Ministry to place him in one so he could escape his life at home. I accept that Mr. Henry was out on the streets trying to survive at an early age, getting money to live on wherever he could, usually by stealing, which eventually led to jail, generally not for long periods of time, but frequently.

**458**  At the time of his convictions for the offences for which he was later acquitted by the Court of Appeal, Mr. Henry had recently served 40 months in jail, having been released in May 1980 with no money, no job, limited job skills, a long prison record, and limited support from his family. His parole officer, Mr. Phillipson, initially gave Mr. Henry little chance of getting through his mandatory parole without incident, and as Mr. Phillipson later said, Mr. Henry "deserved a great deal of credit" for this surprising accomplishment.

**459**  As noted at page 67 of the Sophonow Inquiry Report, people like Mr. Henry:

...are the most vulnerable to state actors - least able to protect and care for themselves. They should not be hastily set aside as unworthy of consideration. His criminal record and work record arose from his unfortunate childhood and immaturity. He simply did not have the opportunity to learn and mature as do most young men.

**460**  As I have mentioned previously, the Province contends that if Mr. Henry had not been incarcerated for the offences of which he was later acquitted by the Court of Appeal, he would likely have reoffended in some other way. I do not accept Mr. Henry's submission that this argument is not open to the Province because, as he contended, "it was their wrongful conduct in imprisoning him that prevented him from proving he would not have re-offended".

**461**  That said, I also do not accept that if Mr. Henry had not been convicted of the charges for which the Court of Appeal directed acquittals, his periods of incarceration for other offences would have been as unpleasant as the period of time that he spent incarcerated as a serial sexual offender.

**462**  Mr. Henry urges the application of the settlements by other governments and other wrongfully convicted individuals in the assessment of his damages for the second and third criteria discussed in *Ward*. While settlements between private litigants are of dubious assistance in the assessment of damages at trial, the amounts paid by governments to settle claims that might be subsumed under the rubric of "wrongful convictions" are of considerably greater assistance, as the factors that are applied in reaching settlement figures by governments are more principled and informed.

**463**  For its part, the Province adverts to Chief Justice McLachlin's admonition in *Ward* to take into account the need to avoid diverting large sums of funds from public programs to private interests. While the Province's budget has recently been tabled for the present year, I heard no evidence in the trial of this matter that would permit me to assess the amount beyond which an award in this case could begin to threaten public funding.

**464**  As mentioned above, Mr. Truscott's *ex gratia* payment was based upon $250,000 per year for the 10 years he spent in jail and $100,000 per year for 40 years he spent on parole. If this formula were applied to Mr. Henry, it would result in an award of $6.75 million for his roughly 27 years in custody.

**465**  The largest Canadian settlement figure for wrongful conviction and subsequent incarceration on the evidence before me is the $10 million paid to Mr. Milgaard. As I have stated above, he was convicted of sexual assault and murder in 1970 and served 22 years, two months and one day in custody. His settlement figure included of the sum of $750,000 to his mother.

**466**  Mr. Milgaard was just 17 years old when he was wrongfully convicted. He had a juvenile criminal record, but none of the offences for which he was convicted alleged violent or physical behaviour. In contrast, Mr. Henry was 36 years old when he was convicted in 1983, and had a more serious and extensive criminal record, including a conviction for assault and attempted rape.

**467**  Bearing in mind the direction of Chief Justice McLachlin in *Ward* that just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair -- or "appropriate and just" -- to both the claimant and the state, and weighing the social burden of a large award to Mr. Henry against his suffering and loss of amenities, I find that an appropriate award to vindicate the violation of Mr. Henry's *Charter* rights is the sum of $7.5 million.

***E. Deterrence of Future Breaches***

**468**  As I have already indicated above, the occasions where the Canadian criminal justice system sees a wrongful conviction and incarceration must be rare, and the need to deter the conduct that might lead to such results is thus limited. Adverting back to the comments of Mr. Cory in the Sophonow Inquiry which I have adopted above, "if Crown Counsel, Defence Counsel and the Judiciary fulfill their demanding roles our system should work effectively".

**469**  Given the compensation that I have determined is appropriate to vindicate the breach of Mr. Henry's *Charter* rights, I have concluded that a further award to deter future such breaches is unnecessary and would duplicate the compensation I have assessed for the vindication of his rights, and constitute double recovery. I therefore decline to award separate damages under this criterion.

**COSTS**

**470**  Mr. Henry argues that he should be entitled to an award of solicitor and own client costs.

**471**  I consider that the remaining parties should have the opportunity to make submissions as to an appropriate order for costs in light of these reasons for judgment, and invite counsel for Mr. Henry to provide me with submissions on his behalf within two weeks of the date of these reasons for judgment. Counsel for the Province will provide the Province's submissions within the two weeks thereafter, and Mr. Henry will then have one week for any submissions in reply that he wishes to make.

**SUMMARY**

**472**  In summary, I make the following findings:

1. Mr. Henry's allegation that Crown Counsel breached his *Charter* rights by applying to dismiss his conviction and sentence appeals for want of prosecution at too early a stage without properly advising the Court of Appeal of certain matters is dismissed.
2. However, Crown Counsel failed in its duty of disclosure to Mr. Henry by intentionally withholding from him relevant information that the Crown had in its possession prior to his 1983 trial.
3. Crown Counsel withheld this information despite repeated requests by Mr. Henry and his counsel for full disclosure.
4. Crown Counsel knew or ought reasonably to have known that the information it intentionally withheld from Mr. Henry was material to the defence, and that the failure to disclose it would likely impinge on Mr. Henry's ability to make full answer and defence. Much of the evidence that the Crown wrongfully withheld was damaging to its case against Mr. Henry.
5. Crown Counsel's decisions to withhold material information from Mr. Henry were not validated by judicial *imprimatur*.
6. Crown Counsel's wrongful non-disclosure seriously infringed Mr. Henry's right to a fair trial, and demonstrates a shocking disregard for his rights under ss. 7 and 11(d) of the *Charter*.
7. If Mr. Henry had received the disclosure to which he was entitled, the likely result would have been his acquittal at his 1983 trial, and certainly the avoidance of his sentencing as dangerous offender. The Province is therefore liable for Mr. Henry's wrongful conviction and subsequent lengthy period of incarceration.
8. Mr. Henry is not responsible in whole or in part for his losses on the basis of contributory ***negligence*** or failure to mitigate.
9. Crown Counsel's failure to disclose the information to which Mr. Henry was entitled negates any fault on the part of the VPD for any failings that might be attributed to them in their investigation of the offences at issue and in their treatment of Mr. Henry.
10. The Province has not discharged its burden of establishing fault on the part of the Federal Crown. The evidence before me falls short of establishing that the Federal Crown failed to conduct a meaningful review of Mr. Henry's applications for mercy or that the Federal Crown behaved recklessly or in bad faith.
11. An award of damages under s. 24(1) of the *Charter* is a just and appropriate remedy in this case.

**473**  As for the relief sought by Mr. Henry, I make the following findings:

1. Mr. Henry's claim on behalf of his daughters for emotional distress and loss of guidance is dismissed.
2. Any non-pecuniary award to which Mr. Henry would be entitled is subsumed under the damages awarded for the vindication of his *Charter* rights and the deterrence of future breaches.
3. Mr. Henry is entitled to the following relief:
4. compensatory damages in the amount of $530,000 under s. 24(1) of the *Charter*;
5. special damages in the amount of $56,691.80; and
6. damages in the amount of $7,500,000 to serve both the vindication and deterrence functions of s. 24(1) of the *Charter*.

Total: $8,086,691.80

C.E. HINKSON C.J.S.C.

**CORRIGENDUM**

Released: June 9, 2016

In my Reasons for Judgment issued June 8, 2016, the following paragraphs have been corrected to read:

[114] Ms. Cunningham agreed as follows:

Q I understand. They're both equally as important?

A Yes. Well, except for ones -- ones in the words of a witness and the other could be in the words of a police officer writing down what was told to him or her by a witness.

Q And of course you would agree both group of documents you've just described would be important for defence counsel to have, yes?

A Yes.

and

[287] I find that, but for the *Charter* breaches committed by the Province, it is likely that Mr. Henry would have been acquitted at trial, and he thus would have avoided his wrongful conviction and subsequent designation as a dangerous offender and lengthy incarceration.

and, paragraphs [413] and [414] shall read as the following:

[413] I reject the "one size fits all" approach to compensation for wrongful conviction and resultant incarceration, for the same reasons that I have reject Mr. Henry's proposal to gross up amounts provided ex gratia to individuals who have been wrongfully convicted, which I will discuss in further detail. Moreover, this type of approach is inconsistent with the functional approach in *Ward*, and was cautioned against by the Supreme Court of Canada in *Hinse*.

C.E. HINKSON C.J.S.C.

\* \* \* \* \*

**CORRECTION**

Released: June 13, 2016

Please be advised that the attached Reasons for Judgment of Chief Justice Hinkson, dated June 8, 2016, have been corrected on the front page.

On the cover page, the dates of trial were corrected.

\* \* \* \* \*

**CORRECTION**

Released: June 15, 2016

Please be advised that the attached Reasons for Judgment of Chief Justice Hinkson dated June 8, 2016, have been corrected on the front page.

On the cover page, names of Counsel for the Defendant, British Columbia were corrected.

**End of Document**

[***Meghji v. Lee, [2011] B.C.J. No. 1560***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22WS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R. Johnston J.

Heard: June 1-5, 8-12, 15-19, 22-26, 29-30, July 2-3, 6-10,

13, 2009; January 18-22, May 3-7, June 7-11, July 5-9, August

3-4 and 30-31, September 1-2, December 6-10, 2010; February

14-16, 2011.

Judgment: August 15, 2011.

Docket: 04-2102

Registry: Victoria

**[2011] B.C.J. No. 1560** | [*2011 BCSC 1108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MW-00000-00&context=) | [*19 M.V.R. (6th) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MW-00000-00&context=) | [*2011 CarswellBC 2126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MW-00000-00&context=) | [*205 A.C.W.S. (3d) 871*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MW-00000-00&context=)

Between Selina Meghji, Plaintiff, and Jamin Lee and Her Majesty the Queen in Right of the Province of British Columbia (Provincial Ministry of Transportation and Highways), Defendants

(399 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Head injuries — Brain damage — Arm injuries — Fractures — Leg injuries — Fractures — Action by plaintiff for damages suffered when she was struck by defendant's vehicle while walking across an intersection allowed — Plaintiff claimed against Ministry for negligent design or installation of overhead lighting — Plaintiff suffered broken limbs, mild traumatic brain injury — Defendant driver liable for breach of duty to keep proper lookout — Defendant Ministry liable for breach of duty of care in failing to provide proper lighting — Plaintiff awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Action by plaintiff for damages suffered when she was struck by defendant's vehicle while walking across an intersection allowed — Plaintiff claimed against Ministry for negligent design or installation of overhead lighting — Plaintiff suffered broken limbs, mild traumatic brain injury — Defendant driver liable for breach of duty to keep proper lookout — Defendant Ministry liable for breach of duty of care in failing to provide proper lighting — Plaintiff awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity.**

**Government law — Crown — Actions by and against Crown — *Negligence* by Crown — Action by plaintiff for damages suffered when she was struck by defendant's vehicle while walking across an intersection allowed — Plaintiff claimed against Ministry for negligent design or installation of overhead lighting — Plaintiff suffered broken limbs, mild traumatic brain injury — Defendant driver liable for breach of duty to keep proper lookout — Defendant Ministry liable for breach of duty of care in failing to provide proper lighting — Plaintiff awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Pedestrians — Action by plaintiff for damages suffered when she was struck by defendant's vehicle while walking across an intersection allowed — Plaintiff claimed against Ministry for negligent design or installation of overhead lighting — Plaintiff suffered broken limbs, mild traumatic brain injury — Defendant driver liable for breach of duty to keep proper lookout — Defendant Ministry liable for breach of duty of care in failing to provide proper lighting — Plaintiff awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — *Negligence* — Action by plaintiff for damages suffered when she was struck by defendant's vehicle while walking across an intersection allowed — Plaintiff claimed against Ministry for negligent design or installation of overhead lighting — Plaintiff suffered broken limbs, mild traumatic brain injury — Defendant driver liable for breach of duty to keep proper lookout — Defendant Ministry liable for breach of duty of care in failing to provide proper lighting — Plaintiff awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity.**

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| --- |
| Action by Meghji for damages suffered when she was struck by Lee's motor vehicle while walking across an intersection. Meghji also claimed against the Ministry of Transportation and Highways for negligent design or installation of overhead lighting. Meghji was walking across the intersection at 7:15am when Lee, who was turning left, struck her. Lee did not see Meghji until the instant before he struck her. Lee had eye issues which caused him visibility problems. His car windshield was not properly sealed, allowing condensation to accumulate on the inside of his windshield. He was momentarily blinded by glare as he completed his turn. There were two luminaires at the intersection, on the southeast and northwest corners, which hung over the secondary road, not the main road. Meghji suffered a broken arm, broken leg and injured ankle.  HELD: Action allowed.  Lee breached his duty to Meghji to keep a proper lookout. The Ministry breached its duty of care by failing to consider moving the luminaires to provide coverage for the main road. Meghji was not contributorily negligent. Liability was apportioned at 90 per cent for Lee and 10 per cent for the Ministry. Meghji required surgery on her shoulder and had reduced range of motion. Meghji also suffered a mild traumatic brain injury and depression and chronic pain disorder. Meghji was awarded $125,000 in general damages, $25,152 in special damages, $150,000 for future care costs, $100,000 for past loss of earning capacity and $750,000 for future loss of earning capacity. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 127*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F4-00000-00&context=), s. 132, s. 179(2), s. 181

**Counsel**

Counsel for the Plaintiff: D. Acheson, Q.C., S. Sweeney and N. Foley.

Counsel for the Defendant: Jamin Lee: H. Turnham and S. Finn.

Counsel for the Defendant: Her Majesty the Queen in Right of the Province of British Columbia: L.D. Johnston and T. Callan.

**Reasons for Judgment**

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| **R. JOHNSTON J.** |

**INTRODUCTION**

**1**  On January 22, 2003, a vehicle operated by the defendant, Jamin Lee, struck the plaintiff, Selina Meghji, while she was walking across the intersection of Blanshard Street and Cloverdale Avenue in Victoria, B.C.

**2**  Blanshard Street runs generally north-south and has three lanes of travel plus a dedicated left-turn lane in each direction. Cloverdale Avenue runs generally east-west and has two lanes of travel plus a dedicated left-turn lane in each direction and is lit by overhead lighting.

**3**  The intersection is in an area where residential use changes to commercial use. To the east of Blanshard Street, along Cloverdale Avenue, there is a short block of commercial use which then changes to residential use. To the west of Blanshard Street, along Cloverdale, the use is entirely commercial for several blocks.

**4**  This pattern continues to the south of the intersection, along Blanshard Street toward downtown Victoria. To the north of the Cloverdale intersection, usage is generally commercial along Blanshard Street for several long blocks, until Blanshard Street becomes Highway 17, leading to the Swartz Bay ferry terminal.

**5**  At about 7:15 a.m. on January 22, 2003, Ms. Meghji was walking across Blanshard Street in an easterly direction, while at the same time Mr. Lee was turning left from Cloverdale Avenue to go south on Blanshard Street. Mr. Lee did not see Ms. Meghji until the instant before he struck her. Why Mr. Lee did not see Ms. Meghji until he did is at the core of the liability issues among the parties. Ms. Meghji alleges that Mr. Lee did not see her in time to avoid striking her because he failed to take reasonable care for her safety and because the overhead lighting for which the Ministry of Transportation and Highways is responsible was negligently designed or installed.

**6**  Each of the defendants, while denying their own culpability, points to the co-defendant as the responsible party and both defendants join together to allege that Ms. Meghji's ***negligence*** in crossing Blanshard Street against a "Don't Walk" signal while wearing dark clothing caused or contributed to her injuries.

**7**  Finally, although it is conceded that Ms. Meghji was injured in the collision, the nature and extent and residual effects of her injuries are in issue.

**ISSUES**

**8**  The issues therefore are:

1. Liability, if any, of the defendants Lee and the Ministry of Transportation and Highways;
2. Contributory ***negligence***, if any, of the plaintiff Ms. Meghji;
3. Nature, extent and residual effects of Ms. Meghji's injuries; and
4. Damages flowing from injuries for which the defendant(s) are liable.

**Liability of the Defendant Lee**

**9**  In January 2003, Ms. Meghji worked for Shaw Cable. Shaw's offices were near the southeast corner of Blanshard and Cloverdale. Ms. Meghji lived in James Bay, in the southern part of Victoria, so she took a bus along Douglas Street and got off just north of the intersection of Douglas Street and Cloverdale Avenue. She walked eastward for a block along Cloverdale Avenue, across Cloverdale at its intersection with Oak Street, then proceeded another block eastward along Cloverdale Avenue to Blanshard Street.

**10**  At the corner of Blanshard and Cloverdale, there is a right-turn lane that a pedestrian has to cross to reach a small triangular island before beginning to cross Blanshard Street. On that island, which counsel referred to as a "pork chop" because of its shape, there is a pole which has, among other things, a button to activate the pedestrian "Walk / Don't Walk" signal to cross Blanshard Street.

**11**  The traffic signals at Blanshard and Cloverdale default to green for Blanshard Street north and south if there is no vehicle or pedestrian traffic east or westbound on Cloverdale Avenue. Vehicle traffic on Cloverdale activates a demand for a change in signals at the intersection through detector loops buried in the roadway.

**12**  Pedestrian movement is controlled by "Walk / Don't Walk" signals that are activated by the button at each corner of the intersection. If the button is not pushed, "Don't Walk" is exhibited in all directions at all times. If a button is pushed by a pedestrian, the "Walk" signal will activate but only when the traffic light sequence for the intersection changes.

**13**  Once a "Walk" signal is exhibited, it remains visible as a white human silhouette for seven seconds before beginning to flash a "Don't Walk" signal for twenty-one seconds. The "Walk" signal then becomes a solid red "Don't Walk" signal for the rest of its cycle.

**14**  It was raining on the morning of January 22, 2003, and at 7:15 am, the time when Ms. Meghji arrived at the intersection, it was full dark. Lighting at the intersection was provided by overhead lights at the southeast and northwest corners. Additionally, there were light standards along both Blanshard Street and Cloverdale Avenue on both sides of the intersection. There were also overhead light standards in nearby commercial developments, including the parking lot of a Future Shop outlet on the southwest corner of Blanshard and Cloverdale.

**15**  When Ms. Meghji arrived at the intersection, she was wearing generally dark clothing and was carrying a bright yellow lunch bag. She testified that she pushed the button to demand a "Walk" signal and waited for some time for the traffic lights to run through their sequence. She said that when the signal opposite her showed "Walk" for pedestrians proceeding in her direction, she stepped into the marked crosswalk and began to cross the intersection. She got fully across two southbound lanes and into the third southbound lane when Mr. Lee struck her near the completion of his left turn onto Blanshard Street from Cloverdale Avenue.

**16**  Mr. Lee has had some physical difficulties that bear on the question of his liability. When he was 18 years old, Mr. Lee had cataract surgery to his left eye. The surgery left him with vision somewhat blurred in his left eye, which could not be completely corrected by eyeglasses. Mr. Lee also had a partial cataract in his right eye. Overall, the combined effects of the cataract condition and the results of his cataract surgery make Mr. Lee more sensitive to glare to the point that direct glare causes him to see double.

**17**  At the time of the accident, Mr. Lee was being treated for psychological or psychiatric conditions for which he was prescribed Risperdal and Prozac. He testified that Risperdal helped him sleep and that Prozac caused drowsiness or nausea. Mr. Lee was somewhat contradictory as to whether he had taken his daily dosage of Risperdal and Prozac on the day of the accident. At first he said he had not taken either of the drugs for 24 hours before the accident, then said he was not sure, then agreed that he had taken his medication that morning.

**18**  On the morning of January 22, 2003, Mr. Lee had a "few tokes" of marijuana which he said caused him to feel elated, improved his mood, and helped with the nausea that his prescription medications caused. Mr. Lee said that he had been feeling some life stresses in the days before the accident.

**19**  Mr. Lee was in something of a rush to get to work on the morning of the accident because he wanted to complete a carpentry project that had engaged his interest before the grocery store in which he worked opened for business.

**20**  At the time of the accident, Mr. Lee was withdrawing from the effects of using crystal methamphetamine.

**21**  Mr. Lee described the weather on the morning of the accident as rainy and drizzling. Ms. Meghji agreed that it was drizzling at the time of the accident. Mr. Lee said it was dark at the time of the accident, he had his headlights on, and his windshield wipers were set at medium.

**22**  Mr. Lee's vehicle had a leak in the seal at the top of the windshield that caused water to accumulate on the inside of his windshield and condensation to form on the inside of the windshield and on other windows of the vehicle.

**23**  As Mr. Lee approached the intersection of Cloverdale and Blanshard, the glare of other lights caused him to feel a tinge of pain in his eyes.

**24**  As Mr. Lee approached the intersection, the light facing him was green. It is not clear whether he stopped in the intersection, or simply slowed down, to allow some traffic eastbound on Cloverdale to go through.

**25**  Mr. Lee said that as he entered the intersection, he was blinded momentarily by brightness. He looked to his left in the direction in which he was turning, saw that the "Walk / Don't Walk" signal was red, he says, and commenced his turn. He did not believe that his turn signal was on.

**26**  Mr. Lee was partially blinded when he looked in the direction of the crosswalk towards which he was turning. He heard someone say, "Oh my God," looked, saw Ms. Meghji, and slammed on his brakes and turned his vehicle to the right. Mr. Lee did not see Ms. Meghji until just before impact, although he testified that when he looked he realized a person was running across the intersection.

**27**  Mr. Lee's ability to see outside his vehicle was affected by the condensation problem on his windshield and windows. This was compounded by the effect on his vision of the glare caused by the lighting outside his vehicle, perhaps exacerbated by the wet pavement.

**28**  Ms. Meghji was in the marked crosswalk when Mr. Lee struck her.

**29**  Sergeant Wright was one of the police officers who responded to the accident report. Sergeant Wright, who had a great deal of experience dealing with traffic accidents and with people whose ability to operate a motor vehicle might be impaired, did not see anything in Mr. Lee that caused him any concern that Mr. Lee was impaired by alcohol or a drug or that Mr. Lee ought not to be allowed to drive his vehicle away from the scene of the accident.

**30**  I find that Mr. Lee owed a duty to Ms. Meghji to keep a proper lookout while driving his vehicle, and to take reasonable care for other persons who were, or might reasonably be expected to be on the road (*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=); *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=) (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=)). I conclude that this duty existed whether or not the signal showed "Don't Walk" when Ms. Meghji started into the crosswalk. Also in support of this conclusion is the language of s. 181 of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318*:

1. Despite sections 178 [Repealed], 179 [Right of way between vehicle and pedestrian] and 180 [Crossing at other than a crosswalk], a driver of a vehicle must
2. exercise due care to avoid colliding with a pedestrian who is on the highway[.]

**31**  Mr. Lee's ability to drive might not have been impaired to the extent to attract Sgt. Wright's attention under either 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=), or the *Motor Vehicle Act*, but the effects of the drugs in his system were nevertheless a contributing factor in the accident. I find that Mr. Lee breached the duty he owed to Ms. Meghji when he turned his vehicle to the left, with his vision affected by his cataract and the residual effects of his cataract surgery, including the effects of glare from overhead and reflected lights, and with his ability to see outside his car reduced by the condensation and moisture on the inside of the windows. These circumstances acted together with the effects of the drugs, both prescription and otherwise, to constitute Mr. Lee's breach of the duty he owed Ms. Meghji.

**Liability of Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Transportation and Highways)**

**Intersection Design and Design Standards**

**32**  The plaintiff's allegations of ***negligence*** against the Ministry of Transportation and Highways, in which Mr. Lee joins, arise out of the number and location of overhead lighting sources at the intersection of Blanshard Street and Cloverdale Avenue. This intersection was created in 1978 when Blanshard Street was substantially widened and connected to Highway 17, which runs to the Swartz Bay ferry terminal, north of Victoria.

**33**  As designed in 1978, the intersection was comprised of Blanshard Street running more or less north-south with three lanes in each direction, plus left-turn and right-turn lanes. Cloverdale Avenue was one lane in each direction, east and westbound, with a left-turn lane in each direction. The new intersection was controlled by electric traffic signals.

**34**  Design and construction of the new intersection fell under the jurisdiction of the Ministry of Transportation and Highways. While the Ministry has changed names from time to time the parties have agreed to refer to the Ministry, in whatever name it held, as the Ministry of Transportation and Highways, or MoTH.

**35**  As built in 1978, the intersection had overhead luminaires at the northwest corner and at the southeast corner. These luminaires were each 250 watt sodium fixtures and hung about 35 feet above the pavement surface over Cloverdale Avenue, not Blanshard Street. Nothing turns on the wattage.

**36**  The plaintiff alleges that there ought to have been four luminaires, not two, at the intersection, one on each corner, and that, if only two were to be installed, they should have been on the opposite corners, that is, northeast and southwest, rather than as placed by MoTH.

**37**  The plaintiff's next argument is that MoTH had an opportunity to rectify its mistakes in 1983. That is when Cloverdale Avenue was widened from one lane to two lanes in each direction, with dedicated left-turn and right-turn lanes. The plaintiff says MoTH was negligent in failing to switch the location of the luminaires to the northeast/southwest corners, or to add two more luminaires so as to place a luminaire on each of the four corners in the intersection.

**38**  Finally, the plaintiff alleges that MoTH negligently failed to take other opportunities afforded to it in during work on the intersection in 1996 and 2001 to rectify the problems created in the original design and perpetuated in the 1983 reconfiguration.

**39**  The plaintiff argues that the number of luminaires and the results of their placement run contrary to standards that the plaintiff alleges applied to MoTH at relevant times. These standards are set out in a document entitled *American National Standard Practice for Roadway Lighting*, approved July 11, 1972, by the American National Standards Institute, sponsored by the Illuminating Engineering Society of North America. They have been referred to both at trial and in roadway lighting design circles as RP-8 (1972). The extent to which MoTH was or should be bound by these standards was very much in issue at the trial.

**40**  The plaintiff called Mr. Lisman, who was educated as a civil engineer and in 1974 joined MoTH as its first highway safety engineer. Mr. Lisman became the director of highway engineering in 1989 and retired from MoTH to go into private practice in 1993.

**41**  Mr. Lisman testified that RP-8 (1972) was accepted by MoTH in 1977-1978 when the Blanshard Street-Cloverdale Avenue intersection was designed and built. It appears, however, that Mr. Lisman had no need to directly consult RP-8 (1972) while he was employed by MoTH as matters concerning electrical engineering were not his area of competence. When Mr. Lisman became the director of highway engineering in 1989, at which time electrical engineering functions that involved traffic engineering would fall under his supervision, he relied on the electrical engineering staff and, it would appear, simply assumed they in turn were guided by RP-8 (1972), or its subsequent revisions.

**42**  Mr. Lohr is the person who actually designed the electrical lighting at the intersection of Blanshard Street and Cloverdale Avenue in 1977. Mr. Lohr graduated from a two year program as an electrical technologist at the British Columbia Institute of Technology. Mr. Lohr was employed with MoTH from 1972 to 1979, beginning as an engineering aide and later becoming an engineering assistant. When he began, he was the junior of two people in the department reporting to Mr. Ferguson, a senior electrical technician. At that time, the office of the electrical engineer was vacant but was soon filled by a Mr. Baggett.

**43**  Mr. Lohr's function was to draft a preliminary layout of lighting in pencil, which he would present to Mr. Ferguson. The two would discuss Mr. Lohr's draft, and when they had finished, Mr. Lohr's design, with any changes resulting from the consultation with Mr. Ferguson, would go to the drafting department for final plans to be prepared and submitted to Mr. Baggett for engineering approval.

**44**  Mr. Lohr testified that, while he worked at MoTH, he does not recall there being any manual other than the Canadian Electrical Code. He was not aware of RP-8 (1972); it was not discussed in his presence.

**45**  When Mr. Lohr left MoTH, Mr. Casey was hired to replace him. Mr. Casey, who has similar qualifications to Mr. Lohr, was aware that there was a copy of RP-8 (1972) at MoTH. He said that it was not a document that he routinely consulted, but it was something that he would refer to if he had a difficult problem.

**46**  The standards set out in RP-8 (1972) include:

1. Lux, which is defined as the amount of light available from all sources;
2. Uniformity ratio, which is the ratio between the average lighting values within an area such as an intersection, to the minimum lighting values within that same area.
3. An appendix recommends the number of overhead lighting luminaires at different types of intersection.

**47**  Mr. Lisman, who was the strongest proponent of RP-8 (1972) as a standard to which MoTH should be held, put it no higher in his evidence than that he understood RP-8 (1972) was being used within MoTH as guidance by those who carried out routine and frequent work of designing and installing of lighting.

**48**  Mr. Lohr and Mr. Casey, as the technicians actually designing lighting, do not support Mr. Lisman's understanding of the place RP-8 (1972) had in MoTH electrical designing. I note, however, that Mr. Lohr and Mr. Casey held relatively junior positions in the electrical lighting design area of MoTH, and were not in a position to say what, if any, recourse the electrical engineer, Mr. Baggett, had to RP-8 (1972) when he was called upon to place his engineering approval on their designs.

**49**  I also note, insofar as the number of luminaires is an issue, that Mr. Lisman acknowledged in his evidence that two luminaires, not four, was the standard practice adopted by MoTH while he was employed there. Mr. Lisman testified, however, that RP-8 (1972) had suggested four luminaires were needed at an intersection with the complexity of that at Blanshard and Cloverdale. From that, I conclude that to the extent that RP-8 (1972) was used within MoTH as a guide to the design of highway lighting, it was not followed slavishly.

**50**  It is obvious that two light sources are cheaper to install and to maintain than are four. I accept that the practice of MoTH from 1977-1978 through to 1991 was that two luminaires were required at intersections such as Blanshard and Cloverdale.

**51**  In 1991, MoTH developed and adopted its own standards. Those standards, as found in the Electrical Standards Manual, require four luminaires at an intersection such as Blanshard and Cloverdale. Notwithstanding the adoption of that standard in 1991, two luminaires were not added to the Blanshard-Cloverdale intersection until 2008. That is because it was MoTH's policy to apply new standards to new construction only, and to existing infrastructure only when that existing infrastructure was being substantially reconfigured. Otherwise, it was not MoTH's policy to retrofit all existing infrastructure to comply with new standards as and when they were adopted.

**52**  Mr. Lohr and Mr. Casey both said that they were instructed that in designing roadway lighting they were to achieve an average of 20 to 22 lux, being the illumination cast on the road surface.

**53**  Before the advent of computers and computer-assisted design, they achieved this objective through a design process that started with a plan of the roadway or intersection to be lighted. They would select a template that corresponded to the luminaire or light source that had been selected to be installed along the roadway or at the intersection.

**54**  These templates were already there when Mr. Lohr was hired, and he understood that they were based upon data provided by the manufacturer of the lighting fixture or luminaire that had been selected for installation. Templates that corresponded to each luminaire had been cut out of plastic, it is not clear by whom, and were available to Mr. Lohr and Mr. Casey, who accepted that by applying these templates to the plans in the way they had been taught, they would achieve the minimum required illumination, or lux, on the road surface.

**55**  Mr. Lohr testified that he would lay the templates on the plan of the roadway, alternating side to side, and so long as the curved edges of the templates touched, he was assured of achieving his minimum illumination. By that process, he would fix on the plan the location of the posts that would hold the luminaires represented by the templates. While Mr. Lohr had been taught how to calculate uniformity ratio, it was a time consuming task, and he was not expected to do it while working for MoTH, as the templates achieved what he was expected to achieve.

**56**  With respect to the location of the luminaires at the Blanshard and Cloverdale intersection, Mr. Lohr testified that they were not on the corners that he would have ordinarily expected them to be. That is, instead of locating the luminaires on the northeast and southwest corners, he had located them on the opposite corners, southeast and northwest.

**57**  Mr. Lohr could not recall why he had done that, but at some point shortly before he testified, he went back to the intersection and saw that a hydro power line ran in an east-west direction along the north side of Cloverdale Avenue and through the intersection of Cloverdale Avenue and Blanshard Street. Mr. Lohr testified that a conflict with the overhead hydro distribution line was probably the reason he located the luminaires where he did and not where he thought he would ordinarily have put them, that is, at the northeast and southwest corners.

**58**  It also appears that, in ordinary circumstances, Mr. Lohr would have placed the luminaires over the main roadway, which in this case is Blanshard Street, but at this intersection they were hung over the secondary road, Cloverdale Avenue.

**59**  As to the hydro conflict, Mr. Lohr testified that he was instructed to maintain at least a three meter clearance between light poles, and the arms and luminaires attached to them, and hydro lines. He said this applied to the upper lines which carry the power, and a lower single line, which he understood was a neutral wire.

**60**  Mr. Kreye, a regional distribution engineer employed by B.C. Hydro, testified that it is not uncommon for there to be clearance issues when a municipality wished to install luminaires near power lines. Mr. Kreye said that it was necessary to maintain a three meter minimum separation between primary wires carrying high voltages, which are located at or near the top of the hydro poles, or secondary wires which also carry voltage but are located below the primary wires. It is not necessary to maintain a three meter distance away from the neutral wire, the lowest of the wires on the hydro pole, because the neutral wire does not carry voltage.

**61**  When Mr. Lohr attended the intersection before trial, he noticed that the luminaires that were then in place were in fact close to the lower or neutral hydro wire, at least at the southwest corner. He concluded that he had placed the luminaires where he did in his 1977 design in order to avoid having a luminaire too close to the lower neutral hydro wire at the northeast corner.

**62**  Mr. Lohr's evidence about luminaire placement was of necessity largely reconstruction. It does not accord with Mr. Kreye's evidence that it is not necessary to maintain a three meter separation from a neutral wire. In cross-examination Mr. Lohr said that he assumed that the luminaires and the poles on which they hang were in the same position relative to hydro poles in 1977 as they were when he looked at them about a week before he testified - which would be inconsistent with pole movement when Cloverdale Avenue was widened in 1983, and in re-examination he said the poles appear to have been moved in. On the other hand, Mr. Lohr testified about what he understood to be the clearance requirements in 1977, while Mr. Kreye did not say whether there had been a change in B.C. Hydro clearance expectations.

**63**  While various witnesses connected with MoTH, including Mr. Lohr, testified about the difficulties and expense in attempting to persuade B.C. Hydro to relocate power lines or raise them to avoid conflicts with overhead lighting, Mr. Lohr testified that he did not consider asking B.C. Hydro to either move its poles or raise its lines in 1977. By June of 1981, if not before, there was a protocol in place between MoTH and B.C. Hydro which called for communication between them "at a high level" and which provided for a flat rate payment of $400 per pole for hydro poles that were moved at the request of MoTH and/or on the schedule requested by MoTH.

**64**  While MoTH does not concede that it accepted the standards set out in RP-8 (1972), it appears that Mr. Lohr's design did achieve minimum lux values that equalled or exceeded those set out in RP-8 (1972) and that also met the 3:1 uniformity ratio stated in RP-8 (1972).

**65**  At the time of Mr. Lohr's original design, computers were not in use and, although there were meters by which lighting levels could be checked after construction was finished, it was not the practice to do so, nor was it the practice to do manual calculations to confirm that the manner in which the design had been created, using the templates, achieved the required lux or the target uniformity ratio.

**66**  The plaintiff argues that, when Cloverdale Avenue was widened in 1983, MoTH missed -- negligently, according to the plaintiff -- an opportunity to move the luminaires from their northwest/southeast orientation to northeast/southwest, in addition, of course, to the opportunity to add two luminaires to the intersection.

**67**  Instead, when Cloverdale Avenue was made wider without re-orienting the luminaries, the plaintiff says the already questionable luminaire placement was made worse by moving the two intersection luminaires further apart.

**68**  While this still left the average illumination within the 20 lux range, it altered the uniformity ratio from just under 3:1 to just over 4:1.

**69**  The significance of the uniformity ratio is that, arguably, when the difference between average illumination and minimum illumination becomes too great, the ability of the human eye to adjust to the relative differences in illumination becomes strained. The plaintiff argues that the 3:1 standard was set out in RP-8 (1972) and adopted by MoTH, or was independently accepted by MoTH as appropriate because it was recognized by MoTH to be a minimum safe ratio between average and minimum illumination.

**70**  When Cloverdale Avenue was widened in 1983, the hydro poles at the northeast and northwest corners of Blanshard and Cloverdale were either replaced or moved, although they had been replaced just a year earlier. Another pole just to the east, along Cloverdale Avenue, was replaced at the same time. It would therefore appear that repositioning the luminaires might have been achieved at minimal to no cost in 1983, either through moving the hydro poles to reduce or avoid any conflict (assuming that such conflict did in fact exist) or by raising hydro lines to avoid conflict. It does not appear on the evidence that reversing the corners on which luminaires were positioned was considered as part of the 1983 design work.

**71**  The design of the 1983 lighting was done by a technician who has since died. That design was not apparently approved by an electrical engineer but instead by Mr. Ferguson, the senior technician, on behalf of the electrical engineer.

**72**  Senior engineers initialled those plans as approved, but that I find was not as a result of an independent engineering review of the electrical aspects of the design. Mr. Lisman testified that senior engineers from other disciplines would accept the certification of an electrical engineer with respect to the electrical aspects of any particular design.

**73**  Mr. McLean, who was qualified to give opinion evidence on design of roadway lighting as well as methods of measuring and calculating lighting levels, said that the difference between a 3:1 and 4:1 uniformity ratio was not of particular significance, and that the average amount of light falling on a surface was a more important number to know. He agreed that a measurement showing the average amount of light falling on a surface was a different matter than what a person, such as a driver, was able to see. Such a difference arose out of measurements taken by the witness Mr. Inch, who had an instrument that measured the light entering a human eye, and a different instrument that measured the amount of light shining on any particular place on the road surface.

**74**  Dr. Lewin, an expert in the ability of the human eye to see in different lighting conditions, said that the difference between 3:1 and 4:1 becomes academic when the road surface is wet, primarily because of glare from vehicle headlights and other sources of light, and that a more significant factor is the contrast between, in this case, a pedestrian in the foreground and the background behind the pedestrian. Dr. Lewin said that the difference in brightness between the pedestrian in the foreground and the background is what permits one to see the pedestrian.

**75**  All of this becomes significant because the plaintiff had Mr. Inch attend at the intersection of Blanshard and Cloverdale to take measurements of the available light (lux) and how much light was reflected off the background and available to the human eye (luminance) in March 2007. This was before two additional luminaires were installed at Blanshard and Cloverdale. Mr. Inch took measurements at various places in the intersection, including the southwest corner from which Ms. Meghji started across the intersection, and at about the point of impact in the third southbound lane, closest to the centre median. Mr. Inch's measurements indicated 3.1 lux at the pedestrian island from which Ms. Meghji started, and 1.3 lux at what he understood to be the point of impact, far below the averages of 20 to 22 Mr. Lohr said he was trying to achieve in his design.

**76**  The plaintiff called Mr. Chadwick, who was qualified to give opinion evidence on roadway lighting and signal design. Mr. Chadwick utilized computer software to calculate the amount of light cast by the luminaires at or near the intersection of Blanshard and Cloverdale in March 2009, after the additional luminaires were installed at the intersection. Mr. Chadwick prepared 10 scenarios, representing different assumptions about the type and placement of luminaires, starting with the original roadway plan from 1977. With the aid of his computer software, Mr. Chadwick could add or subtract luminaires and manipulate their orientation, and the software would then calculate the amount of light available at various points in the intersection, and plot them on a grid. This method permitted him to display in his 10 scenarios the amount of light cast on the roadway from various luminaire sources.

**77**  Mr. Chadwick's first scenario represents his calculation of the light available after the 1978 original intersection construction. His fourth scenario represents his calculations based upon the 1983 widening of Cloverdale Avenue with the luminaires positioned as they were after the reconstruction.

**78**  By way of contrast, Mr. Chadwick's second scenario assumed that in 1977-1978 the two luminaires were repositioned, that is, from the northwest and southeast corners to the northeast and southwest corners. Mr. Chadwick's third scenario presumed four luminaires at the intersection while Cloverdale remained a two-lane road with the left- and right-turn lanes, as built in 1978.

**79**  Mr. Chadwick's calculation of light available in the southwest corner from which Ms. Meghji started and at the point of impact differ from the amount of light measured by Mr. Inch. While the measurements might understandably be different because one is based on computer projection (Chadwick) while the other is based on meter measurement (Inch) two years apart, more troubling is that while Mr. Inch measured the available light at the point of impact lower than the island from which Ms. Meghji started, Mr. Chadwick's calculations show the available light at the point of impact as brighter than at the island from which Ms. Meghji began. Dr. Lewin fastened on this discrepancy to question the accuracy of Mr. Inch's measurements generally.

**80**  In this context it is worth remembering that, in the intersection as configured at the time of the accident, Ms. Meghji left an area of lesser light, where there was no overhead luminaire installed, and was walking toward the luminaire at the southeast corner when she was hit.

**Analysis**

**81**  In *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=) at 1244-1245, Cory J. says for the majority:

It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

**82**  The first question to be answered then is whether there was a relationship of proximity or neighbourhood between Ms. Meghji and the defendant, British Columbia, in its capacity as MoTH at the time of the accident that it would in the reasonable contemplation of MoTH that carelessness on its part might likely cause damage to Ms. Meghji.

**83**  The answer to that is obviously that there was. The intersection of Blanshard and Cloverdale was designed to funnel pedestrians to the crosswalks that were clearly marked and electronically controlled and to discourage any attempts to cross Blanshard Street -- a busy six-lane divided thoroughfare -- at any place other than an intersection such as at Cloverdale Avenue. A *prima facie* duty of care therefore arose.

**84**  The inquiry then shifts to whether MoTH was exempted from this *prima facie* duty of care by either statutory exemption or on the basis that the decisions made, which would otherwise give rise to a duty of care, were policy decisions immune from judicial review.

**85**  This has been characterized as a "governmental policy defence."

**86**  In *Brown v. British Columbia (Minister of Transportation and Highways)*, [*[1994] 1 S.C.R. 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CF-00000-00&context=), Cory J. again stated, this time more succinctly, the reasoning process to be pursued in cases where the liability of a government in tort is raised when he said this at 437:

It may now be appropriate to apply the principles set out in *Just* to the facts presented in this case. We must first determine if a *prima facie* duty of care exists, and then determine whether the imposition of this duty is excluded by statute or because the decision at issue is one of policy.

**87**  The analytical process established in these decisions as well as in *Swinamer v. Nova Scotia (Attorney General)*, [*[1994] 1 S.C.R. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CG-00000-00&context=), requires that the party owing the *prima facie* duty of care assume the evidentiary burden to establish an exemption it asserts, whether statutory or policy-based. This does not shift the overall burden of proof from plaintiff to defendant, it simply recognizes that once the plaintiff has established the *prima facie* existence of a duty owed by MoTH, MoTH then has the burden of leading evidence to establish any exemption it seeks to rely on.

**88**  In this case, there is no statutory exemption from the *prima facie* duty of care.

**89**  With regard to what constitutes a policy decision immune from judicial review, the Court 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=), decided after submissions in this case, affirmed at para. 85 what it termed the "central insight" in *Just*, that "true" or "core" policy decisions should be protected from ***negligence*** liability, while operational decisions should not. Although the Court acknowledged that real life decisions do not fall neatly into either a protected "policy" category, or reviewable "operational" category, it concluded at para. 90 that immune "core policy" government decisions are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."

**90**  Bearing these principles in mind, I conclude that the original decision to install two luminaires at the intersection of Blanshard and Cloverdale, rather than four, was a policy decision. It was a decision that was applied by MoTH across the province and, although there was no direct evidence on point, obviously a decision based upon the difference in costs of designing, installing and maintaining two as opposed to four luminaires at intersections. While this policy decision is not open to question by this court, it was in any event defensible on the basis that, at least at Blanshard and Cloverdale, two luminaires achieved the uniformity ratio sought by MoTH and more than achieved the minimum illumination sought, whether under MoTH internal standards or RP-8 (1972).

**91**  Mr. Lohr's decision to place the luminaires at the northwest and southeast corners as opposed to the opposite corners was apparently approved by his supervisor, Mr. Ferguson, and then by the electrical engineer, Mr. Baggett. That decision, I find, was an implementation or operational decision that had nothing to do with policy. The decision of where to place the luminaires, as part of the operational aspect of MoTH activity, falls to be assessed in the consideration of the standard of care issue. As stated in *Just* at 1245.

The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

**92**  Although the decision to locate the poles on northwest and southeast corners, did not cause or contribute to Ms. Meghji's injuries because of the intervening intersection re-configuration in 1983, I can say that I am not persuaded on the evidence that Mr. Lohr's justification for placing the poles where he did was reasonable.

**93**  I say that in part because Mr. Lohr could not recall a hydro conflict being the reason for luminaire placement at the time he designed the lighting at Blanshard and Cloverdale in 1977. Rather his evidence on that point was a reconstruction he arrived at as a result of attending at the intersection prior to giving evidence at trial.

**94**  Additionally, I note that Mr. Kreye had no concern about possible conflict between the lowest single neutral line and a light standard, as Mr. Lohr thought there was. The evidence of possible encroachment of a light pole and luminaire assembly within three meters of either a primary or a secondary distribution line was insufficient to establish a real possibility of such conflict. Finally, four luminaires were eventually installed at this intersection in 2008, and it does not appear on the evidence that that installation, which added luminaires to the northwest and southwest corners, required any significant movement of hydro wires or poles.

**95**  The work done when Cloverdale Avenue was widened in 1983 raises the same criticism from the plaintiff's point of view, that is, that MoTH should have installed two more luminaires and, if not, ought to have moved the luminaires to the northeast/southwest orientation Mr. Lohr preferred in 1977-1978 and which the plaintiff says would have avoided lighting problems created by the 1983 work that contributed to Ms. Meghji's accident.

**96**  For the same reason already given, I view the decision not to add two luminaires in 1983 as a policy decision. At that time, MoTH was still adhering to its practice of installing two luminaires at each intersection, primarily for budgetary reasons, and partially because it had not been persuaded that more than two were necessary.

**97**  While it was not clear that MoTH directed its mind to whether additional luminaires should be installed in 1983, either the failure to consider it or a deliberate decision not to add luminaires would be exempt from review by this court as being a core policy decision.

**98**  Maintaining the location of the luminaires at the northwest and southeast corners, however, is a different matter. I have concluded that it was not necessary that the luminaires be placed at those corners because of a possible hydro conflict, partly on the basis of Mr. Kreye's evidence and partly because evidence of a real conflict is inadequate in my view.

**99**  While that did not mean that the decision of where to place the luminaires was a breach of the duty owed to Ms. Meghji and others in 1977-1978, the answer is not so clear in 1983 when those two luminaires were moved further apart with the road widening.

**100**  As I understand the evidence of Mr. Lohr and Mr. Casey, ordinarily luminaires would be placed over the main thoroughfare at an intersection, not the secondary road, Blanshard Street being the main thoroughfare here. In this case, however, perhaps because of Mr. Lohr's concern about proximity to the hydro lines, the luminaires at the northwest and southeast corners were placed over Cloverdale Avenue and not over Blanshard Street. This means that, while the amount of the illumination available to the south crosswalk on Blanshard Street from the luminaire at the southeast corner would not be materially reduced as a result of widening Cloverdale, the amount of illumination available to the southwest corner from the luminaire at the northwest corner of Cloverdale and Blanshard would be reduced by moving it the equivalent of two lanes further away.

**101**  I find that this had the effect of reducing the amount of overhead illumination available to the southwest corner from which Ms. Meghji stepped into the crosswalk. That reduction continued for some distance across Blanshard Street as Ms. Meghji approached the luminaire at the southeast corner.

**102**  No one involved in the design of the lighting at the intersection in 1983 gave evidence at the trial. The technician who did the design, Ms. Neimi, has since died, as has Mr. Baggett. Mr. Baggett, however, did not sign off on Ms. Neimi's design as the electrical engineer. Rather, his approval was indicated by Mr. Ferguson, a senior technician. Mr. Ferguson did not give evidence. That means there is no direct evidence of Mr. Ferguson's qualifications. Mr. Lohr and, perhaps, Mr. Casey understood that Mr. Ferguson had joined MoTH after a career in the Navy during which he had been trained in some aspects of lighting. This is a weak evidentiary base upon which to consider whether anyone gave any real consideration to the effect of the widening of Cloverdale Avenue on intersection lighting.

**103**  When the luminaire on the north-west corner was moved further from the south-west corner as part of the Cloverdale Avenue widening, it not only reduced the amount of light available for part of the south crosswalk, it affected the uniformity ratio in that area of the intersection.

**104**  The evidence of people at the scene of the accident shortly after the accident was generally consistent that the area of the crosswalk in the southwest quadrant of the intersection was dark. Sergeant Wright was sufficiently concerned about the lighting that he brought it to the attention of his administrative traffic committee. Constable Bland described the lighting in the southwest quadrant as dimmer. None of the drivers, Mr. Lee, Mr. Roberts or Mr. Konkle, saw Ms. Meghji before she was hit, nor did Mr. Roberts' passenger, his daughter.

**105**  Dr. Lewin's opinion was that uniformity ratio and the speed at which the human eye can adapt to changes in lighting is not as significant in poor lighting conditions as is the potential to show contrast between a pedestrian and the background, but his opinion on that matter as it applied to the circumstances of this accident is dependant, to some extent, on assumptions he made about the position of Mr. Lee at various points in the intersection, assumptions that related to a fluid situation in which Mr. Lee was moving into the intersection, perhaps slowing or stopping briefly before commencing his left turn, at the same time as Ms. Meghji was leaving the southwest island into the crosswalk, while Mr. Lee's attention was directed to oncoming traffic on Cloverdale Avenue and the crosswalk into which he was intending to turn. I also note his evidence that the wet road surface and the glare reflected from it substantially detracted from the significance of the uniformity ratio.

**106**  Dr. Lewin agreed that the lighting in the southwest quadrant, from which Ms. Meghji started into the crosswalk and at the edge of which she was struck, was dimmer than elsewhere in the intersection, and that the visibility situation generally was problematic given the conditions he understood existed at the time of the accident.

**107**  Dr. Lewin testified that one can never provide enough light within practical limits to make a darkly clothed pedestrian visible on a dark morning with water on the road and glare from other light sources. It seems to me that, short of seeking perfection in intersection lighting, there is a reasonable level of lighting that could and should be achieved, and that includes lighting within the accepted uniformity ratio of 3:1. Put another way, in a maritime climate where pedestrians can be expected to be walking in full dark and in the rain, it is reasonable to avoid the design or construction of overhead lighting that falls below accepted standards including uniformity ratio.

**108**  I conclude that MoTH breached the duty of care it owed to Ms. Meghji when, in 1983, it left the luminaires at the northwest and southeast corners of the widened intersection of Cloverdale Avenue and Blanshard Street. MoTH's failure to consider the effect of moving the luminaire in the north-west corner farther from the south-west corner and crosswalk area on the light available to the south crosswalk and on the uniformity ratio in that portion of the intersection, or its failure to consider whether there were reasonably achievable ways to compensate for the reduction in available light, breached the duty of care MoTH owed to Ms. Meghji and contributed to her injury.

**109**  I conclude that the breaches of duty on the part of both Mr. Lee and MoTH caused or contributed to Ms. Meghji's injuries and losses.

**Contributory *Negligence* of the Plaintiff**

**110**  Both defendants, while denying their own liability, plead in the alternative that any injury, loss or damage suffered by the plaintiff was caused or contributed to by her own ***negligence***. MoTH largely left the argument on contributory ***negligence*** to the defendant Lee.

**111**  The allegations against the plaintiff are that she entered the crosswalk against a "Don't Walk" signal, thus depriving herself of the right-of-way; that she wore dark clothing into an intersection she knew was dimly lit, in poor visibility conditions; and that she failed to keep a proper lookout while crossing Blanshard Street.

**112**  The defendant Lee says that the starting point in assessing Ms. Meghji's liability is the determination of which party had the right-of-way, citing *Hmaied,* where the court says at para. 22:

22 When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that other highway users will obey the rules of the road: *Enright v. Marwick*, [*2004 BCCA 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2JK-00000-00&context=) at para. 22. In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way: *Enright, supra* at para. 35; *Ibaraki v. Bamford*, [*[1996] B.C.J. No. 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M397-00000-00&context=) at para. 12-13.

**113**  If, by this, the defendant Lee intends to suggest that the determination of right-of-way is the full answer to a liability question, the argument overlooks the paragraph that follows in *Hmaied:*

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=).

**114**  From this, I conclude that, while a statutory right-of-way is an important consideration, and, depending upon the circumstances, may be the most important consideration, it remains but a factor to be considered when assessing liability.

**115**  Sections 127 and 132 of the *Motor Vehicle Act* deal with the respective obligations of driver and pedestrian in an intersection such as Blanshard and Cloverdale. Section 127 reads:

1. When a green light alone is exhibited at an intersection by a traffic control signal,
2. the driver of a vehicle facing the green light
3. may cause the vehicle to proceed straight through the intersection, or to turn left or right, subject to a sign or signal prohibiting a left or right turn, or both, or designating the turning movement permitted,
4. must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited, and
5. ...
6. a pedestrian facing the green light may proceed across the roadway in a marked or unmarked crosswalk, subject to special pedestrian traffic control signals directing him or her otherwise, and has the right of way for that purpose over all vehicles.

Section 132 reads:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 132 | (1) |  | When the word "walk" or an outline of a walking person is exhibited at an intersection by a pedestrian traffic control signal, a pedestrian may proceed across the roadway in the direction of the signal in a marked or unmarked crosswalk and has the right of way over all vehicles in the intersection or any adjacent crosswalk. |  |

1. ...
2. When the word "wait", the words "don't walk" or an outline of a raised hand are exhibited at an intersection or at a place other than an intersection by a pedestrian traffic control signal,
3. a pedestrian must not enter the roadway, and
4. a pedestrian proceeding across the roadway and facing the word "wait", the words "don't walk", or an outline of a raised hand exhibited after he or she entered the roadway
5. must proceed to the sidewalk as quickly as possible, and
6. has the right of way for that purpose over all vehicles.

**116**  The defendant Lee also points to s. 179(2) of the *Motor Vehicle Act* which reads:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 179 | (2) |  | 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. |  |

**117**  Ms. Meghji testified that when she entered the crosswalk, it was as a result of having pushed the pedestrian signal button and waited for a "walk" signal. The defendants argue that Ms. Meghji's recollection at trial, some six years after the accident, should be viewed with some scepticism as it is an island of clear memory in a sea of otherwise poor recollection on her part, and that it conflicts, to some extent, with statements Ms. Meghji made at the time of the accident, including to the attending police officers and, within weeks, to her lawyer.

**118**  Constable Bland testified that, when he attended the scene of the accident, Ms. Meghji appeared to be in quite a bit of pain but was able to speak in a matter-of-fact manner to ambulance attendants and to him and that, in conversation with him, Ms. Meghji was clear and showed no apparent confusion or hesitation. Constable Bland said that Ms. Meghji told him she had complained about that particular intersection in the past. More to the point, Cst. Bland asked Ms. Meghji if the pedestrian light was flashing and Ms. Meghji told him she thought it was and that she had the right of way. He says he asked her if she had the walk signal and said, "I think so" and that he noted that response in his notebook at the time. The precise contents of this conversation were not put to the plaintiff in cross-examination. That may be because her evidence was fairly consistently that, after the impact, she had only a vague and patchy recollection of events and that she did not recall speaking to a police officer at the scene or in the hospital.

**119**  The pedestrian signal sequence starts with a permissive or "Walk" signal evidenced by a white silhouette of a walking person for seven seconds, followed by 21 seconds of flashing "Don't Walk" symbol, followed by a solid "Don't Walk" signal. It is not clear whether Ms. Meghji's uncertainty was related to the flashing "Don't Walk", or a solid permissive white walking symbol. Her response to Cst. Bland's question, therefore, can be consistent with the impact having occurred at about or shortly after the change in the pedestrian light sequence from the solid permissive "Walk" to the flashing "Don't Walk" which is meant to remind pedestrians to move quickly out of the intersection.

**120**  Ms. Meghji signed a written statement on February 20, 2003. That statement apparently was produced as a result of an interview conducted by an associate from her lawyer's office. That resulted in a typed statement which was later signed by Ms. Meghji and witnessed by her husband. The statement describes Ms. Meghji's habit of pressing the pedestrian "Walk" button and waiting to see if there is a "Walk" or "Don't Walk" signal before crossing Blanshard Street, but it does not specifically state that that is what she did on the day of the accident.

**121**  Ms. Meghji said, in cross-examination, that she was still heavily medicated at the time of this statement and, in any event, her interpretation of the statement is that, by describing her habit, she was in effect saying that is what she did on the day of the accident.

**122**  This level of detail in the analysis is necessary in a case where, as in this one, a party whose interest clearly is affected by the outcome, has the only direct evidence on a material point. See *Faryna v. Chorny* [*(1951), 4 W.W.R. (N.S.) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) at 174 (B.C.C.A.); *Johnson v. Bugera*, [*1999 BCCA 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-225T-00000-00&context=) at paras. 33 and 34.

**123**  The defendants rely substantially on the evidence of Mr. Konkle, who was stopped at the stop line southbound on Blanshard Street in the lane closest to the centre median. That put him directly across the intersection from Ms. Meghji at the point of impact. Mr. Konkle, having stopped for a red light at the intersection, and knowing that he had some time to wait before a green signal, stopped paying attention to the intersection before him. His attention was drawn back to the intersection, he said, by a flash of green in his peripheral vision, which he took to be the change of the light facing him from red to green. Mr. Konkle said he looked up and saw Mr. Lee's vehicle just coming to a stop across the intersection. Mr. Konkle's evidence, if accepted, would put the impact at the change of the light for Blanshard Street traffic from red to green, and, by inference, put Ms. Meghji less than half way across the intersection at that time. All of this would mean that Ms. Meghji must necessarily have stepped into the crosswalk at the southwest corner against a "Don't Walk" signal, either flashing or solid.

**124**  As part of this argument, the defendant Lee challenges the evidence of two other people stopped at the stop line southbound on Blanshard Street, Peter Roberts and his daughter, Selena. They each testified about stopping at the intersection because of a red light, and Selena Roberts estimated the time that elapsed before she saw the impact between Mr. Lee and Ms. Meghji across the intersection. Mr. Roberts also estimated the time he was stopped before his daughter drew his attention to the accident.

**125**  Counsel for the defendant Lee criticises Mr. Roberts' estimates of time lapse on the basis that the estimates changed from time to time, perhaps in response to information about the evidence of other witnesses. Counsel dismisses Selena Roberts' evidence as well-intentioned but mistaken.

**126**  Because neither of the Roberts' were able to say when the light for southbound Blanshard Street traffic changed to red in relation to when they came to a stop, counsel argues that their evidence is at best unreliable and that Mr. Konkle's evidence should be preferred.

**127**  Mr. Konkle's evidence is somewhat inconsistent with the evidence of Mr. Lee, who testified that, when he commenced his left turn, he believed that the light for east-west traffic on Cloverdale Avenue had been green long enough that it was about to turn amber. That suggests that Mr. Lee believed the light facing him to be green when he started his left turn, and on that evidence, unless it took Mr. Lee six seconds, or thereabouts, to go from roughly the middle of the intersection to the crosswalk where he struck Ms. Meghji, his timing and Mr. Konkle's timing do not correspond.

**128**  The admitted evidence from the Ministry of Transportation electrical branch with respect to the signal timing at the intersection indicates that, at the end of the green signal for Cloverdale Avenue traffic, there is a yellow signal for 4.5 seconds, followed by a red signal for 1.5 seconds before the Blanshard Street signal changes to green.

**129**  Given that Mr. Konkle described his level of attention to the intersection before seeing green as "zoned out", I place little weight on his recollection.

**130**  Ms. Meghji testified that she started into the crosswalk on a permissive walk signal. After considering all of the evidence surrounding that point, and viewing Ms. Meghji's evidence on the point with some scepticism, I accept Ms. Meghji's evidence as to the state of the walk signal when she entered the crosswalk. In any event, I would have concluded that the defendants had failed to satisfy the burden upon them of establishing that Ms. Meghji failed to take reasonable care for her own safety. Each defendant's plea of contributory ***negligence*** is dismissed.

**131**  Mr. Lee's ***negligence*** is greater than that of MoTH for a number of reasons, not the least of which is that he was in a position to note the poor lighting in the area into which he was turning, which he described as a "dark hole". He said he was partially blinded when he glanced in the direction of the crosswalk, where he says the brightness met darkness. I also take into account Mr. Lee's knowledge of his own condition and the condition of his vehicle at the time of the accident.

**132**  I apportion liability for the accident 90% to Mr. Lee, 10% to MoTH.

**Injuries and Treatment**

**133**  Ms. Meghji was born in Tanzania November 8, 1969. She was 34 when the accident occurred, 39 when the trial started, and is now 41 years old.

**134**  Mr. Lee struck Ms. Meghji on her left side. That caused a significant fracture to Ms. Meghji's left upper arm, a less significant fracture just below and into her left knee and an injury to her left ankle, all of which required immediate medical intervention. There were also the soft tissue injuries that would reasonably be expected to accompany such trauma.

**135**  Within a day of the accident, Ms. Meghji had surgery to her left upper arm that involved the insertion of a rod that was fixed by screws just below her shoulder and just above her left elbow. She also had a screw placed into her left ankle.

**136**  The attending surgeon, Dr. Zarzour, has not provided any written opinion. Counsel informed the court that Dr. Zarzour refused to provide a written opinion and was not willing to testify, even if counsel were able to overcome an inability to provide advance notice of what he might say.

**137**  The plaintiff has testified that in May 2003, she had the screws removed from her left ankle and from her left shoulder. The plan was to also remove the screw from her left elbow but infection was found and that was left until July 2003, when it was removed. Dr. Zarzour did these follow-up surgeries as well.

**138**  These physical injuries have resulted in a reduction in the range of motion of Ms. Meghji's left shoulder and pain in the shoulder; Ms. Meghji has some altered sensation in her left hand; Ms. Meghji limps on her left side, which is largely attributable to left knee pain.

**139**  In October 2003, Ms. Meghji saw Dr. Landells, an orthopaedic surgeon, and Dr. MacKean, a physiatrist, both on referral from her lawyer. Dr. Landells' opinion was that Ms. Meghji's residual stiffness and chronic pain in her left shoulder would continue and that there was a possibility of progressive degenerative changes in her left knee. Dr. MacKean felt there was an increased risk of post-traumatic osteoarthritis in Ms. Meghji's left knee, possibly to occur in the next five to ten years, and that her left shoulder stiffness and weakness were unlikely to recover fully.

**140**  Ms. Meghji had started physiotherapy at home, then in March 2003, started therapy with Ms. Cuttiford at the Victoria Exercise Rehabilitation Centre.

**141**  In May 2003, Ms. Meghji began to see Penny Hobson-Underwood, a psychologist. Ms. Meghji says that she saw Ms. Hobson-Underwood because of problems with concentration and low mood.

**142**  While the parties did not agree on the long-term effects of Ms. Meghji's physical injuries, the principal issue with respect to the plaintiff's injuries, and the one that occupied the most time at trial, concerned whether the plaintiff proved that she suffered a mild traumatic brain injury in the accident.

**143**  The bases on which the neuropsychologists disagreed have been explored in detail which, at times seemed to approach the arcane. The neuropsychological debate is doubtless important to the issue of brain injury, as is dissection of the evidence of those attending the scene of the accident and responsible for investigating the accident or transporting Ms. Meghji to hospital.

**144**  There are, however, cases where the necessary findings of fact on something as subtle as a mild brain injury can be assisted by credible evidence of witnesses who can present a clear picture of a plaintiff before and after an event that is alleged to have caused the injury. This is one of those cases where any uncertainty left by the competing and contrasting medical and neuropsychological opinions is more than adequately resolved by the evidence of those who have known Ms. Meghji in the past and are in a position to compare and contrast their impressions of her before and after the accident.

**Lay Witness Evidence of Ms. Meghji Before and After the Accident**

**145**  Dr. Ali is now a chiropractor practising in southern Ontario. He first met Ms. Meghji when he was 16 and she was 15, and both were on a summer student exchange in the Province of Quebec. They became friends on that trip and when Ms. Meghji transferred to the high school attended by Dr. Ali, their friendship solidified.

**146**  For a year or so, Ms. Meghji regularly visited Dr. Ali's house and became friendly with his family. After that year, Dr. Ali went off to university, and his contact with Ms. Meghji dropped in frequency to, perhaps, monthly. When Dr. Ali finished his undergraduate degree and took up work in Toronto, he saw Ms. Meghji more frequently. Then, when both were accepted into an international exchange program, he saw her weekly while they met with others to plan the fundraising they had to do in order to pay for their international travel.

**147**  Ms. Meghji and Dr. Ali travelled on the international exchange program apparently in 1994, although to separate places and at different times. When Dr. Ali returned from the exchange program, he entered chiropractic college and had little time to socialize, thus did not see Ms. Meghji much between 1999 and shortly after the accident, in 2003.

**148**  Dr. Ali described Ms. Meghji before the accident as a hard-working, dedicated person with a great heart, a great soul and great ambition. He said that, while they were both involved in the international exchange planning process, Ms. Meghji was a leader, one who made sure things got done and organized others to get their parts done.

**149**  Dr. Ali heard about Ms. Meghji's accident in 2003 from her sister, Nimet. He saw Ms. Meghji when she moved back to Toronto in 2003 and Ms. Meghji and her husband Mr. Kuoni visited him at Dr. Ali's home.

**150**  Dr. Ali testified that he was shocked when he first saw Ms. Meghji in 2003. He described her as frail, weak, moving very slowly, with limitations to her arm and shoulder, and as well, he said she was soft spoken, lacking fire, and did not appear motivated. He said the vitality was not there anymore; there was no spark in her eyes. Dr. Ali said Ms. Meghji did not talk about her problems.

**151**  Ms. Meghji asked Dr. Ali if there was any employment available at the clinic where he worked. He spoke to the owner of the clinic and an arrangement was made to hire Ms. Meghji to work part time as a receptionist/secretary on the same shifts Dr. Ali was working, two days a week in the afternoons and evenings, five to six hours per shift.

**152**  Dr. Ali testified that Ms. Meghji's job was to book appointments, take phone calls, show patients to treatment rooms, pull the patients' files and deliver them with the patient, process payments after each treatment and clean the treatment rooms. This involved personal contact with the patients, making entries into the computer for appointments and billing and the like, and as well, balancing a $100 petty cash float at the end of the day. Dr. Ali said that the billing process involved pulling up the patient name on the computer, entering a billing code, identifying the treating chiropractor, and entering payment, which might involve either a cash transaction or a credit or debit card charge.

**153**  Dr. Ali described this as a Grade 10 type of job, meaning it was well within the capacity of a grade 10 graduate, not requiring any technical ability or any particular computer skills. Ms. Meghji was trained in this job by the other receptionist, by Dr. Ali, and by the clinic owner, Dr. Ismael. The training lasted three days, which is the usual length of training for this level of job in that clinic.

**154**  Dr. Ali described Ms. Meghji's performance in this job as "horrible". He said it was a disaster in many ways: Ms. Meghji could not remember things, made a lot of mistakes and was unable to multitask from the outset. She would forget to pull the patients' files after having been asked to do so. She would greet patients and forget to take them to the treatment rooms and Dr. Ali would find patients in the waiting room instead of where he expected them to be.

**155**  Dr. Ali said that Ms. Meghji made mistakes every day in billings: she would enter the wrong code for the service provided or would forget to put the entry in completely. Dr. Ali found that he was having to stay behind just about every time Ms. Meghji worked, to spend an hour to an hour and a half correcting her mistakes, something he had never had to do with other receptionists.

**156**  Dr. Ali testified that after two or three shifts like this, he spoke to Ms. Meghji about her performance and she got angry with him, denied that he had asked her to pull files as he complained, and threw her keys at him. Dr. Ali was shocked by this because she had ever acted this way before.

**157**  Dr. Ali described Ms. Meghji's problems with multitasking by example: if a patient came in and the phone rang, she would put the telephone caller on hold in order to take a patient to the treatment room but then forget that she had someone on hold. Other times, she would forget to finalize a patient visit by billing the patient and a patient might wait in the waiting room for 15 to 20 minutes.

**158**  Ms. Meghji started work in November 2003 and by January 16, 2004, things had become worse, not better. Dr. Ali felt badly and, because of his friendship with Ms. Meghji, was reluctant to be the one to fire her. He spoke with the clinic owner, Dr. Ismael, and asked Dr. Ismael to work with Ms. Meghji for a time in order to see if Dr. Ismael's impressions corresponded with his own. Dr. Ismael worked with Ms. Meghji for a couple of shifts, concluded that Ms. Meghji could not continue in her employment and informed Ms. Meghji that her employment was terminated.

**159**  While it is not clear whether Ms. Meghji was fired or simply not hired during or at the end of a probation period, the result is the same.

**160**  Dr. Ali said that he could tell by watching Ms. Meghji that she was in pain, although she never complained about it. He said that other than the emotional outburst when Ms. Meghji threw her keys at him, the only other sign of emotional problems was that she appeared flustered to him.

**161**  Mr. Brozak testified that he met Ms. Meghji in 1990 or 1991 when both were students at York University. They started as friends, then became romantically involved about three months later. Once they became romantically involved, he saw Ms. Meghji an average of four times per week. For about a year and a half Mr. Brozak and Ms. Meghji worked in the same department at St. Joseph's Hospital in Toronto.

**162**  Mr. Brozak and Ms. Meghji remained romantically involved for four or five years and in that time, lived together for about three months. Their relationship ended December 31, 1995, when Ms. Meghji, who had spent about 11 months in India over 1994 and 1995, made it clear that she wanted their relationship to become permanent and Mr. Brozak had different ideas.

**163**  Mr. Brozak testified that the dissolution of their relationship was amicable and that they remained good friends after December 31, 1995, although they saw less of each other as time passed. Mr. Brozak said that part of the reason their relationship continued after they stopped being a couple was that Ms. Meghji had formed a fairly strong relationship with Mr. Brozak's mother, and that relationship continued.

**164**  Mr. Brozak and Ms. Meghji continued to stay in touch, sometimes by telephone and sometimes by email, communicating an average of once or twice per month, between 1995 and the accident.

**165**  Mr. Brozak learned of the accident from his mother while he was in the United States. Mr. Brozak was fairly sure that he spoke to Ms. Meghji after the accident and he had the impression she did not like to talk about it.

**166**  Mr. Brozak first saw Ms. Meghji after the accident in February 2004 and saw her about eight to ten times from then until Ms. Meghji moved back to Victoria, which he thought was in 2005. The first couple of times he saw Ms. Meghji it was at her sister Nimet's chiropractic clinic where he thought Ms. Meghji was "sort of helping out" and, on those occasions, he spent five to ten minutes talking with Ms. Meghji. Later that year, Mr. Brozak moved in with his mother and said that he would often come home and find Ms. Meghji visiting with his mother. On some of those occasions he and Ms. Meghji would go for a walk.

**167**  After Ms. Meghji and Mr. Kuoni returned to Victoria, Mr. Brozak's contact with Ms. Meghji gradually lessened. In the last six months prior to his evidence at trial, Mr. Brozak said there were maybe two email or telephone contacts.

**168**  Mr. Brozak described Ms. Meghji when they were students together as a lot of fun, very sharp, sexy, and physically active. They would go camping five or six the weekends during the summer, and he said she had a good sense of humour, was lively, and loved to dance. Mr. Brozak said that once Ms. Meghji got into the environmental studies program at York University, she began to thrive.

**169**  Mr. Brozak was interested in esoteric Buddhism, a topic he said was not for dilettantes. He described Ms. Meghji, after having read one key book on the subject, as appearing to have grasped the concepts. In all the time that he knew Ms. Meghji before the accident, he never had occasion to question her level of intellectual functioning and said that he never would have stayed with her if she had not been intelligent.

**170**  By contrast, Mr. Brozak said that when he saw Ms. Meghji after the accident, she was like an old lady in the sense that she was a different person, she did not seem as excited about things, instead she seemed kind of resigned, and did not have the same level of energy or enthusiasm.

**171**  While Ms. Meghji showed him the scars on her arm, he said she seemed to guard herself from discussing her injuries. He described her as vacuous, by which he meant spacey, or not really getting what was being discussed. He said she had always seemed really sharp to him before the accident and now she is an airhead, or, at least, seems that way to him.

**172**  Mr. Brozak said Ms. Meghji no longer remembers when his birthday is. She used to call him on his birthday every year, now she calls him the first week of April, although his birthday is April 14. He says that in conversation, he will explain something to her and she will carry on in conversation as if she has not heard what he has said. Ms. Meghji seems to meander a bit conversationally, and he no longer enjoys talking to her the way he used to. He describes talking to Ms. Meghji on the telephone as frustrating.

**173**  Evelyn Chauncey is a retired schoolteacher who has been involved in Vipassana Meditation since 1983. She met Ms. Meghji and Mr. Kuoni in 1999 when they moved to Victoria and they became friends. From late 1999 onward, Ms. Meghji and Mr. Kuoni volunteered their condominium unit for small group meditations on a monthly basis.

**174**  Ms. Chauncey says others who have hosted meditation sessions have made tea for attendees, and perhaps one of those attending might bring some cookies. Ms. Meghji was different, however, in that she would make Indian treats and try to engage the attendees, to encourage socializing after the meditation event.

**175**  Ms. Chauncey also described Ms. Meghji's involvement in organizing a larger group meditation for 80 people in 1999 where, over 10 days, Ms. Meghji was involved with planning, ordering food, setting up facilities, organizing the kitchen, and being the manager, which involved daily contact with 40 female students.

**176**  Ms. Chauncey described the work done by Ms. Meghji and Mr. Kuoni in taking over and organizing the financial affairs of the Vipassana organization.

**177**  Ms. Chauncey says that before the accident, Ms. Meghji was a high energy, organized and efficient person with well above-average organizational and management abilities. She said that Ms. Meghji could be relied upon to follow through and, when given a job, she could be confident that Ms. Meghji would get it done. She noted no problems with Ms. Meghji's mental processing or cognition and said that Ms. Meghji was bright, quick to understand, and gave the impression of being a very intelligent woman.

**178**  Ms. Chauncey saw Ms. Meghji after the accident and had the impression that Ms. Meghji's face was bruised. In the first months after the accident, she saw Ms. Meghji three or four times and did not think Ms. Meghji had very much stamina.

**179**  When Ms. Meghji returned to Victoria in September 2003 for arthroscopic examination of her knee, she stayed with Ms. Chauncey in a guest cottage on Ms. Chauncey's property. Ms. Meghji's mother accompanied her and Ms. Chauncey noted that Ms. Meghji's mother seemed to be doing everything for Ms. Meghji, quite unlike Ms. Meghji's pre-accident independence. Ms. Chauncey also noticed that Ms. Meghji had to ask how to operate the washing machine, and after Ms. Chauncey explained it to her, Ms. Meghji did not appear to understand, and called Ms. Chauncey again for instructions on how to operate the machine.

**180**  Ms. Chauncey also described how Ms. Meghji tried to do a simple task of installing a liner in some cupboards. She said that instead of cutting a single piece to size, Ms. Meghji ended up doing a number of small patchwork pieces. Ms. Chauncey observed Ms. Meghji trying to assist in registering people who wished to sign up for meditation courses and concluded that Ms. Meghji was willing, but lacked the capacity, to perform that relatively simple task properly.

**181**  Since Ms. Meghji and Mr. Kuoni returned to Victoria in 2006, Ms. Chauncey has seen Ms. Meghji three or four times a year. Ms. Chauncey described meetings that they both attended in April and June 2009 in the meeting room at Ms. Meghji's condominium building. Ms. Meghji brought a trolley of food but Mr. Kuoni had to lift things out and Ms. Chauncey noted that Ms. Meghji used only her right arm to push the trolley. Ms. Chauncey said Ms. Meghji was passive during the meetings, asked no questions and seemed to be looking off into space. This is unlike what Ms. Chauncey would have expected before the accident when she would have thought Ms. Meghji would participate, ask questions, give suggestions and be otherwise very engaged. Ms. Chauncey also described an earlier meeting in October 2006 that involved rezoning land, again having to do with the Vipassana Foundation. On that occasion, Ms. Meghji was very passive, looked very tired, and at some points seemed puzzled at the conversation.

**182**  Finally, Ms. Chauncey described having volunteered, along with Ms. Meghji, to help a mutual friend who was a dealer in gems, to sort his inventory for a gem show. It was a simple job. Each person got a bundle of gems and transferred them to smaller containers, labelling them and writing down the cost per carat. Ms. Chauncey said Ms. Meghji would start to write information, then look at what Ms. Chauncey was doing, and Ms. Chauncey would tell her to write the price as the next step. Ms. Meghji would then go elsewhere to rest for a bit and when she came back, would require another explanation of how to accomplish the simple task.

**183**  Ms. Chauncey said that she has not had long conversations with Ms. Meghji since the accident because Ms. Meghji fades. When Ms. Meghji told Ms. Chauncey that she was going to apply for a job in a jewellery store, Ms. Chauncey did not think that that was one of Ms. Meghji's better ideas.

**184**  Mr. Kuoni, who as mentioned is Ms. Meghji's husband, was born and raised in Switzerland. He came to Canada on behalf of his Swiss employer and took up the position of president of North American operations. In 1994, Mr. Kuoni's employer reorganized, and wanted him to spend more time in Europe. Mr. Kuoni decided to leave his employment in order to stay in Canada and, after considering the matter, concluded that if he were to live frugally, he could afford to retire. At about the same time, Mr. Kuoni had developed an interest in the Vipassana meditation, and his increasing involvement in that discipline helped him to make up his mind about retirement.

**185**  In about 1994, Mr. Kuoni took a course in Chinese medicine in Toronto, and at the same time, Ms. Meghji was studying Ayurvedic medicine at the same school. The two had some classes together and developed a friendship which then developed into a relationship. Mr. Kuoni, who was in his early 40s, was attracted by Ms. Meghji's energy. He says that he made it clear to Ms. Meghji that, while he had enough to take care of his simple needs, he could not be relied upon to support her.

**186**  After Ms. Meghji graduated university in 1996, the two travelled to India where Mr. Kuoni pursued meditation and Ms. Meghji, Ayurvedic medicine.

**187**  Mr. Kuoni described Ms. Meghji before the accident as very cheery and positive, as well as ambitious. After the two moved to Victoria, he said they lived simply, with Ms. Meghji pursuing courses at the University of Victoria with great success. At home, Ms. Meghji did the cooking and they shared housework.

**188**  Mr. Kuoni thought Ms. Meghji was a very bright young woman before the accident. He pointed to her successes at university.

**189**  Immediately after the accident, Ms. Meghji's physical injuries were most noticeable, and it was only as time went on that Mr. Kuoni started to notice things that troubled him. He said, for example, that Ms. Meghji would leave in the morning and then return because she had forgotten her house key. Or if she were heating water to make tea, she would forget to switch off the stove. Mr. Kuoni said Ms. Meghji was not so alert and attentive and that everything took longer for her. Although he was concerned, Mr. Kuoni did not make a big fuss about his observations. Mr. Kuoni felt that Ms. Meghji was not as focussed, alert or attentive, that she was not as sharp as she had been before the accident.

**190**  As time went on, Mr. Kuoni realized that he was doing most of the cooking because, even after Ms. Meghji physically recovered enough to cook, she sometimes forgot to switch off the stove. After Ms. Meghji ruined two pots, he thought it was dangerous to let her cook.

**191**  Mr. Kuoni described Ms. Meghji as "devastated" after she lost her employment at Dr. Ali's clinic in Toronto. He said that she was shocked and it was after that he learned she had been having some suicidal thoughts. Mr. Kuoni said Ms. Meghji slept a lot and, to him, appeared to have fallen apart.

**192**  Mr. Kuoni was involved in the operation of Ms. Meghji's sister's clinic, and provided some counselling there. He said that occasionally Ms. Meghji would come to the clinic and try to help out. Mr. Kuoni said this was more in 2005 than 2004, and he was pleased because he thought it would be good for Ms. Meghji to get out of their home, to socialize, and to have something to do.

**193**  According to Mr. Kuoni, Ms. Meghji made mistakes when she tried to help at the clinic, such as booking the wrong room for a particular treatment, introducing him to clients he had met before, or booking appointments with too much time in between. Mr. Kuoni said that Ms. Meghji did not appear able to take a telephone call and at the same time ensure that a treatment room would be prepared for the next client. Mr. Kuoni testified that Ms. Meghji's attempts to do some computer bookkeeping were done so poorly that he had to set up a connection to the office accounting system from their condominium so that he could correct her mistakes from home. Even this was made more difficult because, although Ms. Meghji had been told not to turn off the office computers at the end of the day so that Mr. Kuoni could access them from home, she would forget and turn them off.

**194**  Mr. Kuoni said that at first, he would talk to Ms. Meghji about these problems, but he lost hope after a while. Ms. Meghji appeared frustrated that she could not cope with these simple tasks and occasionally became angry or upset with him. He says, as well, that Ms. Meghji's sister, Nimet, was trying to establish her new business and the kind of mistakes Ms. Meghji made were resented because of their impact on Nimet's profits.

**195**  Generally, Mr. Kuoni says that Ms. Meghji is now more or less stable unless there is something he described as "a big storm in life", by which he means some sort of challenge. In such an event, he is not sure what effect it will have on Ms. Meghji and he continues to be concerned about the possibility of suicide. She now has good days and bad days, he says, so that on a good day, Ms. Meghji spends time on a small garden plot near their condominium, or on the computer or she will walk with him to the park. On a bad day, Mr. Kuoni will have trouble getting Ms. Meghji up in the morning, she will take naps during the day, and mostly is unwilling to go out for a walk.

**196**  Mr. Kuoni says that, when Ms. Meghji goes to her part-time job at the jewellery store, she comes home tired to the point of exhaustion, without the energy to make a warm meal. Over the Christmas sales period, she worked a full day from time to time and afterwards was so tired for the rest of that day and the day after that she was not much interested in anything but rest.

**197**  Ms. Wyeth, a senior instructor in mathematics at the University of Victoria, remembered Ms. Meghji, who had been her student in a mathematics course in 2000-2001. Ms. Wyeth has 60 to 100 students in that course each year and testified that she does not remember all of them. She recalled Ms. Meghji as an extremely good student who got an A+ in what Ms. Wyeth described as a fairly heavy course. Of the 60 to 100 students who take that course each year, Ms. Wyeth estimates that two or three, and no more than nine students may get an A+. Part of the Math 120 course involved group assignments and Ms. Wyeth recalled that Ms. Meghji was a leader in groups in which she participated.

**198**  Ms. Wyeth was sufficiently impressed by Ms. Meghji that two years after Ms. Meghji took the mathematics course, Ms. Wyeth agreed to take her on as a teaching assistant for that same course, in spite of Ms. Meghji being somewhat under-qualified academically. Ms. Wyeth thought Ms. Meghji would do a good job as a teaching assistant, which involved marking student assignments, and said that she did.

**199**  Mr. Frewer, the sales and marketing manager for Shaw Cable in Victoria, recalled that Ms. Meghji worked for minimum wage at a telemarketing job until the job ended when the department was moved to the interior of British Columbia. He said that Ms. Meghji was then hired as a technical service representative, to assist customers having problems with their internet service. That required that Ms. Meghji have a knowledge of computer software and hardware, as to the latter, Mr. Frewer said Ms. Meghji had to know how to take a computer apart and put it back together again. Ms. Meghji was expected to be able to deal with technical problems experienced by a range of users, from the technically ignorant to the sophisticated.

**200**  While working in this capacity, Ms. Meghji was seconded to a project in which Mr. Frewer was involved. The project involved trying to establish a way to track reasons customers discontinued their service with Shaw. Mr. Frewer said that Ms. Meghji was a joy to work with in that secondment, she was creative and she listened carefully at meetings.

**201**  When Ms. Meghji quit her job at Shaw around Christmas of 2001 in order to travel with Mr. Kuoni, Mr. Frewer said that ordinarily would have been a bar to any further employment with Shaw. He said somewhat exceptionally, Ms. Meghji was rehired into the technical service department when she returned to Victoria.

**202**  Mr. Frewer described Ms. Meghji overall as a very good employee, and said that it was somewhat unusual for an employee at her level to have been employed in so many positions. He described her as hard working, a quick learner with a positive work attitude and very bright. Mr. Frewer said emotionally Ms. Meghji impressed him as measured and calm.

**203**  Mr. Frewer noted that just before the accident, on January 13, 2003, Ms. Meghji applied to him for a job as a commercial sales representative. While he thought she was a reasonable candidate for that job, he also thought she lacked the hard edge that a sales representative ought to have and that the position would require half time on the road, travelling to commercial accounts on southern Vancouver Island. He thought that Ms. Meghji would be less likely to succeed at such a job than other jobs of a supervisory nature where he considered her skills were a better fit.

**204**  The commercial sales representative job pays between $45,000 and $70,000, depending upon commissions, whereas the supervisory positions now range between $60,000 and $80,000, and were perhaps seven per cent less in 2003. Mr. Frewer concluded by saying that, while he thought Ms. Meghji was a good candidate for a supervisory position, he did not think she was management material for Shaw.

**205**  Also relevant to the before and after picture of Ms. Meghji is the evidence of her current employer, Ms. Wysynski. Ms. Wysynski manages a retail jewellery outlet in a shopping centre in downtown Victoria. Ms. Meghji responded to a help wanted advertisement Ms. Wysynski posted on the internet and, during an interview, told Ms. Wysynski that she had some physical and mental problems arising out of a motor vehicle accident. Notwithstanding this, Ms. Wysynski hired Ms. Meghji on a three-month probationary basis.

**206**  Ms. Wysynski trained Ms. Meghji herself and said that Ms. Meghji took longer than others she has trained to learn about the product she was expected to sell. She said Ms. Meghji needed lots of repetition and instruction on matters such as the computer system in use at the store.

**207**  Ms. Wysynski said Ms. Meghji has obvious memory problems and requires frequent reminders on a variety of things, such as asking a customer whether they had been working with another sales representative. That is important because salespeople are paid partially on commission and hard feelings can result when one salesperson is perceived as poaching the customer of another.

**208**  Ms. Wysynski started Ms. Meghji between 15 and 20 hours per week, and then asked her to work more over the Christmas sales period, at which time she could see that Ms. Meghji became very fatigued, was not processing information as well, and was holding her arm and limping.

**209**  Ms. Wysynski described Ms. Meghji as keen to perform, a very loyal employee who tries very hard to remember to do the paperwork properly. There is a message book where what Ms. Meghji needs to do is written down, and Ms. Meghji has to go to that message book more frequently than other employees to review the list of things she needs to remember to do.

**210**  Ms. Wysynski is not sufficiently confident in Ms. Meghji that she would leave her alone in the store because she feels Ms. Meghji needs constant supervision. As an example, Ms. Wysynski says that Ms. Meghji will forget to lock the display cases and needs help to finish her work on time. Ms. Wysynski says Ms. Meghji is intelligent and mature and very hard working and eager to please, but a lot slower than other staff and that Ms. Meghji cannot multitask well, which creates a difficulty when Ms. Meghji will focus on one customer too long, leaving others untended.

**211**  Notwithstanding Ms. Meghji's difficulties and the additional supervision she requires, Ms. Wysynski would hire her again because she is personable, calm, intelligent and thoughtful and the customers she serves like her and return to the store.

**Medical and Psychological Opinions**

**212**  There are troubling gaps in the medical evidence, with very little in the way of medical opinion between the accident and the fall of 2003, when Ms. Meghji's counsel organized examinations by Dr. Landells and Dr. MacKean, and only the June 2004 report (and cross-examination at trial) of an occupational therapist, but nothing in the way of medical opinion beyond clinical records from Ms. Meghji's time in Toronto, between the middle of 2003 and early 2006.

**213**  Next, there is little evidence from what might be properly called treating physicians, with the bulk of medical and psychological opinion from experts selected and instructed by counsel for the plaintiff. To some extent, this has been necessitated by Dr. Zarzour's intransigence in refusing to provide a medical-legal opinion. I have not overlooked the evidence of Dr. Grimwood, about which I will have more to say later.

**214**  Where causation of injuries is in issue, and the bulk of the medical proof of a plaintiff's injuries is derived from experts retained and instructed by counsel, a trier of fact must spend more time evaluating the evidence in order to determine how much weight should be given to it. A physician who thoroughly examines a patient soon after an accident, and who regularly follows that patient with further examinations is in a better position to opine on causation than is a physician who examines months or even years after an accident. Evaluation of the expert opinion evidence is made more difficult in this case because each expert has been provided with masses of documentary material generated by the other experts, most of whom have been retained and instructed by counsel. A trier of fact must at least consider whether providing this much material is intended to influence each new expert's opinion, and evaluate each expert's opinion in order to determine whether the opinion is the product of the expert's independent examination and thought, or has been swayed by the opinions of others or their sheer volume, and, if so, to what extent.

**215**  At the time of her accident, Ms. Meghji did not have a family doctor in Victoria. She went to Dr. Grimwood on the recommendation of a woman unconnected with her lawyers. Dr. Grimwood was criticized in cross-examination for not having referred Ms. Meghji to the various specialists that he thought she might need to see. Dr. Grimwood's response was that, if he were to refer Ms. Meghji to a specialist, it might take up to 12 months for her to get in to see the specialist. He contrasted that to counsel's ability to get almost immediate access to a specialist on a medical-legal basis. I accept this implied criticism of the medical delivery system from Dr. Grimwood and merely note that it has led to greater difficulty in assigning the weight to be attached to the opinions of specialists selected by counsel.

**216**  Dr. Grimwood's report is dated March 11, 2006. There is remarkably little in it to indicate that any physical examination, as opposed to discussion with Ms. Meghji, took place prior to the report. There is some suggestion of an examination in Dr. Grimwood's observation of post-injury edema in the left arm, and reasonable range of motion in the shoulder. In his tenth numbered item on the second page of his report, Dr. Grimwood says:

Probable closed head injury with the problems of cognition, short term memory, depression, suicidal ideation, job loss, loss of self-esteem, and decreased concentration. Fatigue and loss of appetite also noted. *These symptoms were elicited by psychiatric review in February 2004.* Selina also demonstrated limitation in working memory, visual memory, verbal memory, visual processing speed, and heightened anxiety regarding work. She had been placed on Celexa 20 mg a day. [Emphasis added.]

**217**  No direct opinion was tendered that flowed from the above-mentioned psychiatric review in February 2004. The clinical records of Sunnybrook Hospital, which cover the period before and after February 2004, have been produced and are subject to a document agreement as part of Exhibit 20. Those records include two consultation reports from a psychiatrist, Dr. Kirsh.

**218**  The document agreement indicates that the hospital records are admissible for the following purposes:

1. Any observation of fact reported is admissible of proof of that fact;
2. That any treatment prescribed was, in fact, prescribed as recorded or noted;
3. Any statements made by a patient, or any record, notation, or chart entry of any statement made by a patient is admissible for the fact that was made, but not for the truth of that statement;
4. Any diagnosis or opinion, whether recorded in any note, chart, consultation report, referral, correspondence or other document is evidence of the fact that such diagnosis or opinion was made, but not for the truth of that diagnosis or opinion.

**219**  The document agreement therefore does not make admissible what Ms. Meghji told Dr. Kirsh in 2004 or 2006 to prove that her complaints or symptoms were real. It is not clear from Dr. Grimwood's March 2006 report whether he has elicited the same symptoms from Ms. Meghji, and is noting their consistency with complaints made to another doctor on an earlier occasion, or he is merely repeating what he has read in the material provided by Ms. Meghji's lawyer. If it is the former, the consistency would only be of some relevance if it were significant to Dr. Grimwood's opinion. If it is the latter, it is of no assistance to the court. Reading Dr. Grimwood's report, it seems more likely that he was simply passing on what Dr. Kirsh had said in a consultation letter.

**220**  Dr. Grimwood goes on to say that he has reviewed all the reports on this case, as well as physical and emotional findings of Ms. Meghji. He does not state what those physical and emotional findings are, nor does he list all of the reports that he has reviewed. The opinions set out in Dr. Grimwood's March 11, 2006, report are therefore of little value. In evidence at trial, Dr. Grimwood said that he could not imagine how there could not be some degree of brain injury arising from an accident such as Ms. Meghji's, where she was violently knocked down by a car. He acknowledged that complaints of cognitive problems did not arise until after Ms. Meghji moved to Toronto in 2003, but said that he is not surprised that there was nothing in the emergency or hospital records in the days immediately following the accident about the head injury because he thought the focus would have been on the more obvious traumatic injuries.

**221**  Dr. O'Breasail is a psychiatrist who saw Ms. Meghji for the first time in March 2006. He took an extensive history from her, which included her description of a period of altered consciousness at the scene of the accident, her assertion that she had a bump on the back of her head, and his understanding that she had no immediate complaints of cognitive difficulties. Notwithstanding that and a perfect Glasgow coma scale of 15, as recorded by the ambulance attendant at the scene, he accepts that Ms. Meghji suffered a mild traumatic brain injury. He says, however, it is difficult to state whether the cognitive difficulties Ms. Meghji has experienced were related to the mild traumatic brain injury or to his other diagnoses of chronic pain disorder and major depression.

**222**  Dr. O'Breasail saw Ms. Meghji again in October 2006 and noted that her depression and post-traumatic stress symptoms were improving. He saw her again in February 2007 and, in a rather more extensive report, reaffirms his opinion that Ms. Meghji suffers from a chronic pain disorder flowing from the injuries she suffered in the accident, that she continued to suffer depressive symptoms of a significant level, notwithstanding improvement in her depression since he first saw her, and that she likely suffered a blow to her head and had gone on to present with many of the features characteristic of a traumatic brain injury. Dr. O'Breasail points out there is considerable overlap in the symptoms of depression, pain and traumatic brain injury, all of which have a negative effect on cognition. In his last opinion dated April 2, 2009, Dr. O'Breasail confirms his opinion of chronic pain disorder, a major depressive disorder (improved), mild traumatic brain injury, and says that it is unlikely that there will be a major change in Ms. Meghji's condition in the future. He reaffirms that Ms. Meghji's cognitive difficulties are secondary to the mild traumatic brain injury and also the major depression and chronic pain.

**223**  The evidence of a blow to Ms. Meghji's head is based upon her assertion that a day or two after the accident, while still in hospital, she felt a bump on her forehead. Mr. Kuoni corroborated this in his evidence as having observed a bump on Ms. Meghji's forehead.

**224**  Both were cross-examined aggressively on these assertions, where it was established that Ms. Meghji was unsure whether she had felt the bump with the front of her hand or the back of her hand. There is no notation in the hospital records of any such indication of injury.

**225**  Dr. Youngash, the emergency physician who attended to Ms. Meghji immediately after the accident, testified. Understandably, he recalled nothing of Ms. Meghji's emergency admission, and his evidence was based upon his entries in the hospital records. He said that if there had been any swelling to Ms. Meghji's head, it would show to some degree 40 minutes after the impact. He interviewed Ms. Meghji on her admission and on the basis of her responses, noted no loss of consciousness. He examined Ms. Meghji's scalp and noted that it was not tender. He also noted that Ms. Meghji was alert. Based upon his questions to Ms. Meghji, he noted that she had no complaint of head or neck pain.

**226**  Dr. Youngash testified that if a patient reports symptoms of significant head injury or had signs of significant trauma, he would ordinarily order a CT scan. There is no reason not to order such a scan as cost is not a concern and CT scans are available 24 hours a day. Indications that would favour ordering a CT scan would include severe headache, significant amnesia before or after trauma, vomiting, confusion or altered level of consciousness. Dr. Youngash did not order a CT scan for Ms. Meghji.

**227**  Two neurologists provided reports and testified. Dr. Krieger examined Ms. Meghji at the request of her counsel in August 2006. He deferred reporting on his examination until February 2007 because he wanted to see what Dr. Malcolm, the neuropsychologist, and Dr. O'Breasail, the psychiatrist, would say following their examinations.

**228**  Dr. Kemble examined Ms. Meghji in March 2007 at the request of counsel for the defendant Lee.

**229**  Dr. Krieger's opinion is that Ms. Meghji had a closed head injury with associated brief loss of consciousness causing persistent and permanent mild traumatic brain injury with related permanent changes in cognition, behaviour, emotions, energy level and sexuality.

**230**  Dr. Kemble, on the other hand, said it was probable that Ms. Meghji did not suffer a significant closed head injury in the automobile accident, and that any ongoing cognitive difficulties are more likely due to psychological problems rather than organic brain damage and therefore Ms. Meghji's cognition could improve as her stress level reduces. Dr. Kemble said that there was no persuasive evidence that Ms. Meghji lost consciousness as a result of the accident, and that her reported memory problems immediately after the accident are as likely due to shock as anything else.

**231**  Both neurologists reviewed extensive reports and clinical records of other doctors or professionals before arriving at their opinions.

**232**  In determining what weight to give to the respective neurological opinions, I am less inclined to favour Dr. Krieger's opinion for the following reasons.

**233**  Dr. Krieger's overall presentation slipped over the line that divides objectivity from advocacy in my view. As an example, on page 7 of his report, he refers to the report of Ms. Edwards, the occupational therapist, in this way:

The listing of residual symptoms on page nine are accurate, as are the objective findings of pages 18-27. I have reviewed the recommendations on pages 32-50 and agree with them.

**234**  Whether or not the list of complaints reported in Ms. Edwards' report are the same as reported to Dr. Krieger, the objective findings set out in the 10 pages he endorses are far more detailed than anything described in his report or in his testimony insofar as the type of examination he conducted. Dr. Krieger's prognosis continues the endorsement, without giving any appearance of critical thought:

The Neurological Diagnosis listed above are all permanent and are not expected to improve. I agree with the patient's primary physician who has indicated that Selina Meghji will not ever be able to resume gainful employment. The quality of life this woman, and her husband, will experience in the future has been negatively influenced by this injury. All long term recommendations found in the recent Occupational Therapy are necessary to help this woman cope with the long term effects of this injury.

**235**  I therefore approach Dr. Krieger's opinion with caution.

**236**  Dr. Kemble's opinion is more balanced, it seems to me, and while he ultimately concludes that he does not believe there was a closed head injury, he admits of the difficulty in teasing out whether the symptoms presented by Ms. Meghji are attributable to head injury or to anxiety, stress and other psychological problems.

**237**  Whereas Dr. Krieger conducted a mental status examination and found some problems with Ms. Meghji's ability to perform simple mathematical tasks and to remember three objects over five minutes, Dr. Kemble decided not to conduct a similar examination because Ms. Meghji had just been extensively evaluated by Dr. Malcolm, the neuropsychologist, not long before Dr. Kemble's examination and, as Dr. Kemble phrased it:

Neuropsychometric testing is far more detailed than any testing, which a Neurologist could perform.

**238**  Ms. Meghji saw a third neurologist, Dr. Cameron, in October 2003. Counsel asserted litigation privilege over any results of that attendance, and no report or any other evidence flowing from Dr. Cameron's examination was produced at trial.

**239**  Ms. Meghji testified that she saw Dr. Cameron because of her headaches, although she said this was in 2006. It is not at all clear on the evidence that there were any sufficient complaints of symptoms that might have been attributable to a head injury by October 2003 to warrant Dr. Cameron's examination of Ms. Meghji for such an injury. In my view it would be unfair to speculate that Ms. Meghji was examined by Dr. Cameron for traumatic brain injury complaints or cognitive difficulties flowing from a brain injury, as opposed to complaints of headache.

**240**  In ordinary circumstances, I would agree that a claim of litigation privilege should be sufficient explanation for the failure to produce evidence from an expert who examined a party, and no inference adverse to that party should be drawn from the failure to produce the evidence.

**241**  However, where, as here, counsel has assumed control of medical management of a plaintiff's injuries, the circumstances are not ordinary.

**242**  Dr. Grimwood would ordinarily have been expected to coordinate Ms. Meghji's treatment, including referrals to specialists as he thought advisable. In this case, Dr. Grimwood appears to have largely ceded that responsibility to Ms. Meghji's counsel, largely because counsel were able to arrange examinations by medical specialists much sooner than could Dr. Grimwood.

**243**  Where counsel becomes actively involved in arranging treatment, or in treatment decisions, or in selection of treatment providers to the extent that it becomes difficult or impossible to determine whether any particular doctor is involved for treatment purposes, or to advise counsel, the protective cloak of litigation privilege becomes tattered.

**244**  In such circumstances, counsel and the party who permit the line between treating physicians and physicians retained to advise counsel to become blurred must accept some risk that the protection ordinarily afforded by litigation privilege might be lost.

**245**  Ms. Meghji testified that she saw Dr. Cameron for headaches. In the face of that evidence, I infer, from the refusal to produce evidence from Dr. Cameron, that any opinion generated as a result of his examination of Ms. Meghji was not helpful to the claims she makes in this trial. I also infer that, while examining for headache, had Dr. Cameron observed any signs that suggested to him that Ms. Meghji had suffered a traumatic brain injury in the accident, his observations or opinion would have been produced at trial.

**246**  Ms. Meghji has had extensive neuropsychological evaluations. Her counsel organized an examination by Dr. Malcolm in April 2006, which involved two hours of interview and nine hours of testing. Dr. Malcolm was concerned that Ms. Meghji's emotional state made the test results questionable and therefore recommended that she have treatment for her emotional condition before being re-evaluated.

**247**  Dr. Malcolm did re-examine Ms. Meghji over eleven and one-half hours in January 2007, and produced a written report and opinion. In May 2007 Dr. Krywaniuk, a neuropsychologist, examined Ms. Meghji over three days, May 3, 4 and 5, 2007, for a total of 14.5 hours. He produced a report, all at the request of the defendant, MoTH.

**248**  In March 2009, Dr. Malcolm again examined and tested Ms. Meghji over two days and reported by way of updating his 2007 report which, combined, totals some 64 pages of test results, discussion and opinion.

**249**  At about the same time, Dr. Krywaniuk re-examined Ms. Meghji over two days, March 19 and April 1, 2009, for a further eight and three-quarter hours and produced a subsequent report. Dr. Krywaniuk's two reports total some 48 pages.

**250**  In addition to those reports generated as a result of testing and examination, Dr. Strauss, a neuropsychologist, reviewed reports and records, including Dr. Malcolm's first report, and provided her own eight page comment at the request of counsel for the defendant Lee.

**251**  To complete the neuropsychological reporting, Dr. Malcolm has produced a twelve page reply to Dr. Krywaniuk, and a separate eleven page reply to Dr. Strauss.

**252**  Dr. Malcolm's testing of Ms. Meghji's intelligence resulted in an IQ score of 98. Dr. Malcolm predicted, based on his understanding that Ms. Meghji had successfully completed a university undergraduate degree and had successfully completed one or more courses at a post-graduate level, that Ms. Meghji's IQ should have been in the 120 range. Dr. Malcolm noted other discrepancies between Ms. Meghji's performance on other tests he administered and what he would have predicted for her based upon his understanding of her occupational and academic achievements. Dr. Malcolm concluded that the discrepancies were consistent with the effects of either a complicated mild traumatic brain injury or a mild traumatic brain injury (Dr. Malcolm acknowledged that the "complicated" descriptor was falling out of favour in the profession), operating together with what he felt were well-documented and already diagnosed depression, and other emotional conditions.

**253**  Dr. Krywaniuk conducted somewhat different tests of Ms. Meghji's intellectual abilities and arrived at a score of 96, which Dr. Krywaniuk said was the mid-average range of IQ or equivalent. Dr. Krywaniuk was of the view that Ms Meghji's academic career would have implied to him an above-average or higher score but, on reviewing other results of his tests that were not ordinarily susceptible to the effects of brain injury, concluded that those results, which were similarly mid-average or lower, were consistent with the IQ as measured by his testing and inconsistent with the implied above-average or superior intelligence suggested by Ms. Meghji's pre-accident educational attainments. On balance, Dr. Krywaniuk concluded that, if there were a significant loss of IQ or cognitive ability, as suggested or implied by his test results where contrasted to what would otherwise have been expected from Ms. Meghji's pre-accident achievements, there should have been a very substantial brain injury that would have been evidenced by significant loss of consciousness, visible signs of head trauma and/or likely radiological evidence of neurological impairment, none of which he understood to be have been detected after the accident.

**254**  Generally, Dr. Krywaniuk was of the view that the results of Ms. Meghji's testing generally were sufficiently variable that the better explanation for her test results was either her emotional condition or reduced effort on her part, or perhaps a combination of the two.

**255**  Dr. Strauss did not test or examine Ms. Meghji but confined herself to a review of Dr. Malcolm's initial report and the methodology he employed as well as his interpretation of his results. Dr. Strauss commented:

My impression is that (1) Dr. Malcolm has misinterpreted the criteria for complicated mild Brain Injury, (2) Dr. Malcolm has failed to appreciate the diagnostic limitations of neuropsychological tests and (3) has not adequately excluded other explanations in this case (e.g. compensation issues, her belief that she has suffered a head injury and her expectations of deficits following such injury).

**256**  Illness prevented Dr. Strauss's from converting her draft report into a full medical-legal opinion, and her death during the trial prevented her from attending to be cross-examined. In spite of these difficulties, counsel have, commendably in my view, recognized Dr. Strauss's standing in her profession and agreed that her draft report could be accepted in evidence.

**257**  Dr. Krywaniuk and Dr. Strauss each comment in detail on the results of Dr. Malcolm's testing and, more to the point, his interpretation of those results. Additionally, there are criticisms that some of the tests Dr. Malcolm administered were inferior to other tests that were available to him.

**258**  In his separate replies, Dr. Malcolm takes up the challenges and responds to them, in as much detail as the criticisms have been levelled against him.

**259**  In addition, skilled counsel have spent days in cross-examination of Dr. Malcolm and Dr. Krywaniuk, probing the merits of the various neuropsychological tests administered, the range of interpretations open on the results of the tests administered, and the potential for deliberate or unintentional skewing of test results based upon Ms. Meghji's effort or lack of effort, fatigue or her emotional condition from time to time. Much was made in cross-examination over the ability to predict full-scale IQ from academic or occupational attainments, and the value of attempting to contrast such predictions to measurements derived from intelligence testing.

**260**  Debate over whether there has been significant loss of intelligence or cognitive ability, while of considerable importance to the neuropsychologists and the counsel who cross-examined them, is of partial assistance in resolving the question of the nature and extent of Ms. Meghji's injuries. The other part of the question can be resolved by reference to the evidence of witnesses such as Dr. Ali and Mr. Brozak. If Ms. Meghji is not the same person she was before the accident, if the differences are found to be attributable to the accident, and if one possible explanation for those differences can be explained by neuropsychological test results consistent with brain injury, it becomes useful to inquire what other explanations there might be for the differences noted by people such as Dr. Ali and Mr. Brozak.

**261**  Each of the defendants has attempted to explain the apparent changes in Ms. Meghji by reference to external events for which neither defendant can be faulted, such as the loss of her job at Dr. Ali's clinic in early 2004, which the defendants say was a result of Ms. Meghji's emotional state and not any effect of a brain injury, or the falling out between Ms. Meghji and her sister, Nimet, which may or may not have involved a financial dispute between Mr. Kuoni and Nimet.

**262**  The chronology or sequence, as I understand it, is that Ms. Meghji spent the first 10 months or more after the accident focussed on her physical injuries, the surgeries, her recovery from those surgeries and her physical rehabilitation. Although there was some attention paid to her emotional state through counselling, the primary focus was on her physical injuries.

**263**  Ms. Meghji was not challenged in an intellectual way until she went to work at Dr. Ali's clinic in Toronto in November 2003. Dr. Ali's description is quite graphic as to the complete failure of that attempt to perform at a job that should not have tasked Ms. Meghji much, if at all, before the accident.

**264**  The referral to Dr. Kirsh, a psychiatrist, in February 2004, is of some significance. There is no opinion from Dr. Kirsh. What there is are several consultation letters that appear in the clinical records of Sunnybrook & Women's College Hospital. Those records are the subject of the document agreement referred to earlier, on which basis I accept that in February 2004, Dr. Kirsh recommended that Ms. Meghji be referred to the Traumatic Brain Injury Program at SWCHSC-Sunnybrook Site so that she could have a comprehensive assessment of her reported cognitive deficits to determine the extent to which they may be secondary to a brain injury.

**265**  I conclude that Ms. Meghji lost her job at Dr. Ali's clinic because she was incapable of performing a job that a Grade 10 graduate ought to have been able to perform, and that that lack of capacity was not solely because of her emotional state at the time.

**266**  Carrying on with the chronology, it was not until about the middle of 2004 that Mr. Kuoni put up $10,000 toward the acquisition, initially on a lease, of premises that Ms. Meghji's sister, Nimet, wished to use to operate her chiropractic clinic. I accept that in the early fall of 2004, Mr. Kuoni went on a 30 day meditation in the United States, having satisfied himself through discussion with Dr. Kirsh that it was safe to do so, and that Ms. Meghji made a suicide attempt of sorts while he was gone.

**267**  Through the fall of 2004 and into 2005, Mr. Kuoni worked at Nimet's chiropractic clinic and, from time to time, Ms. Meghji tried to assist, with observable errors and lack of ability.

**268**  It was not until late summer or early fall 2005 when the lease on the clinic premises expired and it was time to make a purchase investment that Nimet refused any further financial input from Mr. Kuoni and, perhaps at the same time, had a falling out of some sort with Ms. Meghji.

**269**  While the estrangement between Ms. Meghji Nimet was no doubt painful and did last for some years, I find, based largely on the timing of its onset, that it was not a significant explanation for Ms. Meghji's observed deficits or changes.

**270**  Based upon the evidence of Dr. Ali and Mr. Brozak of the substantial change noted in Ms. Meghji during this time, as supported by similar observations from Ms. Chauncey's and Ms. Wyeth's description of Ms. Meghji's abilities in her math class and as a teaching assistant before the accident, I conclude that Ms. Meghji has more likely than not suffered a brain injury in the accident, and that the combination of the effects of the brain injury and the depression and chronic pain disorder, which I also find was caused by the accident or flows from injuries suffered in the accident, are so inextricably intertwined that they cannot possibly be disentangled.

**271**  In all of the circumstances, the defendants are ordered to pay Ms. Meghji $125,000 for non-pecuniary damages for pain, suffering, and loss of amenities and enjoyment of life.

**SPECIAL DAMAGES**

**272**  The plaintiff presented claims totalling $38,800 from accident to trial. The claims are made up of a mixture of treatment costs, for psychological counselling and exercise therapy, for example, and for furniture and other items. The furniture category can in turn can be broken down between modifications to the plaintiff's home to improve her mobility or safety in the immediate post-accident period, and office furniture for the plaintiff's home purchased some years later. Other claimed items include regular payments for prescription medications as well as orthotics, eyeglasses, and school textbooks.

**273**  Counsel have done a commendable job of presenting these claims -- or disputing them -- without bogging down the trial in minutiae.

**274**  Where a person has been put to expense as a result of the ***negligence*** of another, that person ought to be made whole, so long as the expenses claimed are reasonable, reasonably incurred, and causally connected to the ***negligence***.

**275**  I have reviewed the expenses set out in Exhibit 6 and the evidence in support of or against the awarding of each of the expenses, such as it is. Rather than deal with each of the expenses for which an award will be made, it is more efficient to deal with those expenses that I disallow, with brief reasons for each. I will refer to each by date and page number reference in Exhibit 6.

**276**  The July 28, 2003, claim for case management by the occupational therapist Ms. Edwards is reduced by $127.00, that being the cost of a work place assessment that took place in July 2003. By that time, Ms. Meghji had declared her intention to move to Toronto, her husband had moved to Toronto, and Ms. Meghji had only remained behind because the infection in her elbow required her to remain for further treatment. It was not reasonable to assess a work place to which Ms. Meghji had no present intention of returning.

**277**  The September 11, 2003 massage therapist account at p. 47 is disallowed. I understand the evidence to be that massage was recommended by the plaintiff's sister, herself a chiropractor, and it is not reasonable that the defendants be obliged to pay for that treatment, particularly when, at the same time, the claims for physiotherapy at St. George Physiotherapy Clinic are allowed.

**278**  The November 17, 2003 claim for orthotics and shoes at p. 53 is reduced by $560.00 to reflect the estimate of the cost of orthotics and shoes arrived at by Ms. Edwards in her "Cost of Future Care" report. The evidence of Ms. Edwards persuades me that the amount charged by the plaintiff's sister, who built the orthotics and shoes, is excessive.

**279**  The November 19, 2003 claim for case management by Ms. Edwards at p. 54 is cut in half, and allowed at $63.75, on the basis that Ms. Meghji had returned to Toronto by the end of October 2003. The Edwards' claims for case management on November 30, 2003 and December 16, 2003, at pp. 55 and 56 are disallowed for similar reasons, as I conclude that whatever Ms. Edwards was doing while Ms. Meghji was living in Ontario had more to do with work done for counsel than for Ms. Meghji.

**280**  The claim of December 17, 2003 for fitting of soft lenses at Prince Arthur Eye Associates at p. 57 is disallowed. There is no sufficient causal connection between the accident and the fitting of soft lenses that I can determine from the evidence.

**281**  The January 5, 2004, claim for massage therapy at p. 59 is denied as having an insufficient basis in the evidence showing that it was appropriate treatment recommended by a treating physician and not duplicated by other treatment.

**282**  The February 17, 2004 claim for nerve fibre analysis at Prince Arthur Eye Associates at p. 63 is disallowed as having no apparent connection to the accident disclosed in the evidence.

**283**  The April 30, 2004, massage therapy account at p. 65 is disallowed for the reasons given earlier with respect to earlier massage therapy accounts.

**284**  The Derma Spa massage therapy account of June 15, 2006, at pp. 77-78 is disallowed for the same reasons.

**285**  The July 9, 2006, claim of Ms. Edwards at p. 85 is disallowed as appearing to be more in the nature of advice to counsel, in which case it can be argued as a disbursement, rather than an expense incurred by the plaintiff, or on her behalf. The balance of Ms. Edwards' charges at pp. 88, 89, 98, 103, 107, 113, 117, 121, 130 are disallowed for the same reasons. While case management may have been reasonable and reasonably necessary in the beginning, I conclude that from 2006 onward, the case management charges were in the nature of advice and assistance to counsel or to prepare to give an opinion or testimony, but not a legitimate expense flowing from the accident.

**286**  The August 31, 2006, textbook charge at p. 90 is disallowed as having no discernible causal connection to the accident.

**287**  The September 6, 2006, Samsonite bag purchased at p. 93, the September 18, 2006, cell phone purchase at p. 94 and the September 19, 2006, University of Victoria Bookstore ("UVic") school supplies purchase at p. 95 are disallowed for the same reasons.

**288**  The same applies to the November 10, 2006, UVic Bookstore expense at p. 106.

**289**  On November 21, 2006, there are Monk Office supply charges at pp. 110 and 111 totalling $1,151.45. I understand that the items represented in these charges were purchased to make the plaintiff more comfortable in a home office environment. It is not clear to me that a home office environment was a reasonable expense reasonably connected to the accident or to Ms. Meghji's injuries, or that a defendant or defendants who were negligent in 2003 ought to be faced with such an expense three and one-half years later.

**290**  For the same reasons, the chair claimed on December 13, 2006, at p. 115, is disallowed.

**291**  The December 20, 2006, charge for a light, which I understand to have been recommended to help the plaintiff with Seasonal Affective Disorder is disallowed as I do not have sufficient evidence that the plaintiff suffered from Seasonal Affective Disorder as a result of the accident, or that such an item was reasonably necessary to treat the plaintiff's psychological conditions.

**292**  The January 8, 2007, UVic Bookstore claims at p. 129 are disallowed as insufficiently connected to the accident.

**293**  The October 2, 2007, massage therapy account at p. 153 is disallowed as insufficiently connected to the accident.

**294**  The prepaid cellular phone minutes on December 31, 2008, at p. 174 and March 27, 2009, at p. 179 are disallowed as having no reasonable connection to the accident.

**295**  Of the $38,800 presented, I understand that $6.29 has been withdrawn in argument and the plaintiff acknowledges that the defendant Lee has already paid $3,215.13. Those deductions, together with the deductions I have just outlined, leave a net award for special damages at $25,212.00, and the defendants are ordered to pay that amount to the plaintiff.

**COST OF FUTURE CARE**

**296**  In *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.), McLachlin J., as she then was, said of future care claims, at 78:

The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

**297**  At 84, in discussing the Manitoba Court of Appeal in *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=) (Man. C.A.), McLachlin J. said:

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. On the latter point, Dickson J. stated in *Andrews* [*Andrews v. Grand & Toy*, [*[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=)] 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.

This then must be basis upon which damages for costs of future care are assessed.

**298**  *Milina* was a case involving catastrophic injury.

**299**  As has already been pointed out, to some considerable extent, the "medical justification" aspects of this case have been reversed. That is, instead of physicians prescribing or recommending, the author of the cost of care report, in her capacity as case manager, has either recommended an item or a treatment, or has accepted and adopted an item or treatment recommended by others who have not been treating physicians or examining physicians.

**300**  The plaintiff argues that medical justification does not require a medical doctor to prescribe or to recommend, but if there is a medical diagnosis of a condition, then others, being health practitioners in various fields, may have useful opinion evidence to assist a court in determining a plaintiff's future care needs. The plaintiff relies there on the decision of Madam Justice L. Smith J. in *Frers v. De Moulin*, [*2002 BCSC 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0T1-00000-00&context=).

**301**  In that decision the trial judge said at para. 191:

191 ... Insofar as she [occupational therapist who authored the cost of care report] is making recommendations for rehabilitation support and case management, I can consider those recommendations without further support. However, with respect to other matters such as psychological counselling, speech and language therapy and physiotherapy, her recommendations do not carry the same weight and I will refer instead to those of Dr. Van Rijn and Ruth Casanova. I do accept that Ms. Landy [report author] is qualified to provide an opinion as to the reasonable cost of the enumerated services, and I will accept her valuations except where otherwise stated.

**302**  Reviewing the reports of the various physicians, I can see that Dr. Landells supports the use of orthotics, the benefit of ongoing exercise, and as a reasonable consequence of future knee replacement and possible shoulder replacement surgery, some allowance for rehabilitation costs and other expenses that might flow from those surgeries if they were to occur.

**303**  Dr. MacKean supports regular exercise and Dr. Ehrenburgh supports cycle therapy in a predicted schedule she sets out, up to the year 2015.

**304**  I have already indicated that I view Dr. Krieger and Dr. Grimwood's endorsement of Ms. Edwards' recommendations without any apparent independent analysis to reduce the value of their endorsements substantially.

**305**  Mr. Kyi, an occupational therapist who saw Ms. Meghji in 2006 and again in 2009, made some recommendations very similar to those made by Ms. Edwards, and then in his second report, elected to defer to Ms. Edwards' recommendations.

**306**  *Milina* makes it clear that every effort must be made to avoid duplication between awards for cost of future care and awards for loss of future income. To the extent that items recommended as part of a future care claim are items that might ordinarily have been purchased in any event out of the plaintiff's earnings, a court must be careful to avoid duplication. Duplication can be avoided by awarding only the increase in costs beyond those that would ordinarily have been incurred by a plaintiff if an accident had not occurred, and by awarding as close to full indemnity for future earnings loss as is reasonable. Duplication can also be avoided by awarding reasonably full indemnity for the future care expenses and then reducing the future earnings loss claim to reflect that portion of future income that would ordinarily have been spent on items that have been awarded as part of the future care claim.

**307**  As McLachlin J. pointed out in *Milina*, which method is best to avoid duplication should be selected on the basis of the evidence presented.

**308**  I do not consider that I have evidence on which to make a choice of method with sufficient confidence. The recommendations put forward by Ms. Edwards do not all attempt to account for what the plaintiff might otherwise have spent on some items that might ordinarily be found in one's home, or to outline what increased costs, if any, she might incur as a result of her injuries. An example would be cost of footwear, furniture for a home office, and other things that the plaintiff might ordinarily be expected to buy out of earnings over her lifetime. I prefer the increased cost approach in this case, and I will attempt to identify those goods or services that I find should be compensated, and where I have confidence that Ms. Edwards has provided an increased cost of the item or service.

**309**  Another problem faced by the manner in which this claim was put forward was that it deliberately ignored, insofar as claims for ongoing prescription medication expenses are concerned, the PharmaCare program in British Columbia. The argument put forward is that it is not clear that PharmaCare will last for the rest of Ms. Meghji's life, as government could easily end or substantially alter the program.

**310**  While that might be true, to make an award as if PharmaCare did not now exist would result in a windfall to Ms. Meghji.

**Assistive Devices**

**311**  Turning to the report of Ms. Edwards and dealing with the specific items, I have concluded that of the assistive devices claimed, the cost of $25.89 for the whiteboard and associated markers as reasonable as is its annual replacement. Ms. Meghji has already acquired the whiteboard and says that she finds it useful and her demonstrated organizational and memory problems justify this item medically.

**312**  The claim for the cost of an iPhone, with the associated annual contract, is a different matter. Ms. Meghji already had a Palm Pilot at the time of the accident. She was using Mr. Kuoni's Palm Pilot, he having turned it over to her when her watch broke. Ms. Meghji said she used the Palm Pilot and utilized its calendar function, along with its watch, alarm and timer functions before the accident.

**313**  Cellular telephones and their enhanced cousins, so-called smart phones, are sufficiently ubiquitous in 2011 that, together with the fact that Ms. Meghji was already employing a Palm Pilot at the time of the accident, this claim is not justified as a cost beyond that which the plaintiff would have ordinarily incurred and is not allowed.

**314**  The $32.82 claimed for an accordion file to organize paperwork is not something that goes beyond or is in any way significantly different from the needs of any person to organize documents at home and is not allowed.

**Safety Aids and Appliances**

**315**  The next classification is safety aids and appliances. Here, I am hampered by the lack of evidence as to whether what is claimed is the additional cost added on to the basic cost of the items mentioned: kettle, slow cooker, toaster oven and coffee maker. I agree the auto switch-off feature is medically justified as Ms. Meghji does have problems remembering to switch off appliances and that does present risks.

**316**  On this category, I accept the kitchen timer at $14.68 with a five year replacement, as medically justified and, with respect to the kettle, slow cooker, toaster oven and coffee maker, allow an admittedly arbitrary $10.00 per item, for a total of $40.00 every five years to reflect an assumed increase in costs for the fully automatic switch off feature. No award is made with respect to the microwave oven because it appears to me to be a standard feature in most, if not all, kitchens.

**Position/Splinting Aids**

**317**  The next item is position/splinting aids. I accept the high back Obus Forme and fast wrap brace as claimed at $163.84 for the former and $90.39 for the latter, both to be replaced every two years.

**Mattress and Pillow**

**318**  The claim for the bed or sleep set is presented as the differential between a regular queen size sleep set and what Ms. Edwards' says Ms. Meghji requires for back pain and spasm. This is medically justified in my view and is awarded at $3,107.54, with a ten year replacement. The same holds for the pillow at $112.99, with a two year replacement cycle.

**Support Footwear and Orthotics**

**319**  I agree that orthotics are medically justified based upon Dr. Landells' opinion. They are allowed at $580.00 per year. I do not have evidence as to the extent to which the amount claimed for supportive footwear exceeds what Ms. Meghji would reasonably have paid for footwear if no accident had occurred. In my view it would be unfair to Ms. Meghji to award nothing and unfair to the defendants to award the claim as presented. Again, arbitrarily, I award $200.00 per year ongoing for the additional cost of supportive footwear.

**Bathroom Safety Aids**

**320**  The amount claimed for bathroom safety aids is awarded with the exception of the bath mat as Ms. Meghji has testified that she refuses to use one. These items have already been dealt with as special damages, so here, the award is for the replacements needed every five years, according to Ms. Edwards, at $118.50 for wall bars, $154.66 for a tub rail, and $93.73 for a handheld shower.

**Rehabilitation Aids**

**321**  As to rehabilitation aids, the hot and cold reusable packs for $33.58 and annual replacement are allowed; the TENS machine and accessories are not allowed, as I have little or no medical evidence upon which the TENS machine has been justified, and, on balance, I conclude that this is something that Ms. Meghji might spend either a portion of her income loss award or her non-pecuniary damages to purchase if she wishes it. The balance of the rehabilitation aids are not awarded, as I assume such things will be supplied with the gym membership already allowed.

**322**  Dr. Landells has mentioned the possibility that Ms. Meghji will require a knee brace and knee injections. Neither has yet been needed, but there is a real possibility that either or both will be needed. It is not possible to predict when the knee brace will be needed or when or how often the injections will be required. A fair award for both would be $3,500.00 on a one time basis.

**323**  There is a real possibility that Ms. Meghji will require knee replacement surgery, and perhaps more than one surgery. Such surgery will require an increase in physiotherapy, and the acquisition of some mobility and other aids for relatively short periods. The amounts claimed in Ms. Edwards' report are, in my view, excessive and unnecessary, in that it is not demonstrated to be reasonably necessary that someone facing knee surgery purchase a walker, a wheelchair, a wheelchair lift for a vehicle or a lift and recline chair. Walkers and wheelchairs are available for rent, and the need for a wheelchair lift or a lift and recline chair are, in my view, speculative at best. There will be, in all likelihood, a need for a raised toilet seat, a bath lift and other aids such as the reacher, shoe horn, etc. On a one-time cost basis and having recognized that the award will be payable now, while the need may be sometime in the future, $2,000.00 is reasonable.

**Medications**

**324**  This claim is presented as if the PharmaCare program did not exist. The PharmaCare program does exist and it would be wrong for this court to ignore it. It is difficult to estimate in the absence of evidence just what Ms. Meghji might have to pay before PharmaCare takes over and indemnifies her fully, as that depends in part on Mr. Kuoni's annual income. The evidence of Mr. Kuoni's income ranges from $5,800 in 2002 to $16,300 in 2007. There is an anomalous year in 2006 where his income was $56,500 and no evidence of his income in 2008.

**325**  I am assuming that, for the purposes of this portion of the award, the family income of Ms. Meghji and Mr. Kuoni does not exceed $30,000 and will not in future. I do so on the basis that Ms. Meghji's employability is restricted and Mr. Kuoni retired long ago on modest savings. That would expose Ms. Meghji to $900 per year in drug costs before PharmaCare totally indemnified her, as I understand it. Medications are, therefore, allowed at $900 per year, for life.

**Miscellaneous Aids and Items**

**326**  The miscellaneous aids I view as dubiously supportable under the medically justified rubric, and I consider that both ought better to be purchased out of future wages or non-pecuniary damages. No award is made for either the closet organizers or foldable shopping cart.

**327**  The amounts claimed for home office aids are not allowed as the evidence is that Ms. Meghji has used the chair already purchased to do a little computer internet surfing and some reading, but there is a distinct lack of evidence that Ms. Meghji spends any considerable time working in a home office environment either to attempt to earn an income or in an attempt to preserve or enhance her cognitive abilities. Nothing is allowed for home office aids.

**Physiotherapy and Exercise Programme**

**328**  The gym membership is allowed at $444.00 per year, on the basis that the medical evidence of Dr. Landells and Dr. MacKean persuades me that ongoing regular exercise is necessary for Ms. Meghji to preserve her mobility.

**329**  The amount claimed for ongoing physiotherapy at $540.00 per year is allowed as I am persuaded by the medical evidence that this is medically justified. The amount claimed for massage therapy is not allowed, partly on the basis of Dr. Vincent's evidence that not much benefit comes from it. The $540.00 per year for a pool program is allowed as it is, like the exercise program, necessary in my view for Ms. Meghji to maintain her strength and conditioning.

**Counselling**

**330**  As to the psychological report, I accept Dr. Ehrenberg's opinion that six to eight sessions would have been required and I assume were required in 2010. Thereafter, five sessions per year for the years 2011 through the end of 2015 at $150.00 per hour, the amount stated by Dr. Ehrenberg, are awarded.

**331**  I make no allowance for family counselling or sexual health counselling as the medical justification is lacking in the evidence.

**Home Support**

**332**  As a reflection of Ms. Meghji's physical problems, as well as the additional problems her cognitive and emotional difficulties present, it seems to me that the home support claim is medically justified.

**333**  The claim for home support, primarily for cleaning, includes two hours per week with additional amounts while Mr. Kuoni is travelling up to Meghji's age 58 and Mr. Kuoni's age 75. The amount presented is to replace Ms. Meghji's contribution to these activities, and recognizes that Mr. Kuoni shares in these duties, at least when he is not out of the city on a meditation program. The present value of this claim, which I accept, is $36,778.25.

**334**  Ms. Meghji claims for home support of 5 hours per week from her age 58 onward, arguing that Mr. Kuoni will be 75 when she is 58, and his ability to continue to do the cleaning chores he has done will be significantly reduced. I agree with this submission, and award the present value of household services after Ms. Meghji's age 58 at $45,103.16

**335**  There are also claims for increased house cleaning for three one-year periods following surgery that it is anticipated Ms. Meghji will require. These claims are accepted, the present value of which totals $4,658.50.

**336**  The total present value of the future cost of care for Ms. Meghji is $181,219.99. The calculations and discount factors supporting this figure are provided in Appendix A to these reasons.

**337**  This total must be evaluated with a view to the contingencies of life. In my view, there is little likelihood that the amounts claimed will increase because Ms. Meghji consumes more goods or services than Ms. Edwards has predicted. I think the reverse is far more likely to occur, and that Ms. Meghji will consume considerably less than predicted, in part because she does not strike me as someone who would use an item or a service unnecessarily, and partly because some of the replacement schedule predicted by Ms. Edwards for things like bath bars, mattress, safety aids and the like appears more frequent than might reasonably be expected if Ms. Meghji were spending her own money.

**338**  The same cannot be said for all of the items for which an award is made under this head. On balance, I conclude that an award for future care costs that does fairness between plaintiff and defendants should be $150,000, and I award that amount.

**INCOME LOSS: ACCIDENT TO DATE OF JUDGMENT**

**339**  Ms. Meghji had about seven years from her graduation in 1996 from York University to the accident in which to establish an employment pattern. In 1996 and 1997 she worked at a naturopathic clinic in Toronto, earning $19,500 in 1996 and just under $18,000 in 1997.

**340**  In 1998, Ms. Meghji travelled to India with Mr. Kuoni. Her earnings that year were around $4,000, divided between employment insurance and social assistance.

**341**  In 1999, Ms. Meghji spent part of the year in Switzerland with Mr. Kuoni after his mother died there, and then Mr. Kuoni and Ms. Meghji moved to Victoria. Ms. Meghji's reported income that year was under $200.

**342**  In 2000, Ms. Meghji started to work for Shaw on a part-time basis in Victoria. She earned $11,000 that year.

**343**  In 2001, Ms. Meghji had her best earnings year, $25,600, working at Shaw. Ms. Meghji quit the job at Shaw on December 24, 2001 to accompany Mr. Kuoni to Thailand.

**344**  In 2002, Ms. Meghji earned about $9,500 from Shaw and another $1,500 from the University of Victoria working as an academic assistant. The Shaw job did not start until September 2002 and the academic assistant position similarly related to the fall of 2002.

**345**  In July 2002, Ms. Meghji applied to Camosun College to enter the computer programming program there. In the same month, she applied to Camosun College to enter their support care worker program, and at the end of July, she applied, again to Camosun College, for admission into their nursing program.

**346**  Ms. Meghji was accepted into the home support care program at Camosun College to start September 2002 but elected instead to take up the employment with Shaw on a one year contract.

**347**  At trial, Ms. Meghji said that her goal was to work for Shaw until she was admitted into the nursing program at least, and continue to work part-time for Shaw in the first couple of years of her nursing program. She said she would gradually wean herself off the Shaw work as the nursing program became more demanding, but felt that in the first year or two she would be able to work part-time at Shaw because her previous academic credentials would make the nursing program less demanding.

**348**  The defendants take the position that Ms. Meghji was much less goal-oriented than she presented at trial. They point particularly, in cross-examination, to several requests made by Ms. Meghji for academic concessions in 2001 and 2002. These concessions were sought for a variety of reasons. Ms. Meghji said that she applied to withdraw without academic penalty from one math course because of illness, and from another because she had decided that she no longer wished to pursue computer programming as an academic discipline. This latter withdrawal occurred just months before Ms. Meghji applied to Camosun College for admission into its computer programming program.

**349**  The defendants point as well to the fact that Ms. Meghji had spent a fair amount of time travelling with Mr. Kuoni.

**350**  Mr. Kuoni's retirement was taken up largely with his pursuit of meditation. As Mr. Kuoni progressed in that discipline, he rose to the teaching or instruction level. That not only permitted him, but to some extent required him, to travel internationally to spend 30 days or more at a time conducting meditation courses or sessions.

**351**  Ms. Meghji was not as advanced in meditation as was Mr. Kuoni but was herself adept. She often accompanied Mr. Kuoni and either attended programs as a student or served in some capacity in the program.

**352**  Ms. Meghji and Mr. Kuoni had been together since 1996 and married in Victoria in November 2001.

**353**  Both Ms. Meghji and Mr. Kuoni agree that, as their relationship developed, Mr. Kuoni made it clear that his financial circumstances were not such that he could afford to support Ms. Meghji and their agreement was that she would have to be economically independent and self-sufficient. Both Ms. Meghji and Mr. Kuoni agreed that they could, and preferred to, live simply and I infer that they had no need for large annual incomes between them in order to be comfortable.

**354**  Ms. Meghji presented her claim for income loss, accident to trial, on two alternate bases: the first is that she would have entered nursing school in September 2005, graduating four years later in 2009. She argued that she would have earned a Shaw income of $23,000 per year until September 2005. While in nursing school, she would have continued to earn some part-time income working for Shaw, which she put at $10,000 per year, and on graduation from nursing, she would have begun to earn $4,000 per month, rising within a year to $5,000 per month.

**355**  The plaintiff's alternate approach is to assume that she did not pursue a nursing career, but remained at Shaw Cable, where she assumes a promotion to a supervisory position in January 2004, and an income of $40,000, rising to $55,000 per year by 2010. The income loss there, after deducting 18% income tax, amounts to $347,000.

**356**  Both approaches assume full-time pursuit by Ms. Meghji, either of a nursing education or employment. The defendants respond by pointing to Ms. Meghji's earnings history and the frequent and lengthy gaps in her earnings from university graduation to the accident. They also point to Ms. Meghji's applications in July 2006 to three different Camosun College programs as evidence that she remained undecided about her future and was not yet committed to any particular career path or even interest.

**357**  Also relevant to this question are the occasions in 2001 and 2002 when Ms. Meghji sought academic concessions from the University of Victoria in order to be permitted to drop courses without academic penalty. She dropped one course because of illness and another because she decided that she no longer wished to pursue her studies in computer programming. That decision was made just months before she applied to Camosun College for admission into its computer programming program.

**358**  The defendant MoTH argues that Ms. Meghji has not proven anything beyond a 10 month income loss after the accident that is causally connected to the accident as opposed to the decision to move to Ontario, and intervening unconnected sources of depression, anxiety or other income impairing conditions. MoTH suggests $27,000 in past income loss.

**359**  The defendant Lee is somewhat more charitable, although discounting entirely the prospects of a nursing career. Instead, the defendant Lee says that a more realistic approach would be continuing at Shaw Cable, but without the promotions assumed by the plaintiff. After factoring in interruptions for travel and attendances at meditations, the defendant Lee suggests $75,000 as an appropriate past income award.

**360**  All figures are after deduction for income tax.

**361**  Ms. Meghji needed to work: she did not wish to be supported by Mr. Kuoni and, in any event, he was unable to provide for both of them in the long term. I accept that Ms. Meghji had a keen interest in nursing as a career at the time of the accident, but do not accept that that would have necessarily translated into the successful completion of a four year nursing program for a long-term career in nursing.

**362**  I accept that, before the accident, Ms. Meghji had an ability to successfully complete a nursing program, but there are lingering doubts about her long-term motivation. Ms. Meghji had many interests in the past and not all of them had held her attention in the long-term.

**363**  Mr. Frewer's evidence is reasonably clear that Ms. Meghji was not, at least in his eyes, management material, nor was she likely to be selected for the sales job for which she had interviewed just prior to the accident. Ms. Meghji's highest and best potential, from a Shaw Cable perspective, was in a supervisory capacity earning between $45,000 and $55,000 per year.

**364**  That capacity, however, had its own risks. Mr. Frewer said that it was unusual that Ms. Meghji had been rehired by Shaw after quitting in December 2001 to accompany Mr. Kuoni on a meditation retreat in Thailand.

**365**  Mr. Kuoni would have, in all likelihood, continued to travel internationally for a month or more at a time in order to pursue meditation either as a teacher or a student. Ms. Meghji, no doubt, would have wished to accompany him, if not to all of these sessions, then at least enough that her long-term employment at Shaw in a supervisory capacity would likely have been threatened.

**366**  That, coupled with Ms. Meghji's history of unsettled employment and changing vocational interests, takes the assessment of accident to judgment income loss out of the realm of simple calculation.

**367**  In the seven years before the accident, Ms. Meghji had averaged just under $13,000 in pre-tax income on an annual basis.

**368**  It has been eight years since the accident during which time Ms. Meghji earned just $2,900 in 2004 working at Mr. Ali's clinic, and another $8,300 in 2008 working at the jewellery store. That was part of a year, and Ms. Meghji's actual income for 2009 and 2010 is not evidence as she testified in mid-2009. It is reasonable to approach the past loss of earnings for earning capacity on the basis of Ms. Meghji's best year at Shaw Cable, $26,000, and to factor in the possibilities, which I conclude are high, that Ms. Meghji's earnings over the last eight years would have been interrupted for significant periods of travel or while she pursued other educational goals. I conclude that an award of $130,000 would do justice between the plaintiff and the defendants with respect to lost income to date. From that should be deducted $30,000, being actual earnings, accident to date. I arrive at that figure, which is net of income tax, by notionally attributing $14,000 per year to Ms. Meghji's 2009 and 2010 earning capacity at the jewellery store which, in turn, is an extrapolation from the actual $8,300 she earned in 2008 working part of the year. After tax, that amounts to about $11,500 per year which, added to actual earnings in 2008 and in 2004, adds up to just under $33,000, which I have rounded down to $30,000.

**369**  The net result then is $100,000 past loss of earnings or earning capacity, after deductions for income tax.

**LOSS OF FUTURE EARNINGS**

**370**  Ms. Meghji's ability to earn an income has been significantly impaired by the injuries she sustained in the accident. Her residual physical limitations are supported by the medical evidence and by the report of Mr. Kyi. Her cognitive problems are similarly well supported in the evidence.

**371**  The combined effect of the physical and cognitive difficulties caused by the accident have substantially reduced the employment and vocation options open to Ms. Meghji to the point where Mr. Nordin, a vocational rehabilitation consultant who assessed Ms. Meghji, expressed some surprise that she was working at all.

**372**  The defendant Lee suggests that, once the trial is concluded, there is a reasonable possibility that Ms. Meghji will improve significantly and that the adverse effects of her injuries on her employability will substantially lessen. I do not accept that argument. On the contrary, I conclude that Ms. Meghji is not likely to substantially improve insofar as her employment prospects are concerned.

**Ms. Meghji's Earning Capacity Prior to Accident**

**373**  Ms. Meghji presents her loss of earning capacity claim in the alternative. The first approach assumes that she would have successfully completed the nursing program she had been accepted into, and approximately five or six years after the accident, would have embarked upon a career at pay levels presented by Ms. Craig, a human resources consultant for Vancouver Island Health Authority. Those pay levels start at about $55,000 per year at the first step of level 1, and increase steadily thereafter, as a new nurse gains experience.

**374**  While a nursing career was possible if the accident had not happened, I do not find that it was probable in Ms. Meghji's case. While she has shown that she had the intellectual capacity to successfully complete the nursing program, had the accident not intervened, she had shown a tendency to begin a new program or path but to have lost interest before completing the program or path, at least since her graduation in the environmental studies program at York University in 1996. The advantage to Ms. Meghji of a nursing degree would have been flexibility that nursing might have presented to her of taking time off for travel or to accompany Mr. Kuoni, with no substantial risk that her employability might be penalized by the time off. Nursing also carried the advantages of a decent employer-funded benefits package and the possibility of well-paid overtime work.

**375**  Had Ms. Meghji embarked upon the nursing program at Camosun College, Ms. Craig's evidence persuades me that she was unlikely to have successfully completed it if she had attempted to work part-time while studying nursing, and that she would most likely have taken four years to complete the program as the two year failure/drop out rate approaches 50%.

**376**  Had Ms. Meghji taken up nursing, the discounted value of the starting level nursing wage would exceed $1,000,000 according to calculations presented by her counsel.

**377**  The other alternative presented by Ms. Meghji is a continuation of her employment with Shaw Cable, but with promotions to at least supervisory level, if not management level. Supervisory salary at Shaw, according to Mr. Frewer, was $45,000 to $55,000 when he testified in 2009, which is somewhat higher than the range Mr. Norden presented for non-supervisory customer service accounting or payroll clerks, whose salaries ranged from $38,000 to $44,000 per year.

**378**  Mr. Frewer was quite supportive of Ms. Meghji and left the impression that he thought she had a very good chance of reaching supervisory positions at Shaw.

**379**  This career path was not, however, a sure thing for Ms. Meghji. Mr. Frewer pointed out that it was unusual that Shaw hired her back in 2002 after she had quit to accompany Mr. Kuoni to Thailand. Mr. Kuoni's position at the teacher level at Vipassana Meditation requires him to teach at least one 30-day course each year and, although not all of them necessarily would involve foreign travel, most of them likely would. As well, Mr. Kuoni has indicated through his past practice that he is prepared to teach and/or attend more than one meditation course in each year. There is a very good chance that Ms. Meghji would have elected to go with him, to the detriment of her job prospects at Shaw, had the accident not occurred.

**380**  I do not, however, accept the argument advanced by MoTH that Ms. Meghji's desire to travel with Mr. Kuoni can be pitched so high as to assume a six month "exotic vacation" every three years, or thereabouts.

**381**  I also bear in mind that Ms. Meghji told Mr. Norden that she did not like the job she was in at the time of the accident as a clerk in the accounts payable department of Shaw. I have found that statement to be made notwithstanding that it was not put to Ms. Meghji in cross-examination and she did not have an opportunity to either deny that she made the statement or to explain it if she had.

**382**  The present value of the low end of the Shaw Cable supervisory range would be about $830,000, and the high end would reach the starting nurses' salary range of $1,000,000.

**383**  Whatever employment Ms. Meghji would have pursued if the accident had not occurred would have been susceptible to interruptions for travel with Mr. Kuoni and to Ms. Meghji's changes in interest from time to time. Although Ms. Meghji's pre-accident employment history ought not to determine her future earning capacity, it is an important consideration or, as Thackray J.A. said in *Vaillancourt v. Molnar Estate*, [*2002 BCCA 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3NP-00000-00&context=) at para. 74, a "key element".

**384**  On Ms. Meghji's argument, assuming maximum experience of nine years at level 2 nursing, her future earning capacity approaches $1,500,000. Although that scenario assumes nursing to age 65, Ms. Craig pointed out that that is not often achieved because of the physical demands of the nursing profession, leading to earlier retirement.

**385**  In any event, the assessment of damages for loss of earning capacity is just that -- assessment -- and not a matter of pure calculation or arithmetic. It involves weighing the possibilities that an income stream upon which the claim is based would have flowed as claimed if the accident had not occurred, which brings to bear the normal contingencies of life as well as the positive and negative contingencies that appear to relate to the specific plaintiff based upon the evidence.

**386**  In striving to achieve fairness between plaintiff and defendants, the court must avoid either over- or under-compensating a plaintiff by predicting, as best it can, what the future may have held for a particular plaintiff had injury not occurred. In my view, that is best achieved in this case by approaching Ms. Meghji's earning capacity on the basis of a salary range at the current interface between the top of the range for clerks and range and bottom of the range for supervisors, or $45,000. But that figure reflects a balance between the possibilities of higher income through supervisory or nursing career paths and the negative possibilities including job loss or earnings interruption for travel, change of career goals, etc. The present value of such a figure is roughly $830,000. From that should be deducted a realistic assessment of what Ms. Meghji might earn, as discussed immediately below.

**Anticipated Future Earnings**

**387**  To be deducted from any assessment of future earnings loss are the amounts that Ms. Meghji likely will earn over the period in which her future capacity loss is assessed. She currently earns some $14,000 working part-time as a sales clerk in a jewellery store. I conclude that she is managing that level of income partly through her own perseverance and partly through the accommodations granted to her by a sympathetic manager. Ms. Meghji's physical limitations will likely preclude her working any more hours than she currently manages and her cognitive problems will likely inhibit any more challenging employment.

**388**  Ms. Meghji's current employment is unlikely to her age 65 partly because she will not be able to tolerate the job for that long, but more because her current manager, who has supported her continuation, is not likely to be there for that long.

**389**  As well, Ms. Meghji's current employment will likely be interrupted at some point for knee surgery, depending on how long the surgery will be deferred relative to how long Ms. Meghji will continue to work.

**390**  If she were able to continue to age 65 at her current employment level, Ms. Meghji would earn about $250,000-$260,000 on a discounted basis.

**391**  My conclusion, however, is that Ms. Meghji is unlikely to work beyond age 50, whether because her knee will not tolerate it or her manager will be replaced by someone less sympathetic. A rough present value of her income between now and age 50 is $123,000.

**Assessment of Loss of Earning Capacity**

**392**  Subtracting the present value of Ms. Meghji's expected earning capacity from her anticipated future earnings and rounding yields $700,000 loss of earning capacity.

**393**  This method of assessment may produce unfairness in that it conceals to some extent the contingencies that have influenced both with and without accident income assumptions. Approaching it in another way, assuming a $55,000 yearly income potential if the accident had not occurred, the present value to Ms. Meghji, if working to age 65 would be just over $1,000,000. Her current income potential of $14,000 per year, if extrapolated to her age 65, would yield $250,000-$260,000.

**394**  It is far more likely in my view that Ms. Meghji would have worked to age 65 if the accident had not occurred than it is that she will work beyond age 50, given the extent of her current disability and the doctor's anticipation of future problems with her knee.

**395**  On balance, therefore, I conclude that a fair and just award for loss of earning capacity in this case is $750,000.

**SUMMARY**

**396**  In summary, the defendants shall pay Ms. Meghji, jointly and severally:

1. General / non-pecuniary damages in the sum of $125,000.00
2. Special damages in the sum of $25,212.00
3. Future care costs in the sum of $150,000.00
4. Past loss of earning capacity in the sum of $100,000.00
5. Loss of future earning capacity in the sum of $750,000.00

**397**  The total award to Ms. Meghji is $1,150,212.00.

**398**  The parties may speak to matters incidental to this award, including gross-up for tax or management fees.

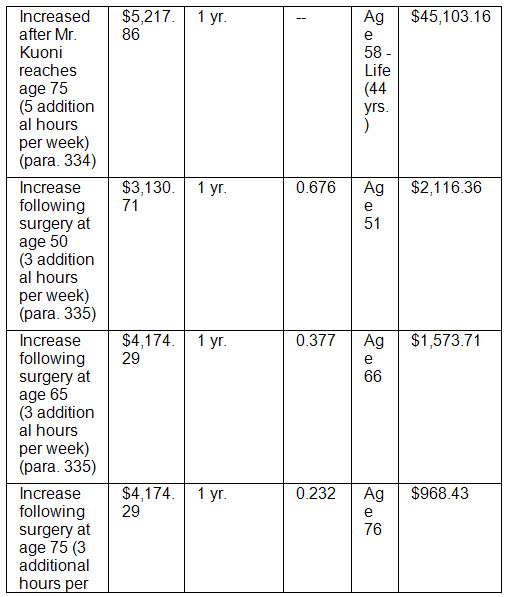
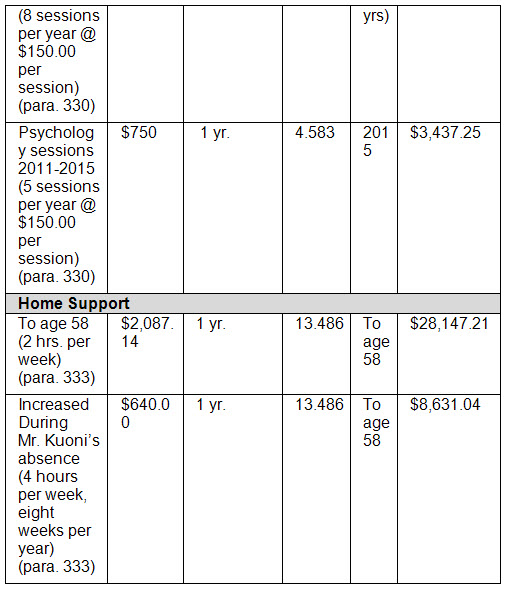
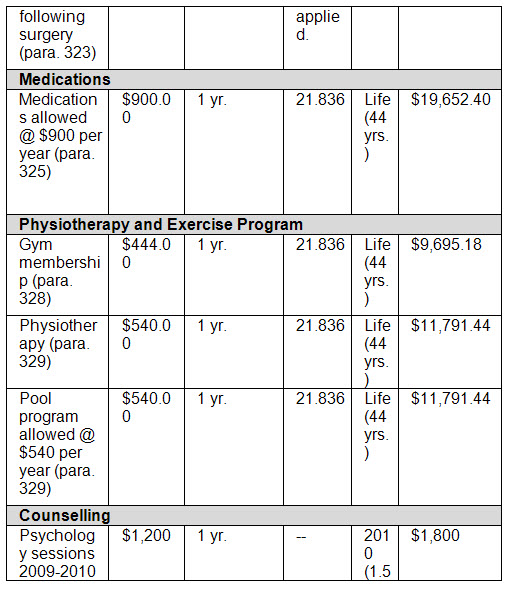
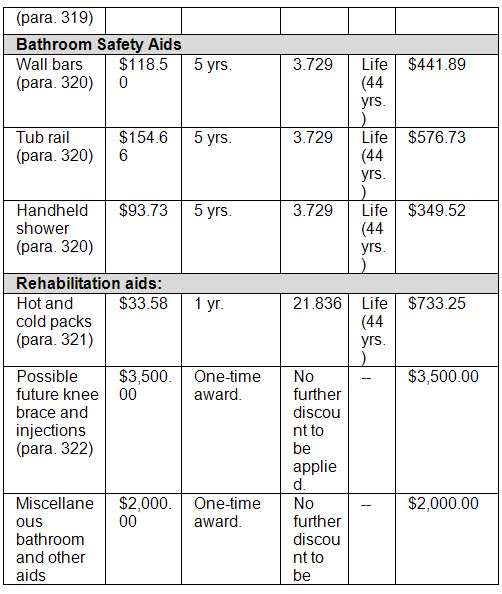
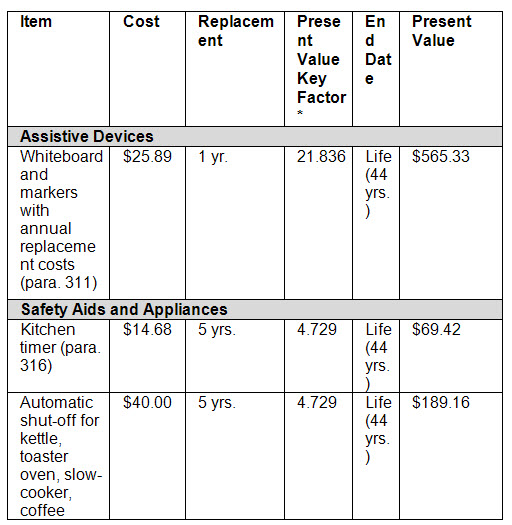
**399**  If there is a reason to deviate from the ordinary order for costs, I will hear counsel.

R. JOHNSTON J.

\* \* \* \* \*

**Appendix A: Calculation of Cost of**

**Future Care Award (from June 1, 2009):**



\* Present value key factors were provide by Mr. Young, and included in exhibit 50. The key factors are based on the statutory discount rate of 3.50% and calculated on either a continuing or end-year basis depending on the nature of the expense.

**End of Document**

[***Morlan v. Barrett, [2010] B.C.J. No. 2484***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4MF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.M. Stewart J.

Heard: November 22-26, 29 and 30, 2010.

Judgment: December 9, 2010.

Docket: M085766

Registry: Vancouver

**[2010] B.C.J. No. 2484** | [*2010 BCSC 1767*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TS-00000-00&context=) | [*2010 CarswellBC 3437*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TS-00000-00&context=) | [*195 A.C.W.S. (3d) 406*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TS-00000-00&context=)

Between Colleen Morlan, Plaintiff, and Jason Scott Barrett, Rebecca Pangan and Alfredo Pangan, Defendants

(34 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Fibromyalgia or chronic pain — Considerations impacting on award — Age of claimant — Future treatment required — Action for damages for *negligence* that resulted from two motor vehicle accidents allowed — Defendants admitted liability — Plaintiff suffered soft tissue injuries that persisted to the trial — She also developed chronic pain and fibromyalgia as a result of the accidents — Plaintiff was previously a high-energy person who had to leave a demanding job that she enjoyed — Non-pecuniary damages of $125,000 were awarded, as was $425,000 for future loss of earnings — Future care costs of $53,243 were awarded — Global award of $610,453 was reasonable.**

**Damages — Type of damages — General damages — For personal injuries — Calculation — Considerations — Duration of loss — Employment status — Cost of future care — Loss of earning capacity — Non-pecuniary loss — Pain and suffering — Action for damages for *negligence* that resulted from two motor vehicle accidents allowed — Defendants admitted liability — Plaintiff suffered soft tissue injuries that persisted to the trial — She also developed chronic pain and fibromyalgia as a result of the accidents — Plaintiff was previously a high-energy person who had to leave a demanding job that she enjoyed — Non-pecuniary damages of $125,000 were awarded, as was $425,000 for future loss of earnings — Future care costs of $53,243 were awarded — Global award of $610,453 was reasonable.**

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| Action by Morlan for damages for ***negligence*** that resulted from two motor vehicle accidents that occurred in quick succession on January 6, 2007. Liability was admitted by all of the defendants. As a result of the significant impacts that occurred Morlan suffered soft tissue injuries to her neck, shoulder and upper back. The results of those injuries, which included headaches, persisted to the trial. The defendants also conceded that, if not for their ***negligence***, Morlan would not have been burdened with chronic pain, which was diagnosed as fibromyalgia in February 2008. Morlan was 50 years' old. She was 46 at the time of the accidents. Morlan was steadily employed since she graduated from high school in 1978. Since 2005 she had been employed as an executive secretary to the president of an organization. After the accidents Morlan had to seek employment in a less demanding job and she had to sell her home and find another. She obtained new employment in 2008 in a less demanding position. The job was far less rewarding in terms of job satisfaction. Having to change jobs was a huge blow. Morlan was a high energy person and a perfectionist before the accidents. She was a different woman afterwards and her energy was miniscule.  HELD: Action allowed.  Morlan was awarded $125,000 for non-pecuniary damages. She was not awarded damages for loss of earning capacity to the trial because her salary increased when she switched jobs. Morlan was awarded $425,000 for loss of capacity to earn future income. She was also awarded $53,243 for future care costs. This consisted of $1,800 for cognitive behavioural therapy, $44,504 for prescription drugs and $6,939 for physiotherapy. Morlan was also awarded $7,210 for special damages. The total award, of $610,453, was reasonable. |

**Counsel**

Counsel for the Plaintiff: D. Kolb, J. Cameron.

Counsel for the Defendants: A. du Plessis.

[Editor's note: A correction was released by the Court April 20, 2012; the changes have been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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| **A.M. STEWART J.** |

**1**   The plaintiff claims damages for ***negligence*** arising out of two motor vehicle accidents which occurred in quick succession on January 6, 2007. The plaintiff's injuries are indivisible: *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=). Liability has been admitted by all defendants.

**2**  My task in the case at bar has been much narrowed in that by the end of the case it was common ground that as a result of significant impacts on January 6, 2007, the plaintiff suffered soft tissue injuries to her neck, shoulder, upper back and that the results for her of those injuries - including headaches - persist, at least in part, to this day. Furthermore, and of greater significance, it is conceded by the defendants that but for the ***negligence*** of the defendants, the plaintiff would not be burdened, as she is, with chronic pain taking the form of widespread pain first noted by the plaintiff in late 2007 and diagnosed as fibromyalgia by her family doctor, Dr. Beck, in February 2008.

**3**  I must assess the damages. To the extent an award of money can do so, I must restore the plaintiff to the position she would have been in absent the defendants' ***negligence*** (*Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paragraph 20). I note here that the plaintiff was an excellent witness.

**4**  The plaintiff is 50 years of age. She was 46 years of age as of January 6, 2007, the date of the collisions in the case at bar. The plaintiff is twice married, now living happily with her second husband, an artist. The plaintiff has two children. Both have left the nest.

**5**  The plaintiff graduated from high school in 1978 and has been steadily employed since then. In 2005, she was hired by the B.C. Fed (as it was referred to at this trial) as executive secretary to the President, Mr. Sinclair. I find that the plaintiff was a high energy, well motivated individual in all aspects of her life including her work and that the job - executive secretary to Mr. Sinclair - suited her perfectly. She loved the fact that the job was fast paced, demanding, unpredictable as to content on any given day and part and parcel of an enterprise aimed at bettering the lot of working people.

**6**  The results for the plaintiff of the defendants' ***negligence*** on January 6, 2007 included her having to seek employment in a less demanding job and her selling her home and finding another. That which had made her job enjoyable now proved to be too much for her. In addition, the three hour (both ways) commute that had been no problem before January 6, 2007 had become a great burden. Moving to a smaller home with fewer stairs proved to be a wise move.

**7**  The plaintiff found work at the Electrical Industry Training Institution (EITI) in 2008 and is employed there as a Program Coordinator. The job is far less demanding and the commute is only 20 minutes. The job is also far less rewarding in terms of job satisfaction. Having to change jobs was a huge blow and this will be reflected in the non-pecuniary damages I award later. By happenstance the plaintiff's salary actually went up when she switched jobs. For that reason there is no claim for loss of earning capacity to the date of trial. But there is a claim for loss of opportunity to earn income - including benefits - in the future.

**8**  As for her private life, suffice it to say that the plaintiff had been a high energy, perfectionist sort of individual who was at the centre of whatever activities she and her family and friends undertook. In a nutshell, she was a whirlwind whether we are looking at her crowded day before and after work, her home being ground zero for large and regular family gatherings, her somewhat obsessive cleaning of her home, her union activities, or such things as what was referred to as "marathon shopping" sessions.

**9**  And I find that all of this has been lost to the plaintiff as a result of the defendants' ***negligence***. The evidence of the plaintiff and of her husband, her daughter, her son, her erstwhile coworkers and a friend make one thing clear: she is a different woman. Her energy is minuscule compared to what it was before January 6, 2007. Her fibromyalgia results in constant pain controlled - in the sense of made endurable - by the ingestion of vast amounts of drugs, principally Gabapentin and Flexeril. (Exhibit 14 - a graph revealing her consumption of drugs since the date of the motor vehicle accidents - speaks volumes.) Her localized pain - the pain that was with her in the neck, shoulder and upper back - is with her still to the extent that as of now she suffers occasional headaches and pain in the area of the neck and shoulder. I accept that the plaintiff can distinguish between her two sources of pain. I note here that in addition to the above, the results for the plaintiff of the defendants' ***negligence*** included ingesting over-the-counter drugs, physiotherapy, a prescription for an anti-inflammatory drug, x-rays, massage, kinesiology, exercising, acupuncture and psychological counselling.

**10**  Having considered the whole of what the doctors have had to say about the plaintiff's future, I think that Dr. Beck has it right when she says that the prognosis is guarded, that is to say, in her opinion the plaintiff has "plateaued even slightly worsened over the last year [before July 30, 2010]". (Exhibit 4 page 6)

**11**  I have considered the case law placed before me by counsel. Having considered the whole of the evidence placed before me and taken into account - without repeating any of it here - what I have said in the whole of these reasons for judgment, I award the plaintiff $125,000 by way of non-pecuniary damages.

**12**  There is no issue as to the award with respect to special damages. The plaintiff is awarded $7,210.

**13**  I turn to the plaintiff's claim for loss of capacity to earn income in the future. Income in this context includes not just salary but benefits. The plaintiff seeks an award in the range of $400,000 to $500,000. Inherently, what is afoot is not a calculation but a foray into the land of probability analysis, real and substantial possibilities, the contingencies of life and assessing a loss "on a judgmental basis" (*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 paragraph 10).

**14**  The plaintiff's claim is grounded on the evidence placed before me by an economist, Curtis Peever. His report is Exhibit 2. At page 5 a "Summary Table" appears. The chart is based on the assumption that whichever events are being looked at are a certainty. In other words, the chart assumes that the plaintiff would have worked at the B.C. Fed until age 65 or 70 and offers a number of choices as to when one wishes to assume she will quit working - and never work again, anywhere - at EITI. The difference between the plaintiff's position if she had worked at the B.C. Fed until age 65 or 70 and her position if she retired from EITI at whatever age one takes as a given then drops out. The range is huge, i.e., from $5,461 to $912,458.

**15**  The chart reflects not just the passage of time but the fact that as of January 1, 2010 things at the B.C. Fed occurred which substantially increased the salary the plaintiff would have earned at the B.C. Fed as an executive secretary and substantially increased the value of her pension plan. Differences between the B.C. Fed and EITI in the value of health and welfare plan benefits are reflected in the chart as well. A B.C. Fed parking allowance is also taken into account in the economist's chart.

**16**  But nothing is certain. All real and substantial possibilities must be taken into account and given weight according to their relative likelihood. In the case at bar the plaintiff suffers from fibromyalgia. Her condition is permanent in that things may improve, stay the same or get worse but there is no cure.

**17**  Pure happenstance resulted in her suffering no loss of income to the date of trial, i.e., she got a less demanding job which happened to pay more than her job at the B.C. Fed. But a reduction in her capacity to earn income has been made out. Her having to give up her job at the B.C. Fed demonstrates that the circle of secretarial or administrative positions for which she could, if necessary, compete has been narrowed. (Exhibit 6, a "Functional Capacity Evaluation" and Exhibit 5, the report of an "Occupational Health Physician" simply confirm the obvious.) To put it in familiar terms: she is less marketable as an employee; she is less capable overall from earning income from all types of employment; she has lost the ability to take advantage of all job opportunities which might otherwise have come her way; and she is less valuable to herself as a person capable of earning income in a competitive labour market (*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 paragraph 10). The live issue is whether there is a real and substantial possibility that the reduction in her capacity to earn income will in fact result in lost income - including benefits - in the future (*Sobolik v. Waters*, [*2010 BCCA 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4BS-00000-00&context=), paragraphs 39-43).

**18**  As noted earlier, having considered the whole of the evidence placed before me I rely on the evidence of the plaintiff's family physician, Dr. Beck, as I peer into my crystal ball and consider the plaintiff's future.

**19**  The fact that the balance of the medical evidence does not replicate what Dr. Beck said at Exhibit 4 page 6 - that the plaintiff has "plateaued even slightly worsened over the past year" - and indeed the evidence of the rheumatologist, Dr. Shuckett is quite different - is neither here nor there as having considered the whole of it I say as the trier of fact that Dr. Beck was an impressive, thoughtful witness of great experience who offered up her opinion against a background of having dealt with the plaintiff for 25 years and, more particularly, having had close supervision of the plaintiff's medical condition since January 6, 2007 and the advent of the motor vehicle accidents. In saying that I have not lost sight of the fact that Dr. Beck has in fact retired.

**20**  Having considered the whole of the evidence together, I say that three real and substantial possibilities have been made out: that the plaintiff's condition will improve; that the plaintiff's condition will remain as it is; and that the plaintiff's condition will worsen. In "giv[ing] weight according to their relative likelihood" to these three hypothetical events I find that the possibility of her condition improving barely rises above mere speculation and that the possibility of her remaining the same and the possibility of her condition worsening are both great (*Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paragraph 27).

**21**  I find that there most certainly is a real and substantial possibility that the reduction in the plaintiff's capacity to earn income will result in lost income - including benefits - in the future. Beyond the fact that nothing in life is certain and that she may yet find herself on the job market there is the real and substantial possibility that even if she remains in her current job until the end of her working career, her working career will end earlier than it would otherwise have absent the effects on the plaintiff of the defendants' ***negligence***. That is so because it is a real and substantial possibility that her fibromyalgia will remain as it is but common experience dictates that as one moves into one's latter years the ability to work in spite of a condition that drains one's energy diminishes. Independently of that, it is a real and substantial possibility that the plaintiff's fibromyalgia - and with it loss of energy - will worsen. I make that finding having considered the whole of the evidence including that of the plaintiff as to her recent experience and of all of the doctors and concluded as the trier of fact that I rely most on the evidence of Dr. Beck.

**22**  I take into account factors beyond those that relate to the state of the health of the plaintiff and her ability to work. The plaintiff has established a real and substantial possibility - not mere speculation - that had she not had to forfeit her job at the B.C. Fed she would have, within a few years of the date of the motor vehicle accidents, taken advantage of an opportunity to perhaps move up in the hierarchy of the B.C. Fed to the point of becoming a Director and with that received an increase in salary and benefits. That is the net effect of the evidence of the plaintiff and of Lynda Bueckert. Moreover, as of January 6, 2007 the plaintiff had to assume that she would retire from the B.C. Fed when she turned 65. After January 6, 2007 the law changed. I find that the plaintiff's love for her job at the B.C. Fed combines with my picture of what she was before January 6, 2007 and results in my accepting her evidence to the effect that it is a real and substantial possibility that absent the defendants' ***negligence*** she would have continued to work at the B.C. Fed even after she had turned 65. I have considered the positive and negative vagaries of life, i.e., the contingencies. Having considered the whole of it I award the plaintiff $425,000.

**23**  I turn to the cost of future care. (I note that the plaintiff chose to deal with loss of capacity with respect to housework under this heading and for that reason I will deal with it here.) The plaintiff seeks an award of $82,878.

**24**  To be compensable the care in question must be medically justified and reasonable.

**25**  The plaintiff refers to the report on cost of future care which appears before me as Exhibit 15. The author is not a doctor. On the basis of what appears at pages 7 and 8 of Exhibit 15 the plaintiff seeks funding for: kinesiology, physiotherapy, "psychology", medications, home support (cleaning) and a TENS machine.

**26**  As for medical justification, the plaintiff relies on the evidence of her treating physicians - Dr. Beck and Dr. Shuckett - and the evidence of Dr. Dunn, a rheumatologist brought into the case by plaintiff's counsel, Dr. Gouws, an "Occupational Health Physician" brought into the case by plaintiff's counsel and certain comments by doctors called by the defendants, i.e. Dr. Sorvio and Dr. Wade.

**27**  As the trier of fact I have decided to pay attention to what the plaintiff's treating physicians have to say. They are the best source of information. To treat what they say as simply a beginning, a thing to be expanded upon by others, would, in my opinion, be wrong.

**28**  Looking at the evidence of Dr. Beck I find solid support for only these items: a cleaning service, physiotherapy, prescription drugs and psychological counselling. I find solid support in Dr. Shuckett's evidence for prescription drugs, cognitive behavioural therapy ("psychology") and physiotherapy.

**29**  I decline to award a discrete sum for cleaning. It would not be reasonable. I am alive to the Court of Appeal's decision in *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=) and realize that the loss in question is personal to the plaintiff. But the fact is that the plaintiff's husband is ready, willing and able to do the cleaning. The plaintiff's real loss is her dissatisfaction at the way the cleaning is done. Her loss is taken into account in the award for non-pecuniary damages (*Deglow v. Uffelman*, [*2001 BCCA 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M408-00000-00&context=) at paragraph 24).

**30**  I find that the defendants' bearing the cost of future care insofar as it relates to physiotherapy, prescription drugs and cognitive behavioural therapy is reasonable and available at a reasonable cost.

**31**  After the submissions of counsel ended I considered this matter and decided that I was wrong about something I suggested during counsels' submissions, i.e., that with respect to those of the items noted above that may come into play, but it is not certain that they will, I should reduce the relevant figure. I say now that as it is the defendants who have put the plaintiff in this position, it is the defendants who must bear the burden arising from any such uncertainty.

**32**  Using the cost figures which appear at Exhibit 15 pages 7 and 8 and assuming that the plaintiff will live well into her 80s, I look to the evidence of the economist, Curtis Peever, for a multiplier (19274) and arrive at an award of $1,800 for cognitive behavioural therapy (one time only), $44,504 for prescription drugs and $6,939 for physiotherapy. The total is $53,243.

**33**  As demanded by the case law I step back and look at whether the global award of damages - $610,453 - is reasonable in the circumstances. In my respectful opinion, it is.

**34**  If necessary, counsel may arrange to speak to the issue of costs or any other ancillary matter on which counsel cannot agree.

A.M. STEWART J.

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**CORRECTION**

Released: April 20, 2012

In paragraphs [14] and [32] the name "Peeves" has been changed to "Peever".

**End of Document**

[***Shinkaruk v. Crouch, [2011] B.C.J. No. 2476***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B19T-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

A. Saunders J.

Heard: November 28-30 and December 1, 2 and 5, 2011.

Judgment: December 22, 2011.

Docket: M114443

Registry: New Westminster

**[2011] B.C.J. No. 2476** | [*2011 BCSC 1762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1P7-00000-00&context=)

Between Allan Shinkaruk, Plaintiff, and Richard Crouch, Defendant

(96 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Considerations impacting on award — Pre-existing injury — Contributory *negligence* — Action by plaintiff against defendant for damages arising out of a motor vehicle accident allowed in part — Defendant collided with plaintiff's vehicle in an intersection — Defendant found to be 80 per cent liable for accident — Plaintiff off work for five months with lower back pain following accident — Court found subsequent pain was largely due to plaintiff's pre-existing lower back condition; however, accident materially contributed to his discomfort — Plaintiff awarded non-pecuniary damages, past income loss, and special damages — After applying a 20 per cent deduction for plaintiff's contributory *negligence*, plaintiff awarded $53,247.**

**Damages — Types of damages — General damages — Categories of — Loss of income — Special damages — Past loss of income — Non-pecuniary loss — Action by plaintiff against defendant for damages arising out of a motor vehicle accident allowed in part — Defendant collided with plaintiff's vehicle in an intersection — Defendant found to be 80 per cent liable for accident — Plaintiff off work for five months with lower back pain following accident — Court found subsequent pain was largely due to plaintiff's pre-existing lower back condition; however, accident materially contributed to his discomfort — Plaintiff awarded non-pecuniary damages, past income loss, and special damages — After applying a 20 per cent deduction for plaintiff's contributory *negligence*, plaintiff awarded $53,247.**

**Tort law — *Negligence* — Causation — Contributory *negligence* — Apportionment of liability — Motor vehicles — Liability of driver — Rules of the road — Action by plaintiff against defendant for damages arising out of a motor vehicle accident allowed in part — Plaintiff was pulling out of parking lot — He looked left, saw defendant but judged him to be far enough away to proceed, looked right and then pulled out without looking left again — Defendant was speeding and entered intersection on red light, colliding with plaintiff's vehicle — Defendant found to be 80 per cent liable and plaintiff's contributory *negligence* assessed at 20 per cent.**

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| Action by the plaintiff against the defendant for damages arising out of a motor vehicle accident. On August 31, 2006, the defendant collided with the front end of the plaintiff's vehicle in an intersection. As the plaintiff was pulling out from a parking lot, he looked to the left and saw the defendant approaching but judged him to be far enough away to proceed. No one was coming from the right. The plaintiff proceeded without looking left again and so did not appreciate that the defendant was speeding and was not going to stop. The defendant entered the intersection on a red light. The plaintiff was taken to hospital with lower back pain as well as pain and numbness in his left foot and ankle. The plaintiff remained off work until January 29, 2007. The plaintiff was an iron worker who had a significant history of lower back pain, including time off work. Throughout 2007 and 2008 the plaintiff experienced bouts of lower back pain that necessitated more time off work. The plaintiff continued to have lower back pain as often as once or twice a week, but was able to manage the pain. The defence agreed that the plaintiff was entitled to compensation that reflected his pain and discomfort, and income lost, for the period up to the end of January 2007. However, beyond that the defence argued that the plaintiff failed to prove that the accident accelerated the onset of his low back pain.  HELD: Action allowed in part.  With respect to liability for the accident, the Court found the defendant 80 per cent liable for the accident given that he was speeding and entered the intersection on a red light. With respect to the issue of damages, the Court found that after January 2007, the plaintiff's pre-existing lower back condition had become the predominant explanation for the plaintiff's symptoms. Subsequent episodes were largely explained by the plaintiff's physical exertions that immediately preceded the onset of back pain. However, the plaintiff's back would have still been healing from the accident, thus rendering him more susceptible to injury from overexerting himself in the course of everyday events. The Court found the accident materially contributed to the discomfort he suffered during those episodes, and that the discomfort was compensable as a component of his non-pecuniary damages. The Court awarded non-pecuniary damages in the amount of $45,000, net past income loss in the amount of $20,522, and special damages of $1,036. After applying a 20 per cent deduction to account for the plaintiff's contributory ***negligence***, he was awarded $53,247. He was also entitled to interest and 80 per cent of his costs. |

**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, R.S.B.C. 1979, c. 318, s. 176(2)

**Counsel**

Counsel for Plaintiff: J. Voss.

Counsel for Defendant: A.D.C. Ross, L. McOuatt, Articled Student.

**Reasons for Judgment**

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| **A. SAUNDERS J.** |

**1**   The plaintiff was injured in a motor vehicle accident on August 31, 2006. I have concluded that the greater portion of fault rests with the defendant. I have also found that the plaintiff suffered a period of disability of approximately five months' duration, following which he continued to have minimal residual symptoms attributable to the accident. However, I have found that the majority of his complaints since the end of his period of disability, and moving forward into the future, are and will be attributable not to the subject accident, but to a longstanding pre-existing back condition and to other independent factors for which the defendant bears no liability.

**Circumstances of Accident and Liability**

**2**  The defendant collided with the plaintiff's vehicle in the intersection of 96th Avenue and Telegraph Trail in Langley. The intersection forms an inverted "T", with Telegraph Trail running in a north-by-northwesterly direction from 96th Avenue. The weather was clear, visibility was good and the streets were bare. It was about 7:00 p.m.; the plaintiff Mr. Shinkaruk, who was then employed on the afternoon shift at a nearby metal fabrication shop, was on his lunch break.

**3**  On the south side of 96th Avenue at the intersection there is a ramped access to a parking lot. Mr. Shinkaruk was in his vehicle, exiting the parking lot, having picked up a sandwich for his lunch. His evidence was that he pulled up to, or just past, the sidewalk and looked to his left, that is, to the west, down 96th Avenue. There was only one vehicle approaching from that direction, the defendant's pickup truck; it was in the lane closest to the centre line, heading east. 96th Avenue has four lanes of traffic at that point, two in each direction. Mr. Shinkaruk said that he could see quite a distance, three or four blocks, down 96th Avenue to the west; the defendant's truck was two or three blocks back.

**4**  This is an industrial area, and it was not clear to me what distance a "block" was, as Mr. Shinkaruk used the term. The business next to the shopping centre where Mr. Shinkaruk had been is an Esso station; shown photographs of the accident scene, he said that the defendant's vehicle was a good deal to the west of the gas station's sign. He was far enough back, Mr. Shinkaruk said, that the question of whether or not the defendant was going to stop wasn't an issue.

**5**  There are no traffic control signals for vehicles entering the intersection from the parking lot. After observing the defendant's oncoming vehicle, Mr. Shinkaruk looked to the right and could see the traffic lights for eastbound traffic. They were red. Mr. Shinkaruk then looked forward. Opposite him on Telegraph Trail was a "B-train", a tractor hauling two trailers, intending to turn left across his path and head east on 96th Avenue. The B-Train had been stopped and was just starting to enter the intersection. The B-Train would take time to accelerate, and Mr. Shinkaruk judged that he had enough time to cross the intersection before the B-Train turned across his path. He therefore started into the intersection.

**6**  As he entered the curb lane, something caught his eye and he looked to the left again. He saw the defendant's vehicle closing on him quickly. Mr. Shinkaruk braked, coming to a stop with the first one or two feet of the front end of his vehicle in the lane closest the centre line, in which the defendant was travelling. Mr. Shinkaruk believed that there was, physically, room for the defendant to go around him, but he knew that there was going to be a collision. He could see that the defendant was going quite fast, and although he did not hear a screech of brakes or skidding, he could see that the defendant was skidding towards him.

**7**  The defendant's pickup truck impacted the front left corner of Mr. Shinkaruk's vehicle, turning it 90 degrees so that it came to a stop facing east in the curb lane.

**8**  Mr. Shinkaruk was the only one who gave evidence as to the speed limit at this location. He said that the speed limit was 50 km/h.

**9**  The defendant Mr. Crouch testified. He said that he was travelling 65 to 70 km/h eastbound on 96th Avenue, and just as he was coming up to the intersection saw the plaintiff's vehicle suddenly pull out in front of him. He had not previously seen it. Mr. Crouch said that he believed the light was green, "from my recollection". This aspect of his testimony was less than emphatic.

**10**  Mr. Crouch said that he hit the brakes very hard, and his truck started to slide. His front wheels locked and he could not steer.

**11**  Mr. Crouch had worked on his truck's brakes about a month before the accident. In cross-examination, he stated that he has no idea if the rear brakes were working. Pictures of the accident show that there were skid marks made by the front tires only. He was unable to explain why the rear wheels did not lock up and skid also.

**12**  Mr. Crouch acknowledged being "slightly" over the speed limit.

**13**  In cross-examination, he agreed with the suggestion that if he had been going slower, and had got better braking, he could possibly have released his brake before his wheels locked up and manoeuvred his truck around the plaintiff's car. Mr. Crouch said that he did not know if the plaintiff's vehicle was still moving, but if it was stopped, he could "quite possibly" have steered around him.

**14**  An independent witness, Mr. Whetstone, testified. Just before the accident he had pulled out of a parking lot on the north side of 96th Avenue, east of the intersection, turning to his right. The length of his vehicle - he was hauling a trailer - required him to turn into the westbound lane closest the centre line. As he approached the intersection, the light went yellow, and he came to a stop. He was at the stop line, first in line in that lane. When he stopped, the light was red. He saw only one vehicle coming on from the other direction, the defendant's truck; he described its location as being back around the gas station. He also observed the plaintiff's vehicle; he believes that it was stopped. The plaintiff seemed to Mr. Whetstone to be waiting.

**15**  He then saw the plaintiff start to move into the intersection. The oncoming pickup was still approaching. It did not appear to Mr. Whetstone that it was going to stop at the red light. He heard the its brakes being applied. Once the plaintiff began to move into the intersection, Mr. Whetstone knew there was going to be a collision.

**16**  Mr. Whetstone recalled that at the point of impact, the plaintiff was not all the way into the eastbound lane closest the centre line. He thought that there was quite possibly room for the defendant to get around the plaintiff's vehicle, although he said that it would be "touch-and-go", and it was possible that the defendant would have ended up colliding with him.

**17**  Section 176(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 318, states:

The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

**18**  A breach of the *Motor Vehicle Act* is not in itself determinative of liability; all of the surrounding circumstances may be taken into account.

**19**  The sequence of events is that the plaintiff stopped at the exit from the parking lot, looked to the left and observed the defendant, then looked to the right, and then looked ahead and saw the B-train moving forward from its stopped position. Had the plaintiff then looked to the left again, he would have had the same view as Mr. Whetstone and at that point would have appreciated that the defendant was not going to stop, as Mr. Whetstone did. At that point, immediately prior to the plaintiff entering the intersection, the defendant's vehicle was an immediate hazard. The plaintiff ought then to have yielded to the defendant.

**20**  If, as the plaintiff testified, the defendant's vehicle was two to three blocks back from the intersection, some time must have elapsed for the defendant to reach the intersection. During that time, there was the possibility that traffic could have pulled out onto the road from the gas station. There would have been more than enough time for the plaintiff to look again to the left before pulling forward.

**21**  The most probable explanation for what happened is that the defendant did not bother checking again because the light was red, and because his attention had been drawn to the B-Train, and he was determined to beat it through the intersection so that he would not have to wait and risk missing an opportunity to cross while traffic on 96th Ave. was stopped. If he had taken the time to look, the defendant's vehicle would have been perceived by him as a hazard. I therefore find that there was some contributory ***negligence*** on the plaintiff's part.

**22**  However, the greater ***negligence***, I find, rests with the defendant, who entered the intersection on a red light and who was speeding. The evidence also suggests that his rear brakes were not properly functioning.

**23**  I assess the defendant's liability at 80%.

**The Plaintiff's Pre-Accident History**

**24**  Mr. Shinkaruk is an ironworker. He is now 48 years of age. He has a significant history of low back pain, including absences from work.

**25**  Pre-1999 medical records are not in evidence, but Mr. Shinkaruk has been under the care of the same family physician, Dr. Ian Mitchell, since he was a teenager. Dr. Mitchell's report of October 22, 2007, notes that Mr. Shinkaruk has a history of intermittent low back pain dating to the early 1980s.

**26**  It appears that in late 1996 or early 1997, he developed significant low back pain with associated left leg pain. His left foot became numb and he lost mobility. He was referred to a neurologist, Dr. Chan, who saw him in February 1997. A CT scan at that time showed a large left L4-5 disc herniation, with inferior sequestration. Mr. Shinkaruk was off work for a period of time, but the painful symptoms settled down with conservative treatment and he returned to work.

**27**  In May 1999 he experienced a spontaneous return of low back pain and left side sciatica, down into his leg, ankle, and foot. It appears from the medical records that he was off work for approximately one week and then returned to work. However, the pain persisted and in June 1999 he was off work again. A further CT scan showed a small central L4-5 disc herniation, with a suggestion of disc material extending down to the L5 level. Degenerative changes at the L3-4 and L5-S1 discs and L5-S1 facet joints were also noted. During this period, he was again assessed by Dr. Chan, on three occasions. He was not judged to be a candidate for surgery. Dr. Chan discussed with him proper lifting techniques, and he was advised to avoid twisting his back and to be careful with vacuuming and gardening. He was advised to exercise. He also had physiotherapy during this period. He returned to work in February 2000.

**28**  There were no further complaints to his doctor of back pain until an incident which occurred in mid-May 2004, when Mr. Shinkaruk was boating with friends. This was an activity he enjoyed very much and was a significant feature of his social life. He owned a power boat, and had several friends who also owned boats. They would take turns riding in each other's boats during summer evenings, when Mr. Shinkaruk was on vacation or not working, and on weekends, sightseeing up the Fraser River and across the Straights to the Gulf Islands, trolling for salmon, and crab fishing. On this occasion, Mr. Shinkaruk was in a friend's boat when it went over several waves at high speed. This injured his low back, and he was off work for a week to 10 days.

**29**  In early February 2005, Mr. Shinkaruk was working as a Fitter Improver at Marsh Steel. He suffered a workplace injury to his mid-back while bending over to move a piece of steel plate. This injury led to Mr. Shinkaruk taking physiotherapy, and while doing exercises with a rubber band - performing a motion similar to repeatedly pulling on a lawn mower cord - he reinjured his lower back, as a consequence of which he did not return to work until April. His job was physically demanding, but he had been given low back exercises to do by the physiotherapist, and from the advice he had received he had learned to "work smarter", and was in good shape.

**30**  In June 2005 Mr. Shinkaruk's employment was terminated, after he got into a fist fight with a fellow employee. He did not work again until mid-October 2005, when he started working as a fabricator at Knelson Concentrators ("Knelson"). He was working at Knelson at the time of the subject accident.

**31**  There is no further record of complaints to his physician, Dr. Mitchell, of low back pain, up to the date of the accident.

**Injuries and Post-Accident Progress**

**32**  Mr. Shinkaruk was taken from the accident scene to hospital by ambulance. While in the ambulance his lower back started to hurt, and his left foot and ankle were sore, numb and painful. He suffered other minor soft tissue injuries which healed quickly.

**33**  Through the following five months, Mr. Shinkaruk experienced mid- and lower-back pain and leg pain of varying intensity which gradually resolved. He attended physiotherapy, and was regularly assessed by his GP, Dr. Mitchell. Dr. Mitchell's clinical notes during this time record complaints of severe left sacroiliac joint pain radiating down the left leg, and he prescribed anti-inflammatory medication.

**34**  In early November 2006 he attempted to return to work, hoping to perform light duty. Mr. Shinkaruk's supervisor at Knelson, Mr. Ceron, testified. He said that Mr. Shinkaruk's job performance during this brief attempt at returning to work was not up to the company's standards. He did not think Mr. Shinkaruk was able to concentrate adequately. He told Mr. Shinkaruk that there was no light duty on his shift, and told him to go back to his doctor and not to come back until he was 100%. It appears from the employment records that this attempted return to work lasted only five days.

**35**  Mr. Shinkaruk then remained off work until January 29, 2007. During that period of disability he drew down his accumulated vacation pay and sick days, and obtained a disability pension.

**36**  During this time off, Mr. Shinkaruk suffered a reversal in his personal life. He had been living with a Ms. Wahlwroth for about three years, and they had become engaged in March 2006. Her teenage son also lived with them. She worked days and did a lot of travelling, and Mr. Shinkaruk, as noted, worked afternoons; their time together was Friday nights and weekends.

**37**  Mr. Shinkaruk testified in direct that the collision destroyed their relationship. With him being around the home all the time convalescing, he got in her space too much, and got in the way of the routine she had with her son. They began fighting. Mr. Shinkaruk testified that Ms. Wahlwroth said to him that any man she would be with should have a job and be able to support the family. Things came to a head in December, during a vacation to the Caribbean with members of her extended family. They got into some bad arguments, and when they returned she told him to move out. He did so the following day, which was Christmas.

**38**  Since then they have seen each other on and off. Several attempts at reconciliation were unsuccessful, but more recently they have reunited and are seeing each other steadily.

**39**  Ms. Wahlwroth gave her own testimony as to Mr. Shinkaruk's demeanour following the accident and as to the reasons for their breakup, which I will return to later in these reasons.

**40**  By February 19, 2007, Mr. Shinkaruk had been back to work for approximately three weeks. He reported to Dr. Mitchell that he was able to do his normal job. There was no numbness in his leg, and his back was a lot less painful. On March 20, he reported that his back was sore intermittently, but he was doing "okay".

**41**  In April 2007, Mr. Shinkaruk had another incident of low back pain, which was triggered when he wrenched his back stepping out of a car. As a result of this incident, he was off work for three days. He sought further physiotherapy treatment. In cross-examination, it was suggested to Mr. Shinkaruk that this incident was similar to the incidents in the late 1990s when he had suffered the onset of lower back pain suddenly and spontaneously, without any triggering event. Mr. Shinkaruk agreed with this, unless, he said, he had twisted his back when he got out of the car. I took Mr. Shinkaruk to mean that he may have twisted his back, and that it may have been this twisting action that triggered the low back pain.

**42**  There was no evidence that this incident occurred while Mr. Shinkaruk was having one of the intermittent episodes of low back pain he had suffered since the accident.

**43**  On May 18, 2007, Dr. Mitchell assessed Mr. Shinkaruk for ICBC. His orthopedic and neurological examination of Mr. Shinkaruk's lower back was normal and unremarkable. There was palpatory tenderness only across the thoracic spine, none across the lumbar spine. Mr. Shinkaruk's current subjective complaints were noted as "occasional low back pain".

**44**  In June 2007, Mr. Shinkaruk purchased his own condominium. He had been living with a friend since leaving Ms. Wahlwroth's house in December. Both when he had moved from Ms. Wahlwroth's house, and when he moved into his new condo, he required the assistance of friends to complete the moves; he could not do any lifting.

**45**  There was a further incident of back pain, triggered on June 16, 2007, by him bending over and extending his back, reaching forward to pick up a bag of frozen food from a supermarket freezer. He took more time off work, returning on July 3, 2007. At the time of his return to work, his evidence was that he was feeling fine; his pain level, he testified, was minimal, and he was ready to return to work and do his job. Dr. Mitchell saw him on July 9, 2007, and assessed him as being "98% better".

**46**  On July 13, 2007, Mr. Shinkaruk was dismissed from his employment. He claims that his employer dismissed him because he had missed too much work.

**47**  The circumstances of the dismissal were described by Mr. Shinkaruk in his evidence in chief. For three days running, preceding the dismissal, he had received a blueprint from the engineering department with mistakes on it. Each day he would take the blueprint to his supervisor, Mr. Ceron; Mr. Ceron would agree that the blueprint needed correction, and on each occasion asked Mr. Shinkaruk to return it to engineering. Such mistakes were not uncommon, and this was the usual procedure to follow. The following day, the blueprint would be back at Mr. Shinkaruk's workstation, uncorrected. After this happened three days running, Mr. Shinkaruk says that he remarked to a co-worker that the day shift supervisor was an "idiot". The day shift supervisor apparently overheard him making this remark, and Mr. Shinkaruk was fired the next day. The plant supervisor came down to see him, told him that he had been making too many mistakes, the quality of his workmanship was poor, and his attitude "the other day" had been "unacceptable", which Mr. Shinkaruk assumed to be a reference to his criticism of the supervisor.

**48**  Mr. Shinkaruk testified that the quality control system at Knelson required workers to fill out a sheet whenever their work had to be redone because of an error. He denied ever having had to fill out such sheets during his time with Knelson, and denied that there had been any problems with the quality of his workmanship. His evidence on this point was supported by the testimony of his supervisor, Mr. Ceron, which is discussed in further detail below.

**49**  Following his dismissal, Mr. Shinkaruk had periods of employment at various fabrication shops, and periods of unemployment. At the end of August 2007, he was dispatched by his union hall to Canron Construction, where he worked as a "yardman". This outside job involved less lifting that inside work, and he had more opportunity to be mobile, which was better for his back. His back was good over this time period. That job lasted until October 21, 2007.

**50**  He was then employed at Richmond Steel Recycling, from early April until late June 2008. This work entailed operating a crane and a forklift. He found that the bouncing motion on the forklift would get to him after a couple of days; however, he missed no time from work. Mr. Shinkaruk was not happy with the demands that job placed on him - he worked six days a week - and his pay rate was less than what he had made at his previous jobs, and so he quit that position.

**51**  In mid-July 2008, he started working as a fabricator with Empire Iron Works, doing work similar to what he had done at Knelson. He was laid off in July 2009 due to a lack of work.

**52**  He had a brief stint with an HVAC installation company for a few weeks. In May 2010 he began working with Wellons Canada, starting as a panel builder, but quickly being promoted to a machine operator. He is still employed there. His wage rate is lower than what he earned at Knelson.

**53**  Mr. Shinkaruk still gets low back pain as often as once or twice a week. He finds that his low back becomes painful if he has had to stand in one place for a long period of time, such as when doing a long cut. He controls his symptoms by attempting to adjust the position of his legs, propping one foot up on a beam placed on the floor at his work station, and with over-the-counter anti-inflammatories. He does have periods of up to weeks at a time when he is pain-free.

**54**  As will be discussed, Mr. Shinkaruk has seen a rehabilitation specialist, Dr. Travlos. Dr. Travlos has recommended that he strengthen his back with a regular exercise routine. However, Mr. Shinkaruk does not participate in such exercise activity. He does the stretching routines that were given to him by the physiotherapist he saw in 2005. He also walks for exercise. He is no longer nearly as physically active as he used to be, has had to curtail his boating activities, and no longer enjoys camping due to difficulties sleeping on the ground. He has lost muscle mass and is not as strong and fit as he once was.

**55**  Several friends of Mr. Shinkaruk testified. They have known him for years, and gave evidence as to his enthusiasm, before the accident, for boating, and off-road driving in four wheel drive vehicles. He is described by his friends as having been a fun loving, extroverted, outgoing and adventurous person. Due to his physical limitations he is no longer able to pursue these activities, and his social contacts with his friends have diminished. He is no longer the vigorous, active person he once was. He seems very conscious of the risk of further injury to his back.

**56**  One of these witnesses, Mr. Morrow, has known Mr. Shinkaruk for 35 years. Mr. Morrow did not recall Mr. Shinkaruk's 2004 boating incident, but he agreed, in cross-examination, with the suggestion that it was at that point in time that Mr. Shinkaruk curtailed his boating activities. He also agreed that, to his recollection, that it was following Mr. Shinkaruk's back complaints of February - April 2005 that he cut back on his outdoor activities - boating, and four wheel drive off-roading.

**57**  Overall, I did not find that this testimony from his friends assisted Mr. Shinkaruk in proving that his current physical limitations have been materially contributed to by the accident.

**58**  As I noted above, Ms. Wahlwroth also testified as to the circumstances of their breakup in December 2006. That was not their first breakup; they had separated in the summer of 2005 for a month or two. After that, the relationship had its ups and downs.

**59**  It was apparent from Ms. Wahlwroth's description of their interaction with each other, during the period in which Mr. Shinkaruk was convalescing from the accident, that their disagreements were largely a function of the two of them having very different visions of their roles and responsibilities within their relationship. It may be that these differences did not become manifest when the two of them had different working schedules. But with Mr. Shinkaruk at home in the evenings, she testified that she found it difficult to have him there without him making any contributions to the housework, making meals, cleaning up dishes, and doing other tasks which she felt he was physically capable of. She contrasted his lack of contribution with efforts made by husbands of friends of hers, when the couples had dinner together. Their differences were compounded by their poor communication skills, and they became trapped in a cycle of angry arguments, sniping and a lack of mutual respect. This climaxed during the December 2006 family vacation, when they spent little time in each other's company, and had heated arguments when they did. She did not want her 13 year-old son exposed to that kind of behaviour, and that was a key consideration in her asking Mr. Shinkaruk to leave. These communication problems are issues which, she testified, they have both done a lot of work on recently and now that they are seeing each other again, there is a greater deal of emotional maturity being exhibited by both of them.

**60**  It appears from the evidence that the most that could be said is that the motor vehicle accident contributed to the breakup in that it created a living situation, with Mr. Shinkaruk at home convalescing, in which fundamental and deep-seated issues between this couple became manifest. To the extent that Mr. Shinkaruk may have suffered emotionally or psychologically due to their breakup in December 2006, the defendant's ***negligence*** is too remote to create liability.

**Medical Reports**

**61**  There are reports from three doctors in evidence.

**62**  Dr. Mitchell, the plaintiff's family physician, has provided two reports. The first is dated October 22, 2007. Dr. Mitchell begins this report by nothing that Mr. Shinkaruk has a history of intermittent low back pain. He mentions the fact that Mr. Shinkaruk was off work in 1997 and 1999 because of his L4-5 disc prolapse. He does not mention the absence from work caused by the back pain triggered by the boating incident in May 2004.

**63**  Dr. Mitchell goes on to say that Mr. Shinkaruk last reported significant back pain to his office in February 2005. Because Dr. Mitchell was not following Dr. Shinkaruk's work-related injury at that time, he appears to be unaware that Mr. Shinkaruk was in fact off work up until April 2005. He also does not mention - possibly because he did not know - that Mr. Shinkaruk was off work from June until October 2005.

**64**  Dr. Mitchell expresses the opinion that the persistent symptoms since the accident were 100% related to the injuries sustained in the accident. Dr. Mitchell's opinion of Mr. Shinkaruk's prognosis at the time of that report was pessimistic. He noted that Mr. Shinkaruk might need to change his career, and might suffer permanent, partial or complete disability. The report concluded:

He may require intermittent medications and physical therapies. He is at risk of spontaneous return of his symptoms. He is at risk of reinjury to the symptomatic areas. In the event of reinjury he would likely experience more discomfort at require longer to heal than an individual with no history of previous injury.

**65**  This report does not mention the essentially normal lower back findings made during Dr. Mitchell's examination for ICBC in May 2007, and does not mention Dr. Mitchell's assessment that Mr. Shinkaruk was "98% better" as of July 9, 2007.

**66**  Dr. Mitchell's second report is dated November 14, 2010. He noted that Mr. Shinkaruk was working normally, and was able to carry out his normal activities of daily living and usual recreation activities. Mr. Shinkaruk was much improved and was experiencing no significant limitations. His prognosis for continued recovery was very good.

**67**  That second report then concludes with Dr. Mitchell substantially repeating the final paragraph of his previous report, quoted above. Cross-examined on this paragraph, Dr. Mitchell agreed that in fact, given his history, Mr. Shinkaruk was always at risk of spontaneous return of symptoms and of re-injury to the symptomatic area, regardless of the accident. Dr. Mitchell stated that the motor vehicle accident could have slightly elevated the risk.

**68**  Asked to respond to Dr. Travlos's assessment - as described below - that the current symptoms of intermittent back pain are wholly attributable to the existing condition, Dr. Mitchell stated that in his view it was hard to know if the motor vehicle accident resulted in an increased risk of back pain. He said:

He did have a long history of back pain prior to [the accident], and I don't know if his baseline was ... whether the injury resulted in an increased risk of ongoing pain and injury, or not. It certainly could. But, I don't know whether it does or not.

**69**  Mr. Shinkaruk was assessed by Dr. McGraw, an orthopedic surgeon, at the request of his legal counsel. His report of that assessment is dated September 4, 2008. He states his opinion that Mr. Shinkaruk's level of impairment and disability at that point was causally related to the motor vehicle accident of August 31, 2006. He states that it is possible that Mr. Shinkaruk might have had a recurrence of low back pain but for the accident, but that it was by no means probable.

**70**  In cross-examination, Dr. McGraw conceded that Mr. Shinkaruk did not advise him of his 2005 back injury. He also said that Mr. Shinkaruk only advised him only that he was unable to ride in small boats due to the pounding since the accident; Mr. Shinkaruk did not disclose the 2004 boating incident.

**71**  Dr. McGraw was generally aware that Mr. Shinkaruk had permanent degenerative disc disease in his lower back, and that he had experienced significant symptomatic degenerative disc problems in 1999. In cross-examination, he admitted that just knowing those facts, one could expect that Mr. Shinkaruk would become symptomatic from time to time. He admitted that in a person with these pre-existing traits, back pain can come on without any apparent triggering event, or can happen because of something as minor as stepping out of a car, or picking up a bag of frozen groceries.

**72**  Dr. McGraw wrote a follow-up report dated July 13, 2011, based solely on a review of further reports and studies from Dr. Mitchell's file. Dr. McGraw agreed that Mr. Shinkaruk had made an excellent recovery. On cross-examination, he said that there was, by this point, much more improvement than he had anticipated when he had examined Mr. Shinkaruk in 2008.

**73**  Given the lack of full disclosure of Mr. Shinkaruk's pre-accident history, I give relatively little weight to Dr. McGraw's conclusions as to causation, i.e. the relative degree of contribution, if any, of the injury suffered in the accident, to his post-accident, current and future back issues.

**74**  Finally, as noted, Dr. Travlos, a physiatrist, examined Mr. Shinkaruk at the request of counsel, in February 2010. In his report, Dr. Travlos states:

Mr. Shinkaruk has no significant ongoing symptoms other than occasional low back pain. These low back pain symptoms are likely baseline for him and consistent with that expected, given his past history of back complaints. These current symptoms are therefore primarily related to his underlying back condition as opposed to injuries from the accident. It was expected that with time, he would have developed some intermittent low back symptoms as he has now when standing or with excessive physical activities. It was expected that these symptoms would have been short-lasting, just as they are now for a few hours or even a day or two at a time at most.

**75**  Dr. Travlos continues:

Mr. Shinkaruk has, to all intents and purposes, recovered from the injuries that he sustained in the accident of August 31, 2006. His residual symptoms are those expected for his underlying condition.

Mr. Shinkaruk remains at risk for injury to his back with increased symptoms related to activities. He therefore does have some restrictions in terms of making sure he does not do anything that could potentially aggravate his back. This is the reason why I recommend that he partake in a regular exercise program to reduce these restrictions and improve his activities...

...

Mr. Shinkaruk is able to continue working and should be able to continue working into the future. He will have to be a little cautious with activities in order to avoid causing himself harm and injury, but by and large he should be able to continue working. He is at increased risk of injury and time out from the workplace, primarily due to his pre-accident problems but at least to some extent contributed to by additional injuries from the accident, given the problems that he has had since the accident. Any additional time off work from this point on would be primarily related to new events and his past history prior to the accident.

**76**  Dr. Travlos also expresses the opinion but for the accident, it was possible that Mr. Shinkaruk would have gone on to develop the spontaneous onset of back and leg symptoms at some point in the future, and probable that he would have had occasional low back symptoms from certain types of activities. However, he states that the symptoms would not have been to the extent or duration of the symptoms he had after the accident.

**77**  Dr. Travlos does not examine in detail the question of whether the symptoms experienced by Mr. Shinkaruk following the April 2007 and June 2007 incidents were materially contributed to by the motor vehicle accident. In fact, it does not appear from the detailed record of the history provided Dr. Travlos by Mr. Shinkaruk, that those two incidents were described in any detail; Mr. Shinkaruk simply described his attempt to return to work, in November 2006, and that he recalled being off and on work for a period of time until he finally returned in July 2007, following which he was laid off. Not having been given a complete history, Dr. Travlos appears not to have considered the question of whether the two incidents were themselves discrete, independent causes of the back pain and associated absences from work, or whether they were materially contributed to by the accident.

**Discussion**

**78**  The test for causation in this case is as discussed by the Supreme Court of Canada in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*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=), [*[1997] 1 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The defendant will be liable if the plaintiff has established on a balance of probabilities that the motor vehicle accident materially contributed to the proven losses.

**79**  It is not contested by the defence that Mr. Shinkaruk is entitled for compensation that reflects his pain and discomfort, and income lost, secondary to his mid-and low-back pain, for the period up to the end of January 2007; a total period of approximately five months. The defence, however, says that beyond that, the plaintiff has failed to discharge his burden of proving the accident accelerated the appearance of intermittent low back pain. Though the evidence of Dr. Travlos, who did not examine the plaintiff until February 2010, is that from that point in time the pre-existing condition had become the predominant explanation for the plaintiff's symptoms, the defence says that this must also have been the case from an earlier in point in time, as early as the spring of 2007, when Dr. Mitchell's objective examination of the plaintiff revealed essentially normal findings. To find otherwise, the defence argues - to find that the accident was a material cause of the continuing intermittent low back pain, or the incidents of April and June 2007 - could only result from applying the logical fallacy of *post hoc ergo propter hoc.*

**80**  This mode of reasoning was commented on by Ehrcke J. 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=):

[74] 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."

[75] 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?

**81**  If Dr. Mitchell's opinion is discounted due to his lack of understanding of the full extent of Mr. Shinkaruk's pre-accident back pain, as I think it must be, then, given Mr. Shinkaruk's history, it can be fairly argued that there is nothing to connect the April 2007 and June 2007 incidents with the August 2006 accident. It is certainly possible that Mr. Shinkaruk's physical exertions which immediately preceded the onset of back pain, during those incidents, provide a sufficient causal explanation in themselves. However, these do seem from the limited testimony I heard to have been common, everyday activities. The evidence did not establish, for example, that the bending and lifting Mr. Shinkaruk was undertaking at the supermarket, in June, was a type of manoeuvre he had habitually avoided. The lack of further incidents of significant back pain, during the summer of 2007 or subsequently, leads me to conclude that those two incidents probably occurred in part because Mr. Shinkaruk's back was still healing from the effects of the subject motor vehicle accident, rendering him more susceptible to injury from overexerting himself in the course of everyday events. I find that the accident materially contributed to the discomfort he suffered because of those incidents, that the discomfort is compensable as a component of his non-pecuniary damages, and that the income loss for those two periods of time is also recoverable against the defendant.

**82**  Further, in addition to the period in which he was effectively totally disabled from his physical job, of approximately five months duration, up to his return to work in late January 2007, and, in addition to the two discrete episodes of low back pain in the spring of 2007, I find that there was a continuing material contribution made by the accident to his intermittent episodes of back pain, up until the end of 2009, though the degree of contribution would have diminished over time.

**83**  However, I cannot find, on the evidence, that Mr. Shinkaruk's dismissal from his employment in July 2007 was as a result of his absences from work, as he contends. This is simply conjecture on Mr. Shinkaruk's part. Mr. Ceron, Mr. Shinkaruk's supervisor at Knelson, testified that the procedure at Knelson was of an escalating series of disciplinary measures in case of an infraction of the company's rules: verbal warnings, written warnings, suspension, and then finally termination as the last resort. Mr. Ceron testified that this procedure was not followed in the case of Mr. Shinkaruk. He could not think of another case where this had happened. He was not consulted regarding Mr. Shinkaruk's dismissal, as he ought to have been given his role as supervisor, and again this was unique. Although this evidence does give weight to the claim that his dismissal was improper or irregular, it does not lead to one drawing a causal connection to the accident. Mr. Ceron also testified that Mr. Shinkaruk was a skilled and valued employee, whom he looked to as his "right hand man". He could not remember Mr. Shinkaruk's absences from work in the spring of 2007 and did not remember that Mr. Shinkaruk's absences caused any disruption to his shift. Mr. Shinkaruk was not paid during his absence in June 2007. Given these facts, I cannot find that the employer would have been motivated to dismiss Mr. Shinkaruk simply because of his absences.

**84**  The testimony of Mr. Ceron did support Mr. Shinkaruk's evidence that there were in fact no issues with the quality of his work. This gives credence to the contention that there was no basis for the employer using quality or performance issues as a justification for terminating his employment. That does not, however, lead to the conclusion that his absence from work was the real explanation. The conflict with his superior with which Mr. Shinkaruk testified to may possibly have been, in the mind of his employers, reason enough to want him gone from the workplace, with performance issues simply being alleged to give weight to what may have been a weak legal case for termination.

**85**  I therefore do not find the defendant responsible for Mr. Shinkaruk's income losses from July 2007. Without the employer representatives responsible for the decision having given evidence, I cannot draw that conclusion on the balance of probabilities.

**86**  With regard to Mr. Shinkaruk's future, on the basis of the evidence of Dr. Mitchell and Dr. Travlos I find no entitlement to a loss of future earning capacity. As noted by Dr. Mitchell, Mr. Shinkaruk faces some increased risk of future injury; but that is on account of his pre-existing degenerative disc disease. His current baseline, in the words of Dr. Travlos, is "consistent with that expected given his past history of back complaints". Physiologically, at a microscopic level, it is certainly possible that the trauma of the motor vehicle accident could continue to play some incidental role in any future symptoms. But the plaintiff has not established the probability of his motor vehicle injury continuing to play a material role, sufficient to justify an award of damages.

**87**  With respect to the award of non-pecuniary damages, the cases cited by the plaintiff, which are in the range of $50,000 - $105,000, largely deal with situations in which the subject accident was found still to be a materially contributing cause at the time of trial. Although they serve only as rough comparators, I have been given greater assistance in determining the appropriate range by the cases cited by the defence, including *Lee v. Jarvie*, [*2010 BCSC 1852*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2K2-00000-00&context=); *Dial v. Grewal*, [*2010 BCSC 759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-221V-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=). I assess the plaintiff's non-pecuniary damages at $45,000.

**88**  With respect to the past income loss, I calculate the total time at work missed by Mr. Shinkaruk in 2006 due to his injuries at 563.75 hours. This does not include the family vacation taken in December 2006, which I find would have been taken by him in any event. His wage rate at that time, including an afternoon shift differential, 4% vacation pay, and 3% employer RRSP contributions, totalled $29.69. I assess his total income loss in 2006 at a gross amount of $16,737.74.

**89**  Mr. Shinkaruk lost a further 160 hours in the month of January 2007; and a further 106 hours in April and June 2007. By April, his wage rate had increased to a total of $30.55. I assess his total income loss in 2007 at a gross amount of $7,988.70.

**90**  A table showing the taxes and employment insurance contributions for B.C. residents, prepared by the economist Mr. Robert Carson, is in evidence. For the sake of expedience, the defence is agreeable to a 17% deduction of the gross income figures being applied across the board, so as to arrive at the net income loss recoverable pursuant to s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*. I therefore award Mr. Shinkaruk, past income losses totalling $20,522.95.

**91**  Special damages have been agreed at $1,036.01.

**92**  In summary, the damages have been assessed under the following heads:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages: | $45,000.00 |  |
|  | Net Past Income Loss: | $20,522.95 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $ 1,036.01 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $66,558.96 |  |

**93**  Applying a 20% deduction on account of Mr. Shinkaruk's contributory ***negligence***, I award him the total sum of $53,247.17.

**94**  Mr. Shinkaruk will be entitled, in addition, to court order interest.

**95**  Mr. Shinkaruk will also be entitled to 80% of his costs, at Scale B.

**96**  If the parties wish to make submissions as to costs because of factors not within my knowledge, arrangements may be made to appear before me, through New Westminster Trial Scheduling.

A. SAUNDERS J.

**End of Document**

[***Stanway v. Wyeth Canada Inc., [2011] B.C.J. No. 1494***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22T8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.M. Gropper J.

Heard: March 9-11, 2011.

Judgment: August 4, 2011.

Docket: S111075

Registry: Vancouver

**[2011] B.C.J. No. 1494** | 2011 BCSC 1057 | 10 C.P.C. (7th) 51 | 2011 CarswellBC 2210 | 205 A.C.W.S. (3d) 330

Between Dianna Louise Stanway, Plaintiff, and Wyeth Canada Inc., Wyeth Pharmaceuticals Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth Ayerst International Inc. and Wyeth, Defendants

(82 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Common interests and issues — Definition of class — Representative plaintiff — Application by Stanway for certification of claim against Wyeth as class proceeding allowed — Stanway identified common issues about Wyeth's *negligence* and breach of statutory reporting duty and duty of care to patients in making and selling estrogen-progestin combination for use in hormone therapy for years where possible causal link between use and breast cancer reported — Stanway was appropriate representative plaintiff, and class of product users who contracted breast cancer between 1997 and 2003 was identifiable class — Class Proceedings Act, ss. 1, 4, 5, 6, 16.**

**Commercial law — Consumer reporting — Duty to inform consumer — Application by Stanway for certification of claim against Wyeth as class proceeding allowed — Stanway identified common issues about Wyeth's *negligence* and breach of statutory reporting duty and duty of care to patients in making and selling estrogen-progestin combination for use in hormone therapy for years where possible causal link between use and breast cancer reported — Wyeth not relieved of statutory duty to properly label product with risks because it sold products to learned intermediaries, physicians, as opposed to directly to patients — Business Practices and Consumer Protection Act, ss. 1, 4, 5.**

**Health law — Public health — Food and drug safety — Application by Stanway for certification of claim against Wyeth as class proceeding allowed — Stanway identified common issues about Wyeth's *negligence* and breach of statutory reporting duty and duty of care to patients in making and selling estrogen-progestin combination for use in hormone therapy for years where possible causal link between use and breast cancer reported.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Causation — Causal connection — Application by Stanway for certification of claim against Wyeth as class proceeding allowed — Stanway identified common issues about Wyeth's *negligence* and breach of statutory reporting duty and duty of care to patients in making and selling estrogen-progestin combination for use in hormone therapy for years where possible causal link between use and breast cancer reported.**

|  |
| --- |
| Application by Stanway to certify her action against Wyeth as a class proceeding. Stanway alleged she contracted breast cancer as a result of consuming Premarin, conjugated estrogen, marketed in Canada by Wyeth to be take in combination with progestin in the late 1970s to treat the symptoms of menopause. Stanway alleged Wyeth was negligent in marketing, testing, labelling, distributing, promoting and selling Premarin to be taken with progestin, and that Wyeth illegally engaged in solicitations, offers, advertisements and promotions of the sale and supply of Premarin with progestin, which had the effect of deceiving consumers regarding the safety and efficacy of this hormone therapy. The proposed plaintiff class included women prescribed the drug combination in Canada who ingested the combination and were thereafter diagnosed with breast cancer between January 1, 1997 and December 1, 2003. The commons issues were whether or not there was a causal connection between the use of the combination and breast cancer, the existence of a duty of care between Wyeth and the class members, the existence of a breach of that duty, and the appropriate damages associated with that breach. Stanway relied upon medical reports concerning a causal connection between estrogen-progestin therapy and breast cancer. She pointed out significant changes to Wyeth's labelling of Premarin showed the company became aware over the course of the years between 1992 and 2003 that this connection existed, and took the position had proper research been done, proper warnings would have been made about its use years earlier. Wyeth relied on various experts in arguing the cause of breast cancer in any particular patient was difficult to identify, as many individual factors were at play. Wyeth's experts opined the debate over the connection between hormone therapy and breast cancer was still ongoing. They pointed out Wyeth never marketed its products directly to consumers, only to physicians and pharmacists.  HELD: Application allowed.  There was no dispute that Stanway had a cause of action against Wyeth in ***negligence***. She also had a cause of action for breach of its statutory obligation to disclose the risks associated with the use of its product. There was an identifiable class of plaintiffs, sufficiently numerous. The length of time the class period covered was not a bar to certification. Stanway identified common issues with respect to general causation, Wyeth's breach of its duty to properly inform consumers of the risks associated with Premarin, punitive damages, and Wyeth's breach of its duties under the Business practices and Consumer Protection Act. The court would not engage in a weighing of the merits of Stanway's claim there was a causal connection between Wyeth's product and breast cancer. It was immaterial that its product remained on the market as of the date of the certification hearing. It was unnecessary to certify the question of Wyeth's duty of care as a common issue, as it was self-evident that manufacturers owed a duty of care to consumers of their products. The fact Wyeth provided its product and warnings to physicians as opposed to directly to consumers did not preclude a cause of action for breach of duty to inform. The existence of physicians as informed intermediaries did not relieve Wyeth of its responsibility to its ultimate consumers. A class proceeding was the preferable procedure to resolve the common issues, despite the existence of significant individual issues within the plaintiff class. Stanway was an appropriate class representative, and Williss, a Manitoba resident, was an appropriate representative for the non-resident sub-class of plaintiffs. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, [*SBC 2004, CHAPTER 2, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B22P-00000-00&context=), s. 4, s. 4(3), s. 4(3)(a)(i), s. 4(3)(b)(vi), s. 4(3)(b)(viii), s. 5(2)

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RM1-F7VM-S13S-00000-00&context=), s. 4, s. 4(1)(b), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e), s. 4(2), s. 4(2) (b), s. 4(2)(e), s. 5, s. 6(2), s. 16(2)

Competition Act, [*R.S.C. 1985, c. C-34, s. 36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B791-JW09-M0XN-00000-00&context=)(1)

**Counsel**

Counsel for the Plaintiff: D. Lennox, N.C. Hartigan.

Counsel for the Defendants: W. McNamara, T.J. Walsh, R.C. Sutton.

[Editor's note: A corrigendum was released by the Court August 15, 2011; the corrections have been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment on Certification**

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| **J.M. GROPPER J.** |

**INTRODUCTION**

**1**  Ms. Stanway seeks to certify her class action against the defendants, Wyeth Canada Inc., Wyeth Pharmaceuticals Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth Ayerst International Inc. and Wyeth (collectively, "Wyeth"). She alleges that she contracted ductal and lobular breast cancer as a result of consuming its products, Premarin in combination with progestin and Premplus.

**2**  Premarin is conjugated estrogen derived from a natural source. Conjugated estrogen such as Premarin was first marketed in Canada in 1941. It became widely used in the 1960s. An estrogen plus progestin regimen became widespread in the late 1970s when hormone therapy added a progestin (a synthetic form of progesterone) to estrogen to counter an increased risk of endometrial cancer associated with taking estrogen alone. Premarin and Premplus are prescribed to women to treat the symptoms of menopause and are known as hormone therapy ("HT").

**3**  In her statement of claim, the plaintiff alleges that the defendants were negligent in their marketing, testing, manufacturing, labelling, distribution, promotion and sale of Premarin taken with progestin and Premplus. The plaintiff also alleges that the defendants breached the British Columbia *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* [*BPCPA*], by engaging in solicitations, offers, advertisements and promotion of the sale and supply of Premarin taken with progestin and Premplus which had the effect of deceiving consumers regarding the efficacy and safety of HT.

**4**  Four conditions are necessary to a class action: the class must be capable of clear definition; there must be issues of fact or law common to all class members; success for one class member on a common issue must mean success for all; the class representative must adequately represent the class: *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) at paras. 38-42.

**5**  The advantages of a class action were outlined by the Supreme Court of Canada in *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) at para. 15:

[C]lass actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

**LEGISLATION**

**6**  The relevant enactments are:

1. *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*CPA*], ss. 4 and 5:

**Class certification**

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of 2 or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
8. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
9. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
10. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
11. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
12. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
13. whether other means of resolving the claims are less practical or less efficient;
14. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**Certification application**

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

...

1. An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.
2. *BPCPA*, ss. 4-6:

**Deceptive acts or practices**

1. In this Division:

**"deceptive act or practice"** means, in relation to a consumer transaction,

1. an oral, written, visual, descriptive or other representation by a supplier, or
2. any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

**"representation"** includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

1. A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
2. Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
3. a representation by a supplier that goods or services
4. have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

...

1. a representation by a supplier

...

1. that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

...

1. that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, (d) a prescribed act or practice.

**Prohibition and burden of proof**

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

1. If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.
2. *Supreme Court Rules*, R. 9-5(1):

**Scandalous, frivolous or vexatious matters**

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,
3. it is unnecessary, scandalous, frivolous or vexatious,
4. it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
5. it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**Admissibility of evidence**

1. No evidence is admissible on an application under subrule (1)(a).

**PROPOSED CLASS DEFINITION AND COMMON ISSUES**

**7**  Ms. Stanway seeks to certify a class defined as:

Women who were prescribed Premplus, or Premarin in combination with progestin, in Canada during the Class Period and ingested Premplus, or Premarin in combination with progestin and were thereafter diagnosed with breast cancer.

The "Class Period" runs from January 1, 1977 until December 1, 2003, inclusive.

Common Issues

1. certifying the following issues as common issues:
2. Is there a causal connection between the use of Premplus, or Premarin in combination with progestin, and breast cancer and if so, what is the nature and extent of the connection?
3. Did the Defendants, or any of them, owe a duty of care to class members?
4. Did the Defendants, or any of them, breach a duty of care to class members, and if so, when?
5. If the Defendants, or any of them, breached a duty of care owed to class members, were the Defendants, or any of them, guilty of conduct that justifies punishment?
6. If the answer to common issue 1(d) is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against the Defendants, or any of them?
7. certifying the following issues as common issues for class members who ingested Premplus or Premarin that was supplied in British Columbia:
8. Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Premplus and Premarin for personal, family or household use by class members fall within the meaning of "consumer transactions" under the *Business Practices and Consumer Protection Act* ("BPCPA")?
9. With respect to the supply in British Columbia of Premplus and Premarin to class members for their personal, family or household use, are the Defendants, or any of them, "suppliers" as defined in the BPCPA?
10. Are the class members "consumers" as defined by the BPCPA?
11. Did the Defendants, or any of them, engage in conduct that constituted deceptive acts or practices contrary to the BPCPA as alleged in the Amended Statement of Claim?

**EVIDENCE ON A CERTIFICATION APPLICATION**

**8**  The plaintiff, as the class representative, must provide the court with sufficient evidence to support certification. The plaintiff must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action. The evidentiary threshold is not onerous: *Hollick* at paras. 21, 25.

**9**  The defendants may respond with evidence of their own to challenge certification but there is a heavier evidentiary burden on the defendants: the defendants must show that there is no basis in the evidence for the facts asserted by the plaintiff.

**10**  The court does not decide factual issues in the same manner as it would as a trier of fact: *Lambert v. Guidant Corp.*, [*72 C.P.C. (6th) 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S456-00000-00&context=) (Ont. S.C.J.), at paras. 68-69, leave to appeal ref'd [*82 C.P.C. (6th) 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-F22N-X1WN-00000-00&context=) (Ont. Div. Ct.). At the certification stage, the court does not apply a "likely to succeed" test of the plaintiff's claim: *Lambert* at paras. 109-110.

**11**  In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [*2009 BCCA 503*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B7-00000-00&context=), leave to appeal ref'd [*[2010] S.C.C.A. No. 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JWXF-21CK-00000-00&context=), the court explained the proper assessment of expert opinion evidence in the context of certification of a class action at para. 67:

[67] The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents' evidence and against Ms. Sanderson's evidence in particular. In so doing, he failed to take into account that the factual evidence upon which Ms. Sanderson's opinion was based came in part from the respondents and was untested. Further, he failed to adequately consider that Dr. Ross' opinion was necessarily preliminary since the appellant has not yet had access to the information Dr. Ross needs to perform his analysis. In my view, this approach was fundamentally unfair at this stage of the proceeding, when the appellant has not had discoveries and an adequate opportunity to marshal the evidence required by Dr. Ross for his analysis.

**Plaintiff's Evidence**

**12**  Ms. Stanway filed an affidavit seeking to be appointed as the representative plaintiff. There are two other affiants, Judy Midgley and Kathryn Willis.

**13**  The plaintiff relies upon the medical reports of Dr. Victoria Kirsh. She is an epidemiologist employed by Cancer Care Ontario in its research unit on population studies and surveillance.

**14**  The plaintiff asserts that the reports of Dr. Kirsh show there is "some basis in fact" to the allegations in the statement of claim. Specifically, the plaintiff asserts (all quotations are from Dr. Kirsh's reports):

1. Evidence supports the implication of estrogen and progestin in the etiology of breast cancer. Breast tissue is estrogen dependent and responds to the hormone's growth simulating effects. There is evidence of a role for estrogen metabolites in breast cancer. Progestin increases cell proliferation in breast tissue and "therefore an association with breast cancer is not unexpected."
2. The Women's Health Initiative (WHI) study was initiated in 1991. It was a randomized controlled trial, referred to as a level 1 study. One arm of the study was designed to measure the risks and benefits of estrogen-progestin HT. This portion of the clinical trial commenced in 1997. In 2002, WHI researchers concluded that the risks associated with estrogen plus progestin for use among healthy post menopausal women outweighed the benefits: after five years of follow up, estrogen plus progestin increased the risk of breast cancer.
3. A causal connection between estrogen-progestin therapy and an increased risk of breast cancer was established in the WHI study and these "findings were corroborated by results from recent prospective cohort studies; the increased risk appears to be particularly pronounced with longer durations of use."
4. News of the results of the WHI study caused a significant reduction in the number of prescriptions of HT. The decline in hormone therapy use in North America was followed by a decline in breast cancer rates.
5. Studies in international population trends show the same patterns in the years following the WHI trial results.

**Defendants' Evidence**

**15**  The defendants rely on various expert reports, including that of Dr. John Collins, a retired specialist in obstetrics and gynecology with a sub-speciality in reproductive endocrinology and infertility and Dr. Robert Reid, a specialist in obstetrics and gynecology who is the chair of the division of reproductive endocrinology and infertility at Queen's University and an author of medical reports on menopause and other conditions related to aging. Dr. Reid also has a clinical practice where he provides advice and treatment to women presenting with menopausal symptoms. The defendants also rely on the report of Dr. Jan Sedgeworth, currently vice president of regulatory affairs with a consulting firm for the pharmaceutical and biotechnology industries, upon the affidavits of Marie Berry, a lawyer and pharmacist and Terry Davidson, a former district manager employed by Wyeth Canada from 1979 to 2006.

**16**  Based upon the evidence they have provided, the defendants assert:

1. Dr. Collins addresses epidemiological issues in his affidavit, particularly the different types and corresponding levels of scientific evidence used in epidemiological research. He explains in his report the development of breast cancer and the numerous factors relating to genetics, family and personal history and life choices. The risk of each woman for breast cancer based on these various factors is different. Dr. Collins explains the hormone therapy which preceded the WHI study and the significance of the WHI study. Despite an association between HT and breast cancer, causation of breast cancer remains unknown, both generally and in specific cases.
2. Dr. Reid addresses a perspective on HT from his practice related experience. He addresses the pre-WHI study attitudes on HT and explains how the WHI study, and additional research, continued to change perceptions about the role of HT in treating menopausal symptoms. Dr. Reid reviews the sources of information and drug products for physicians over the period of HT. He also describes a typical encounter with a menopausal patient and the discussion which would occur between a doctor and his or her patient forming part of the informed consent for treatment, the individualized nature of the decision to use HT and the factors that each patient and physician must consider in determining whether HT use is appropriate.
3. Dr. Sedgeworth describes the regulatory framework in which Canadian drug manufacturers develop, test, manufacture, label and market their products. She discusses the role that Health Canada has played in considering use of HT in patients and that a consultative panel was struck to consider the relationship between HT and breast cancer. Health Canada regulates the contents of the pharmaceutical product labels and the packaging inserts and imposes stringent restrictions regarding consumer advertising.
4. Marie Berry describes the interchangeability of pharmaceutical products. A pharmacist may dispense another congregated estrogen instead of a branded estrogen product like Premarin. She also addresses the interaction between a pharmacist and a patient concerning the risks associated with HT, including breast cancer and the benefits.
5. Terry Davidson's affidavit attaches extensive communications and informal documents from Wyeth Canada and from the public domain regarding menopause, conditions associated with aging and HT. The materials appended to Mr. Davidson's affidavit describe the ongoing debate about whether HT is a risk factor for breast cancer and the evaluation and risk benefit analysis to be undertaken by a physician before prescribing HT. The material also demonstrates that Health Canada approved the product labelling. There was limited direct to consumer advertising undertaken and Wyeth Canada's sales representatives did not provide marketing material or information directly to patients, only to physicians and pharmacists.

**CLASS CERTIFICATION**

**1. Cause of Action**

**17**  The requirement of disclosing a cause of action has a low threshold and the plaintiff will fail only if the claim is "certain to fail" or if it is "plain and obvious" that the statement of claim discloses no reasonable cause of action: *Koubi v. Mazda Canada Inc.,* [*2010 BCSC 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6322-00000-00&context=) at paras. 42-43. No evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof: *Hollick* at para. 25.

**18**  The plaintiff asserts that both its claim in ***negligence*** and under the provisions of the *BPCPA* disclose a cause of action.

**19**  In respect of a cause of action in ***negligence***, the plaintiff says that the common law imposes a heavy obligation on manufacturers of medical products to provide adequate warnings to doctors and patients: *Hollis v. Dow Corning Corp.*, [*[1995] 4 S.C.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3MF-00000-00&context=) at para. 23. *Hollis* also notes that the heavy obligation to provide adequate warning is related to the dependence that both the patient and the physician have on the manufacturers to provide clear and current information concerning the inherent dangers of the use of their product. It also goes to the issue of informed consent (at para. 24).

**20**  The plaintiff also asserts that the manufacturer's duty to warn cannot be delegated to the physician: *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, [*54 O.R. (2d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M307-00000-00&context=), [*25 D.L.R. (4th) 658*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M307-00000-00&context=) at para. 74.

**21**  In respect of the particulars of ***negligence***, the plaintiff argues that while the defendants appeared to be attuned to the potential issue of a connection between breast cancer and HT, they were not forthcoming, nor clear and complete in their warnings. She refers to the label having gone through many changes between 1992 and December 2003, which express a "qualitative difference" in warnings. The plaintiff asserts that if the defendants had done appropriate research, the warning label which appears in December 2003 would have been issued years or perhaps decades before.

**22**  The December 1, 2003 warning label was contained in a box entitled "warning." It refers to the WHI study and mentions an increased risk of invasive breast cancer and a significant risk of osteoporosis. It recommends the lowest effective dose for the shortest period as possible.

**23**  In respect of her consumer protection claim under the *BPCPA*, the plaintiff argues that the defendants, as "supplier," as defined in s. 1, engaged in deceptive acts or practices contrary to s. 4. Section 5(2) places the burden of proof on the supplier, and thus makes this claim more suited for a class action.

**24**  The plaintiff suggests that the deceptive acts described under s. 4(3) do not represent an exhaustive list. She also suggests that the provisions which are relevant are s. 4(3)(a)(i) because the defendants claim benefits which the product does not have; s. 4(3)(b)(vi) in that the defendants exaggerated or failed to state a material fact, specifically, the inadequacy of the warning label in expressing that the risk of breast cancer was a material fact; and s. 4(3)(b)(viii) may apply if scientific reports were prepared to promote and sell the product.

**25**  The defendants do not take issue with the plaintiff having a cause of action in ***negligence***, although they challenge the plaintiff's assertion that the evidence establishes that Premarin in combination with progestin and Premplus are capable of causing breast cancer. The defendants challenge the plaintiff's assertion that she has a cause of action under the *BPCPA*.

**26**  The defendants argue that there is no cause of action relating to the defendants' alleged failure to disclose all material facts relating to the efficacy and safety of Premarin and Premplus, or lack thereof (para. 17 of the amended statement of claim). The defendants assert that the *BPCPA* does not include a "failure to disclose a deceptive act or practice, as its predecessor, the *Trade Practices Act* did." The court noted in *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc.*, [*2009 BCSC 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3MK-00000-00&context=), that a claim for "failure to disclose" could not be advanced. The plaintiff's pleadings do not particularize the nature of the deceptive acts and practices but simply makes bald allegations relating to alleged breaches. This is fatal to a product liability case based on the consumer protection legislation: *Griffin v. Dell Canada Inc.*, [*72 C.P.C. (6th) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF61-JPP5-21XG-00000-00&context=) (Ont. S.C.J.) at para. 65, leave to appeal ref'd, [*180 A.C.W.S. (3d) 584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JF75-M1MX-00000-00&context=) (Ont. Div. Ct.).

**27**  The defendants assert that the representations which were made to the plaintiff and the potential class members were numerous; they were not the same for all potential plaintiffs nor consistent. There were representations made over a significant period to physicians and to potential purchasers. One cannot amalgamate all the statements made by the defendants over 26 years to support a claim under the *BPCPA*. The proceeding would be unmanageable and unwieldy: the analysis of the alleged deception must be done individually.

**28**  There is no dispute that the plaintiff has a cause of action against the defendants in ***negligence***. I find that she also has a cause of action under the *BPCPA.* Failure to disclose appears to remain a deceptive act or practice despite its omission from the *BPCPA*. In *Chalmers v. AMO Canada Company,* [*2010 BCCA 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4KC-00000-00&context=), Tysoe J.A. stated:

[18] Whatever deficiencies may have existed in the statement of claim at the time of the certification hearing, it is my opinion that the amended statement of claim clearly gives particulars of the claim under the *Consumer Protection Act* [*BPCPA*]. The amended statement of claim gives particulars of two specific representations allegedly made by the defendants, and asserts they were untrue. It also asserts that the defendants breached the *Consumer Protection Act* [*BPCPA*] by failing to disclose the risk that the lens solution would not prevent the eye infection and by misrepresenting that the lens solution was safe, comfortable and effective at preventing infection.

**29**  The failure to disclose allegation was found to constitute a deceptive practice in *Bouchanskaia v. Bayer Inc.*, [*2003 BCSC 1306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20KN-00000-00&context=).

**30**  The lack of particulars referred to in *Griffin* was fatal to the plaintiff's claim under the *Competition Act*, [*R.S.C. 1985, c. C-34, ss. 36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B791-JW09-M0XN-00000-00&context=)(1) and 52, but the court granted the plaintiff's leave to amend their pleadings to particularize their claim.

**31**  The plaintiff's claim in respect of breach under the *BPCPA* is addressed in paras. 16-21 of the amended statement of claim. They are described in para. 17 as follows:

The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Premarin and Premplus, as particularized above, had the capability, tendency or effect of deceiving or misleading consumers regarding the efficacy and safety of Premarin and Premplus. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Premarin and Premplus were deceptive acts and practices contrary to ... s. 4 of the BPCPA . The Defendants' deceptive acts and practices included the Defendants' failure to properly disclose all material facts regarding the efficacy and safety of Premarin and Premplus, or lack thereof.

**32**  I am satisfied that the amended statement of claim is sufficiently particular to determine that the plaintiff has a cause of action under the *BPCPA.*

**33**  The defendants' objections that the claims under the *BPCPA* are by their nature individual and therefore unwieldy in a class action are more appropriately considered in the context of the other criteria for certification.

**2. Identifiable Class**

**34**  The Supreme Court of Canada defines the requirement for identifiable class in *Dutton* at para. 38.

... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria [citations omitted].

**35**  The plaintiff asserts that the class is identifiable and meets the requirements of s. 4(1)(b) of the *CPA*. The plaintiff asserts that the class is sufficiently numerous, objective and not tied to the merits. It is also sufficiently clear that class members can choose whether to opt in or out of this proceeding. Class members will know whether they have had HT and whether they have had breast cancer.

**36**  A non-resident sub-class of individuals who are not residents of British Columbia and, therefore, not entitled to pursue the remedy under the *BPCPA* will be represented by Kathryn Willis, who is a Manitoba resident and is willing to represent the non-resident sub-class. Section 16(2) of the *CPA* expressly permits participation of non-residents of class actions in British Columbia.

**37**  The defendant concedes that there is an identifiable class period but they assert that a 26-year period presents a moving target. The court will have to consider the evolution of medical science from throughout the period to determine whether there is general causation and general breach. The defendants also point out that the state of knowledge of medical science is reflected in the evolution of the product monograph: both in the label and in the Compendium of Pharmaceuticals Specialties published by the Canadian Pharmacists Association (CPA).

**38**  I am satisfied that there is an identifiable class, including a non-resident class. The requirements of s. 4(1)(b) of the *CPA* is satisfied.

**3. Common Issues**

**39**  Section 4(1)(c) of the *CPA* requires the representative plaintiff to raise common issues. "Common issues" is defined in s. 1 as:

1. common but not necessarily identical issues of fact, or
2. common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

**40**  The Supreme Court of Canada explains the fundamental question behind whether the claims of the potential class members raise common issues at para. 18 in *Hollick*:

[T]he underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" *Dutton* (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

**41**  The focus is not on how many individual issues there might be, but whether there are any issues which necessarily resolve each class member's claim or a substantial ingredient of each member's claim: *Cloud v. Canada (Attorney General)* [*(2004), 73 O.R. (3d) 401*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WK-00000-00&context=) (C.A.) at para. 55. Mr. Justice Strathy provided a non-exhaustive list of general propositions in respect of common issues at para. 140 of *Singer v. Schering-Plough Canada Inc.*, [*2010 ONSC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=):

[140] The following general propositions, which are by no means exhaustive, are supported by the authorities:

**A:** The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.

**B:** The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.

**C:** There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [*[2005] O.J. No. 3961*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-JCBX-S2NN-00000-00&context=) (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [*[2009] O.J. No. 2531*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-F8SS-63YR-00000-00&context=), at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

**D:** In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

**E:** The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.

**F:** A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [*[1996] B.C.J. No. 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=), [*48 C.P.C. (3d) 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M39J-00000-00&context=) (S.C.), aff'd [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*[2000] B.C.J. No. 2237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), leave to appeal to S.C.C. ref'd [*[2001] S.C.C.A. No. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G4BN-00000-00&context=).

**G:** With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 4, *Ernewein v. General Motors of Canada Ltd.*, [*[2005] B.C.J. No. 2370*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2D4-00000-00&context=), at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, [*2009 SKCA 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K741-K0BB-S4YV-00000-00&context=), [*[2009] S.J. No. 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K741-K0BB-S4YV-00000-00&context=) (C.A.), at paras. 145-146 and 160.

**H:** A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* [*(2000), 51 O.R. (3d) 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B519-00000-00&context=), [*[2000] O.J. No. 3821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B306-00000-00&context=) (S.C.J.) at para. 39, aff'd [*[2001] O.J. No. 4952*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-F81W-20TD-00000-00&context=), [*17 C.P.C. (5th) 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-F81W-20TD-00000-00&context=) (Div. Ct.), aff'd *[2003] O.J. No. 1160* and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [*[2002] O.J. No. 4110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JB7K-232K-00000-00&context=), [*27 C.P.C. (5th) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JB7K-232K-00000-00&context=), (S.C.J.), aff'd [*[2003] O.J. No. 3918*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JFSV-G3VR-00000-00&context=), [*39 C.P.C. (5th) 151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JFSV-G3VR-00000-00&context=) (Div. Ct.).

**I:** Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [*[2003] O.J. No. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-JKB3-X179-00000-00&context=), [*2003 CanLII 35843*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3C6-00000-00&context=) (C.A.) at para. 52, leave to appeal dismissed [*[2003] S.C.C.A. No. 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-JKPJ-G280-00000-00&context=), and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [*2008 BCSC 575*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DJ-00000-00&context=), [*[2008] B.C.J. No. 831*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DJ-00000-00&context=) (S.C.) at para. 139.

**J:** Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, [*[2001] 3 S.C.R. 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), [*[2001] S.C.J. No. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S15P-00000-00&context=) at para. 29.

**42**  There are additional principles which have application here. While only a minimum evidentiary basis is required, the plaintiff must demonstrate that there is some evidence showing that the issue exists and that there is a basis in fact for accepting that the common issue is a triable issue: *Campbell v. Flexwatt Corp.* [*(1996), 25 B.C.L.R. (3d) 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S226-00000-00&context=) (S.C.) at para. 51. The assessment of whether an issue is a common issue involves a discretionary component. The Chambers Judge must determine whether the proposed issue is "significant" or a "substantial ingredient" of the claim: *Lam v. University of British Columbia*, [*2010 BCCA 325*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C7-00000-00&context=) at para. 48.

**43**  Whether the defendants' conduct could cause a particular type of harm may constitute a common issue: *Boulanger v. Johnson & Johnson Corp.* [*(2007), 40 C.P.C. (6th) 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JG02-S1D4-00000-00&context=) at para. 25. A product liability case may be particularly amenable to a class action: *Harrington v. Dow Corning Corp.*, [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=) at para. 48.

**44**  In *Pro-Sys Consultants*, the court cautioned against "exacting scrutiny" of expert opinion evidence adduced during a certification hearing in respect of the question of whether there are common issues (at para. 66).

**45**  In *Wilson v. Servier Canada Inc.* [*(2000), 50 O.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4YG-00000-00&context=) (Ont. S.C.J.), and *Walls v. Bayer* Inc., [*2005 MBQB 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JK4W-M3NP-00000-00&context=), the courts expressed the view that an inquiry into whether a drug was defective or unfit is ideally suited for class certification.

**46**  The plaintiff identifies five common issues based on a claim in ***negligence*** and four common issues based on the *BPCPA*. I will go through each of the issues identified by the plaintiff, shown at para. 7 above, in turn.

**Part I. Common Issues Based on a Claim in *Negligence***

**i. General Causation**

**47**  The defendants' position requires that I engage in "exacting scrutiny" of the expert opinions. While I appreciate that the experts hold differing views concerning whether there is a causal connection between the use of the defendants' products and breast cancer, I cannot at this stage of the proceedings compare or weigh the opinions. Such an approach is not consistent with the provisions of the *CPA*, which is to be construed generously in order to achieve its objects, as the jurisprudence consistently emphasises. I am not to assess the merits of the claim but rather, whether the form of the action can be heard as a class proceeding.

1. The defendants have emphasized that the cases where certification has been granted have the three factors: a limited time period on the market, a more apparent nexus between the product and the harm, and the product was withdrawn voluntarily or at the direction of Health Canada. The drug Neurontin was still on the market when the class action was certified in *Goodridge v. Pfizer Canada Inc.,* [*2010 ONSC 1095*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-231D-00000-00&context=). I agree with the plaintiff that whether the drug is removed from the market or sold with a revised warning is immaterial: *Heward v. Eli Lilly & Co.* [*(2007), 39 C.P.C. (6th) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDW1-F57G-S132-00000-00&context=) (Ont. S.C.J.), aff'd [*(2008) 91 O.R. (3d) 691*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64K5-00000-00&context=) (Div. Ct.). The allegation is whether the defendants failed to provide a timely warning. In regard to the defendants' assertion that other cases were certified where there was more apparent nexus between the product and the harm, I repeat that it is not appropriate at this stage to subject the opinion evidence to vigorous scrutiny. Finally, in respect of whether the drug was voluntarily withdrawn from the market or by the direction of Health Canada does not preclude a certification in a class proceeding. Whether the drug was approved and reviewed from time to time by Health Canada is not dispositive of liability.
2. I find that the causal connection issue is a "substantial ingredient" of each of the class member's claims.

**ii. Duty of Care**

**48**  The plaintiff suggests that this is a threshold legal question which should be decided once and is therefore an appropriate common issue. The defendants say that it should not be certified as a common issue as its resolution would not advance the litigation. The defendants assert that it is a "self-evident proposition of law that manufacturers owe a duty of care to consumers of those products."

**49**  The defendants refer to *Bouchanskaia* where the Supreme Court of British Columbia refused to certify this as a common issue. The court held at paras. 99-100:

[99] Bayer effectively conceded that this is a common question, but argued that it is a self-evident proposition of law, and its resolution would not advance the case. Plaintiff's counsel argued that Bayer's concession that it owed a duty of care would not be binding as against any other members of the proposed class unless the case were certified.

[100] The question of whether Bayer owed a duty to persons who ingested a drug that it distributed is common, but is a question which must be answered affirmatively as a question of law. Answering this question alone would not advance this litigation and, accordingly, I did not certify that question.

**50**  I agree with the defendants. This question is one of law. It is unnecessary to certify this question as a common issue.

**iii. Breach of Duty**

**51**  The plaintiff asserts that this "core common issue" focuses on the defendants' knowledge and conduct toward the class. She suggests that the defendants were negligent in over-promoting the long-term and widespread use of the drugs; and in marketing them with insufficient research as to their efficacy and safety.

**52**  The defendants assert that the duty of care must be evaluated over the entire class period of 26 years. There was an evolving state of medical knowledge, including an evolution of the "product monograph," which included the label and the CPA entries. The issue of whether there was breach of duty will have to focus on each of these issues over a 26-year period: what did the defendants know at the beginning and before each change to the product monograph?

**53**  The defendants also assert that the breach of duty issue is complicated by the involvement of healthcare professionals. The manufacturer's duty to warn consumers is discharged if the manufacturer provides prescribing physicians, rather than consumers, with an adequate warning of potential dangers associated with a drug: *Goodridge* at para. 85.

**54**  I find that this common issue should be certified as such despite the defendants' reliance on having provided an adequate warning to a "learned intermediary." The defendants continue to have an obligation to provide accurate product labels throughout the class period. If they failed to do so, it remains the manufacturer's responsibility. The learned intermediary's considerations are irrelevant if the defendants failed to provide accurate product labels or did not fairly state the risk of the drugs. In *Tiboni v. Merck Frosst Canada Ltd.* [*(2008), 295 D.L.R. (4th) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S061-00000-00&context=) (Ont. S.C.J.), aff'd [*(2009) 95 O.R. (3d) 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22M5-00000-00&context=) (Div. Ct.), the court stated at para. 88:

Merck accepts that the information it is to provide to physicians, and the manner in which this is to be done, is prescribed by regulation. If it has failed to provide such information in the prescribed manner, it may well be found to breach a duty, and a standard of care, whether or not a patient or a physician has obtained information from other sources, and whether the physician has passed on all appropriate information and warnings to the patient.

**55**  The plaintiff also asserts that the defendants have actively engaged in misleading sales tactics. *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* [*(1986), 54 O.R. (2d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M307-00000-00&context=) (C.A.), considered the promotional materials which the defendant provided to doctors and statements of the defendant's sales agents who minimized the risk of harm at para. 66:

This, patently, is not a case in which the intervening doctor proceeded solely on independently acquired information. Ortho's failure to give physicians a warning commensurate with its actual knowledge of the dangers inherent in its products combined with the efforts of its sales representatives to minimize those dangers and counteract reports of adverse side- effects plainly influenced the doctor's opinion as to the drug's safety and the need to inform patients of the risks. It is, therefore, not unreasonable to conclude, as I infer the trial judge did, that the doctor's failure to disclose the risk of stroke (or, for that matter, any thromboembolic risk) to the plaintiff was contributed to by the inadequacy of Ortho's warnings, devoid as they were of any reference to stroke, and the promotional tactics of its pharmaceutical salesmen. In these circumstances, I cannot agree that there was no causal link between Ortho's breach of the duty to warn and the plaintiff 's ingestion of the drug, and, it follows, the doctor's intervention cannot operate to exonerate Ortho from liability for its breach of duty.

**56**  Determining whether the learned intermediary defence is established is beyond the scope of the court's role in determining whether this is a common issue in support of a certification application. I find that this is an appropriate common issue.

**iv. Does the Defendants' Conduct Justify Punishment**

**57**  It is not the role of this court in this certification proceeding to determine whether there was a breach of the duty of care by the defendants in the first place, and thus, it is not appropriate to deal with the question of whether that breach of duty justifies punishment.

**v. Punitive Damages**

**58**  The courts in British Columbia endorse a bifurcated approach to punitive damages as a common issue in class action proceedings. The Court of Appeal stated in *Chalmers* at para. 31:

[31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

**59**  At para. 35, the court formulated the questions as follows:

...

1. If either or both of the Defendants breached a duty of care owed to class members, was either or both of the Defendants guilty of conduct that justifies punishment?
2. If the answer to common issue 7(c) is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against either or both of the Defendants?

**60**  I am satisfied, based on the court's comments in *Chalmers*, that the plaintiff's claim for punitive damages should be certified as a common issue.

**Part II. Common Issues Based on the *BPCPA***

**61**  The plaintiff asserts a statutory claim under the *BPCPA*. The *BPCPA* concerns conduct and representations which a supplier directs to the "world at large" in the marketing of its products as opposed to specific interactions between a supplier and an individual customer. The question of whether a representation is deceptive or misleading does not require an individual enquiry: *Wakelam v. Johnson & Johnson*, [*2009 BCSC 839*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S08D-00000-00&context=) at para. 39.

**62**  The defendant reiterates its position regarding whether there is a cause of action under the *BPCPA*. In respect of whether it is an appropriate common issue, the defendants argue that alleged deceptive acts under the *BPCPA* are not common, but are an amalgamation of differing allegedly deceptive representations relating to safety, risk, efficacy, long-term use and benefits. The defendants also assert that there is no commonality amongst the issues challenged or the statements made. Remedies under the *BPCPA* will only be triggered if the transaction is considered to be a "deceptive practice." A statement made by the defendants in a particular context which may be deceptive will not advance other class members' claims and cannot be extrapolated. Finally, the allegedly false representations were made in a variety of different documents at different times and in the context of a prescribing decision involving a physician and/or a pharmacist. Addressing these matters as a common issue is unmanageable, too broad and unfocused.

**63**  I agree with the plaintiff that if I consider that the ***negligence*** allegation is a common issue, the claimant or the *BPCPA* does not make the case any more complicated. The defendants have not satisfied me that there is no commonality in respect of each individual class member which results in these claims not representing common issues.

**64**  I agree with the plaintiff that the objective nature of the statutory cause of action under the *BPCPA* is suited for class treatment. The participation of individual class members is not necessary to determine whether the defendants have breached the statute.

**4. Preferable Procedure**

**65**  Section 4(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the fair and efficient resolution of common issues. The court, in considering whether to certify the class action, must analyze whether a class proceeding is preferable to any alternative method of resolving the claims and represents a fair, efficient and manageable way of determining common issues: *Cloud* at paras. 73-75.

**66**  The factors to be considered are listed in s. 4(2) of the *CPA*.

**67**  The *CPA* provides specific guidance to the court, as it was explained in *Rumley* at para. 35:

[35] The question remains whether a class action would be the preferable procedure. Here I would begin by incorporating my discussion in Hollick as to the meaning of preferability: see Hollick, supra, at paras. 28-31. While the legislative history of the British Columbia Class Proceedings Act is of course different from that of the corresponding Ontario legislation, in my view the preferability inquiry is, at least in general terms, the same under each statute. The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (Hollick, at para. 28). I would note one difference, however, between the British Columbia Class Proceedings Act and the corresponding Ontario legislation. Like the British Columbia legislation, the Ontario legislation requires that a class action be "the preferable procedure" for the resolution of the common issues: see Ontario Class Proceedings Act, 1992, s. 5(1)(d); British Columbia Class Proceedings Act, s. 4(1)(d). Unlike the Ontario legislation, however, the British Columbia legislation provides express guidance as to how a court should approach the preferability question, listing five factors that the court must consider: see s. 4(2). I turn, now, to these factors.

**68**  The advantages of a class procedure are discussed in *Bouchanskaia* at para. 150:

[150] There are numerous advantages to class actions for plaintiffs. Mr. Branch suggested that they include the following:

1. Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
2. A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
3. The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);
4. A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
5. Class members are given the ability to apply to participate in the litigation if desired (s. 15);
6. [omitted in the original]
7. The action is case managed by a single judge (s. 14);
8. The court is given a number of powers designed to protect the interests of absent class members (s. 12);
9. Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
10. In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
11. Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

**69**  The courts have recognized that product liability suits involve significant time and expense and are best litigated once in a class action rather than many times through protracted individual litigation: *Tiboni v. Merck Frosst Canada Ltd.*, [*295 D.L.R. (4th) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S061-00000-00&context=); [*60 C.P.C. (6th) 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S061-00000-00&context=) at para. 100.

**Common Issues v. Individual Issues**

**70**  The plaintiff asserts that the common issues form an essential component of each class member's claim which favours certification. Despite their remaining individual issues of specific causation and damages, a decision on the common issues will substantially advance the litigation towards the resolution of the claims, which suggests that a class action procedure is preferable: *Tiboni* at para. 105-107. Even where individual issues substantially predominate over common issues, and the overall benefits may be slight, the plaintiff asserts that there may be some practical utility in deciding the common issues once: *T.L. v. Alberta* (*Child, Youth and Family Enhancement Act*, Director), [*2009 ABCA 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-F65M-60HD-00000-00&context=) at para. 25.

**71**  The defendants assert that all eight of the questions posed by the plaintiff as common issues could be decided by way of a common issues trial but, before liability can be determined for any class member, it will be necessary to consider multiple potential individual issues. These include the length of time a class member ingested the defendants' products, whether the class member took the product continuously or from time to time, whether the class member took products manufactured by the defendants or some interchangeable product, the extent to which the class member and her physician or pharmacist were aware of warnings, and to what extent the class member's physician or pharmacist heeded those warnings. The defendant says that the issues relating to individual claimants overwhelm common issues and that no purpose is served by trying the proposed common issues. This includes a consideration under *BPCPA*. Even if there is a determination of deception common to the class, every consumer transaction occurred in the presence of a learned intermediary and the court will have to consider whether the learned intermediary explained the various risk factors based on his or her clinical judgment.

**72**  I find that in spite of the significant individual issues which arise, class proceeding is a preferable procedure to resolve the common issues. The common issues are not, in my view, overwhelmed or subsumed by the individual issues and in spite of there being a number of individual issues, there will be substantial benefits with respect to access to justice and judicial economy achieved through a common issues trial. As noted in *T.L. v. Alberta,* a class proceeding will be of some practical utility (at paras. 131-132). As noted in *Cloud* at para. 73-75, the preferability requirement can be met even where there are substantial individual issues and the common issues do not predominate.

**73**  In specific reference to the factors referred to at s. 4(2)(b)-(e), individual litigation would not be economically viable for most of the class members and a class proceeding is the most effective means providing access to justice. There is no evidence that other proceedings in British Columbia or in other Canadian jurisdictions address this particular claim against the defendants; judicial economy is served by proceeding with this class action. There is also no reason to assume that the administration in this case would be unduly burdensome. Class proceedings have demonstrated that an appropriate and reasonable way to manage medical product claims in many cases. Finally, the defendants' position that HT and its sale in Canada is governed by a regulatory regime established by Health Canada does not, in my view, satisfy me that a class action is not the preferable procedure because behaviour modification is not a concern in this case. I appreciate that a comprehensive regulatory regime exists, but as I have stated, that is not dispositive of the plaintiff's action in ***negligence*** or under the *BPCPA*.

**5. Representative Plaintiff**

**74**  Section 4(1)(e) of the *CPA* requires that there be a representative plaintiff who can adequately represent the class, does not have a conflict with other class members, and has developed a reasonable plan for litigating the action and providing notice to other potential class members. The test for adequacy of a proposed plaintiff is whether she will "vigorously prosecute the claim": *Campbell v. Flexwatt Corp.* [*(1997), 98 BCAC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) at paras. 75 and 76.

**75**  The plaintiff asserts that she meets the test and that her litigation plan is workable.

**76**  The plaintiff asserts that the litigation plan is a template and is purposely general. The litigation plan provides for ongoing modification based on input from the parties or the case management judge. The litigation plan need only demonstrate that the plaintiff fully considered how the action will proceed and will be resolved: *Fakhri et al. v. Alfalfa Canada Inc. cba Capers*, [*2003 BCSC 1717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0NK-00000-00&context=) at paras. 77 and 78, aff'd [*2004 BCCA 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G070-00000-00&context=).

**77**  The defendant asserts that Ms. Stanway has given an advantage to residents of British Columbia by advancing her claims under the *BPCPA* without regard to the consumer protection legislations in other provinces. While this may make the proposed class action more amenable to certification, it demonstrates the lack of adequate representation by the plaintiff whose British Columbia residency precludes her from making statutory consumer claims in other provinces or territories.

**78**  The defendants also argue that the plaintiff's litigation plan is deficient: it does not address a workable methodology for determining the issues of causation on a class-wide basis. The litigation does not address the issue of how individual causation will be determined. Moreover, the medical records of Ms. Stanway, Ms. Midgley, and Ms. Willis demonstrate that each proposed representative plaintiff may have conflicts of interests with other putative class members.

**79**  I find that Ms. Stanway is an appropriate class representative. She has the advantage of protection and the ability to advance a claim under the *BPCPA*, However, Ms. Willis, a resident of Manitoba, has offered to fill the role of a non-resident sub-class in accordance with s. 6(2) of the *CPA*. I have addressed the defendants' position on the substantial individual issues and have determined that proving liability against the defendants advances the proceeding for all class members. I do not find that there is a conflict of interest between Ms. Stanway as a representative plaintiff and other potential members of the class which would make her an unsuitable representative. Conflicts may arise. I have the flexibility to amend the order to address those conflicts which actually do arise: *Tiboni* at para. 114.

**CONCLUSION**

**80**  I grant the plaintiff's application to certify this proceeding as a class proceeding, which will include a non-resident subclass. The class definition will be that described by the plaintiff (at para 7 of these reasons).

**81**  Ms. Stanway is an appropriate representative plaintiff as is Ms. Willis as the representative of the non-resident subclass. Ms. Stanway has provided a workable litigation plan.

**82**  The common issues (outlined in para. 7 herein) are suitable for certification under the *CPA*, with the exception of the item 1 (b): Did the Defendants, or any of them, breach a duty of care to class members, and if so, when?

J.M. GROPPER J.

\* \* \* \* \*

Corrigendum

Released: August 15, 2011

[1] In the second sub-paragraph of the definition in paragraph 7 of my reasons for judgment released August 4, 2011 (2011 BCSC 1057), the reference to January 1, 1997 is corrected to read "January 1, 1977".

[2] In paragraph 82 of my reasons for judgment, the reference to the item 1 (c) is corrected to read "item 1(b)".

J.M. GROPPER J.

**End of Document**

[***Stevanovic v. Petrovic, [2011] B.C.J. No. 7***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2MY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.S. Sigurdson J.

Heard: September 14-18, 21-25, 28-29, October 2, November

10, 2009; January 4-8 and May 25, 2010.

Judgment: January 5, 2011.

Docket: M054338

Registry: Vancouver

**[2011] B.C.J. No. 7** | [*2011 BCSC 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PC-00000-00&context=) | [*196 A.C.W.S. (3d) 1024*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PC-00000-00&context=) | [*2011 CarswellBC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PC-00000-00&context=)

Between Ratomir Stevanovic, Plaintiff, and Stevan Petrovic, Defendant

(353 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Leg injuries — Knee — Psychological injuries — Emotional and mental distress — Considerations impacting on award — Age of claimant — Mitigation — Credibility — Contributory *negligence* — Future treatment required — Action for damages for injuries sustained in motor vehicle accident allowed — Defendant drove into plaintiff and injured him when he engaged in risky and dangerous maneuver to impress his friends — He was negligent and was entirely at fault for accident — Plaintiff's most serious injury was damage to his right knee — Injury substantially diminished plaintiff's earning capacity — Plaintiff was awarded $600,000 for loss of earning capacity and he was awarded $275,000 for future care costs — He did not fail to mitigate his damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Action for damages for injuries sustained in motor vehicle accident allowed — Defendant drove into plaintiff and injured him when he engaged in risky and dangerous maneuver to impress his friends — He was negligent and was entirely at fault for accident — Plaintiff's most serious injury was damage to his right knee — Injury substantially diminished plaintiff's earning capacity — Plaintiff was awarded $600,000 for loss of earning capacity and he was awarded $275,000 for future care costs — He did not fail to mitigate his damages.**

**Tort law — *Negligence* — Causation — Causal connection — Effect of wrongful conduct — Contributory *negligence* — Apportionment of liability — Duty of care — Motor vehicles — Pedestrians — Motor vehicles — Liability of driver — Pedestrians — Action for damages for injuries sustained in motor vehicle accident allowed — Defendant drove into plaintiff and injured him when he engaged in risky and dangerous maneuver to impress his friends — He was negligent and was entirely at fault for accident — Plaintiff's most serious injury was damage to his right knee — Injury substantially diminished plaintiff's earning capacity — Plaintiff was awarded $600,000 for loss of earning capacity and he was awarded $275,000 for future care costs — He did not fail to mitigate his damages.**

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| --- |
| Action by Stevanovic against the defendant Petrovic for damages for injuries sustained in a motor vehicle accident. On the evening of May 28, 2005 Stevanovic stood in the roadway while he waited for Petrovic to pick him up and another friend to go out for dinner. While Stevanovic stood in the street he was struck by Petrovic's vehicle. Liability was in issue. As a result of the accident Stevanovic suffered a serious right knee injury that required surgery on four occasions. Further, he claimed to suffer from chronic pain, anxiety, headaches and sleep difficulties as a result of the accident. The parties reached agreement on certain heads of damage. The heads of damage in dispute were loss of earning capacity and the cost of future care. Petrovic also submitted that damages should be reduced because Stevanovic failed to mitigate his damages by seeking appropriate psychiatric assistance. Stevanovic was 30 years' old and he was single. At the time of the accident he worked for a company that produced and sold digital photocopiers and high end printers. He serviced the equipment and he assisted sales people by doing demonstrations. The job involved walking, several hours of driving during each shift and repetitive and heavy lifting. In 2004 Stevanovic had a gross income of $36,419.  HELD: Action allowed.  Stevanovic was credible. Petrovic was negligent and was entirely at fault for the accident. He intended to drive close to Stevanovic and to pass him and he did so to show off for his friends. Petrovic could not have avoided the collision by simply applying his brakes immediately before Stevanovic moved right before the collision to avoid being struck. Petrovic planned to swing to his left at the last second and drive around Stevanovic. The accident was the result of a very risky and dangerous approach by Petrovic. Stevanovic was not contributorily negligent. Ordinarily, standing in a roadway would be negligent. However, because both parties saw each other and Stevanovic did not move and Petrovic was driving to pick up Stevanovic, it was reasonable for Stevanovic to assume that Petrovic would easily stop short of him. Stevanovic's most serious physical injury was the damage to his right knee. It was significant for the loss of earning capacity claim because it affected his ability to do his job. Only a total knee replacement was the only surgical solution to deal with ongoing pain and discomfort. There was a reasonable prospect that he would improve, particularly with his anxiety and sleeping difficulties. This would reduce his chronic pain and headaches and it would improve his work capacity over time. However, because of his knee condition he was limited to sedentary work that would not involve activities that would load his knee. The knee injury and the ongoing pain and restrictions substantially diminished Stevanovic's earning capacity. He was less competitive in the job market. Stevanovic was awarded $600,000 for loss of earning capacity. For future care costs Stevanovic was awarded $275,000. This included $20,000 for the services of a kinesiologist, nothing for massage therapy, $4,000 for a bath assist device, nothing for a mobilization device, $1,500 for a stair glide system and for its maintenance, and $25,000 for interior home maintenance. Stevanovic did not fail to mitigate his damages. |

**Statutes, Regulations and Rules Cited:**

Law and Equity Act, *RSBC 1996, CHAPTER 253*,

Motor Vehicle Act, *RSBC 1996, CHAPTER 318*, "highway, s. 144(1), s. 146(3), s. 147(2), s. 179, a. 179(1), s. 179(2), s. 180, s. 181, s. 182

**Counsel**

Counsel for the Plaintiff: Stephen E. Gibson, Irina Kordic, Joseph E. Murphy, Q.C.

Counsel for the Defendant: Robert A. Deering, Lynn Scrivener, Aleksandra Mihailovic.

**Reasons for Judgment**

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| --- |
| **J.S. SIGURDSON J.** |

**INTRODUCTION**

**1**  This is a determination of issues of liability and damages in connection with a motor vehicle accident.

**2**  The plaintiff, Ratomir Stevanovic, and the defendant, Stevan Petrovic, were good friends.

**3**  In the evening of May 28, 2005, the plaintiff was standing in the roadway in the 800 block of West 20th Avenue in Vancouver, waiting for the defendant to pick him and another friend up to go out for dinner. While the plaintiff was standing in the street, he was struck by the vehicle driven by the defendant.

**4**  Liability is in issue.

**5**  As a result of the accident, the plaintiff suffered a serious right knee injury that has required surgery on four occasions. Further, he claims to suffer from chronic pain, anxiety, headaches and sleep difficulties as a result of the accident.

**ISSUES**

**6**  The main issues in this case can be described as follows:

1. Liability;
2. Damages
3. Loss of Earning Capacity;
4. Cost of Future Care; and
5. Failure to Mitigate.

**7**  The parties have reached agreement on certain heads of damage. Although liability is in issue, if it is found, the parties agree on certain heads of damages, including non-pecuniary damages of $155,000 and net past wage loss of $125,000 from the date of the accident to September 14, 2009 (the start date of the trial).

**8**  The parties agree as well on an in trust claim of $15,000 and special damages of $26,000, subject to further argument about deductibility.

**9**  The heads of damage in dispute are loss of earning capacity and the cost of future care. The defendant also says that damages should be reduced because the plaintiff has failed to mitigate his damages by seeking appropriate psychiatric assistance.

**1. LIABILITY**

**10**  On May 28, 2005, the plaintiff was visiting his friend, Ivan Vojvodic, who lived at 881 West 20th Avenue, Vancouver across the street from Douglas Park. The plaintiff had parked his vehicle in front of the house and went inside while Mr. Vojvodic got ready to go out. The plaintiff telephoned the defendant to invite him to join them for dinner. The defendant agreed, said he was close by, and that he would drive over and pick them up from Mr. Vojvodic's house.

**11**  The house is located on the north side of 20th Avenue, across the street from a park that has a playground area. The plaintiff told the defendant that he and Mr. Vojvodic would be in front of the house, waiting for the defendant.

**12**  The park on the south side of 20th Avenue, in front of Mr. Vojvodic's house, is two blocks wide, stretching from Laurel Street on the west to Heather Street on the east. At the middle of the park, Willow Street forms a T-intersection with 20th Avenue. There are traffic circles on 20th Avenue at both Heather Street and at Laurel Street.

**13**  It was a dry day. There was an issue as to whether it was dusk yet. It appears the accident occurred by approximately 9:00 p.m., or shortly thereafter at the latest. There were a number of cars parked on the north side of 20th Avenue, but no cars parked on the south side adjacent to the park. Although people attended shortly after the vehicle stuck the plaintiff, the only eyewitnesses to the accident who were in the vicinity and who testified at trial were the plaintiff and the defendant.

**14**  The plaintiff, while he waited for the defendant to arrive, crossed 20th Avenue and walked into the park, and for a few minutes watched a game being played. At some point, Mr. Vojvodic came outside and the plaintiff went back to 20th Avenue, standing in the roadway, to speak with him. As the plaintiff expected, the defendant, after some time, approached in his 1998 BMW 540i.

**15**  It is in dispute in the evidence whether the defendant approached the area of Mr. Vojvodic's house by driving south on Heather Street, and entering 20th Avenue by coming around the traffic circle there, or whether he had driven south on Willow Street, then turned right onto 20th Avenue. The evidence of the plaintiff and the defendant is that the defendant approached via Heather Street, two blocks to the east of Mr. Vojvodic's house, and then travelled along 20th Avenue. However, the evidence of a neighbour, Zdenka Buric, who had just arrived home with her children and husband, was that the defendant, after coming southbound on Willow Street, had turned right onto 20th Avenue and continued heading west.

**16**  I find on the evidence that shortly before the accident, the plaintiff was standing in the roadway on 20th Avenue talking to Mr. Vojvodic. It appears that Mr. Vojvodic was likely standing in between parked cars on the north side of 20th Avenue as the two men waited for the defendant.

**17**  There is some question in the evidence whether the defendant, after entering the block of 20th Avenue where the plaintiff was standing, flashed his lights to indicate that he had seen the plaintiff (or sped up and then slowed down), but the evidence, I find, is clear that the defendant saw the plaintiff standing on the roadway waiting for him well before the accident.

**18**  The evidence of Ms. Buric does not coincide with the evidence of either the plaintiff or the defendant as to how the defendant approached the plaintiff. At the time of the accident, she lived at 769 West 20th Avenue, around one block from where the accident occurred. She testified that the defendant's vehicle entered the 800 block of West 20th Avenue by turning right from Willow Street. She testified that the defendant was using excessive speed and doing S-type movements up 20th Avenue.

**19**  The defendant testified that as he approached the plaintiff standing on the roadway, he saw a parking space ahead of the plaintiff on the north side of the street. He testified that he intended to go around the plaintiff by driving on the south side of the street, and pull into the parking space.

**20**  The plaintiff testified that after seeing the defendant approaching from over a block away on 20th Avenue, he turned back to talk to his friend. The exact location where the plaintiff was standing is not clear in the evidence (I find it was likely near the centre of the road), however he was in the roadway for the defendant to see, and it is clear the defendant did see him as he approached.

**21**  However, the defendant struck the plaintiff with the right front of his motor vehicle. The plaintiff was thrown up on the hood of the car and was seriously injured. After striking the plaintiff, the defendant's vehicle came to a stop angled towards the park (south) almost at the curb, and the plaintiff was lying on the ground.

**22**  How did this accident occur?

**23**  According to the plaintiff, he was standing on the street talking to his friend. He saw the defendant's car, which he said was driving slowly, and then, he said, the defendant accelerated to more than 60 kph. He testified that he waved to the defendant, and saw the defendant's high beams flash and the car hood go down, indicating the defendant had lifted his foot off the gas pedal. The plaintiff said he looked at the car for a few seconds and then turned and continued talking to Mr. Vojvodic. The plaintiff said he heard no squealing of tires a block away, nor did he see the defendant's vehicle making swerving motions as Ms. Buric's evidence suggests. The plaintiff said the first indication that he was in trouble was when he heard the tires and the defendant's vehicle skidding. The plaintiff, who had still been talking to Mr. Vojvodic, testified that he turned his head and the car was then only a few metres away. He said he tried to jump, but he could not lift his right leg and was hit.

**24**  The plaintiff testified that when he last saw the defendant's car, it was occupying the middle of the drivable surface of the road. However, he had no concern the defendant would hit him, because he was sure the defendant had seen him. The plaintiff said he did not receive any warning of the impending collision, nor did the defendant honk his horn. The plaintiff said that at the time of impact, he put his hands on the hood of the car, but his head went forward, he was struck in the knee, and his face hit the hood of the car. Although he testified at trial that he took no steps to move away from the defendant's car, he had given a statement to an insurance adjuster on July 11, 2005, in which he said he remembered trying to get out of the way of the car, and that he moved in a southerly direction further across the street. The plaintiff testified he was standing to the centre, towards the south curb, and that he was talking to Mr. Vojvodic, who was in between the cars or just beside the cars on the north side of the street (opposite the park). The plaintiff agreed that, as the defendant approached, there was nothing to prevent him from moving to the south side of the road to safety.

**25**  The defendant's version generally was as follows. He said that he had been to Mr. Vojvodic's house before, and he approached it along West 20th Avenue as he had on those previous occasions. As he negotiated the roundabout at Heather Street, two blocks to the east of the accident site, he said the only person he saw, and then recognized, was the plaintiff. The defendant testified that he believed it was dusk as he approached Mr. Vojvodic's house. He testified that the posted speed limit on West 20th Avenue was 50 kph, and that he could have been driving up to that speed, but not more than that speed. He testified that near the intersection of Heather Street and the accident, he started to decelerate. He testified that he saw the plaintiff about halfway down the block, when he was driving along 20th halfway between Willow and Heather or, in other words, when he was more than a block from the accident site.

**26**  The defendant testified that he was driving on 20th Avenue at a constant speed. He did not recall flashing his lights or the plaintiff waving to him. As he got closer to the plaintiff, his intention, he said, was to turn towards his left and drive around the plaintiff by driving between the plaintiff and the park to the south, and then parking on the north side of West 20th. When asked if he wanted to drive around the plaintiff, and whether he felt he could do it safely as he approached the plaintiff, he said "I steered to the left, to my left, towards the south. Almost immediately Ratomir moved in the southbound direction and I applied the brake as quickly as possible".

**27**  He said that the car stopped approximately a car length after he hit the plaintiff. His evidence was that it was approximately one car length from the time he started braking until he ran into the plaintiff. He said that after the accident his vehicle was close to the south curb, about a foot away from it. He was asked:

1. In your mind what would have occurred if the plaintiff had not moved?
2. I was hoping to go around him.
3. Do you feel you could have gone around him?
4. Yes.

**28**  The defendant testified that he only applied his brakes once the plaintiff moved to the south. He said that his speed just before he applied the brakes was 30 kph. He said that the plaintiff at most moved a couple of feet, enough so he could not go around him. The defendant said that the accident occurred very quickly.

**Parties' Positions on Liability**

***Plaintiff's Position***

**29**  The plaintiff's position is as follows.

**30**  The plaintiff says that the accident and damages suffered by the plaintiff were caused entirely by the ***negligence*** of the defendant and there was no contributory ***negligence*** on the part of the plaintiff.

**31**  The plaintiff says that the defendant must drive in accordance with his obligation under the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*. In these circumstances, that means he must not drive without due care and attention or without reasonable consideration for others using the highway (s. 144(1)), he must obey the designated speed (s. 146(3)), and, in passing a playground between dawn and dusk, he must not exceed 30 kph (s. 147(2)). While acknowledging the obligations of a pedestrian (s. 179 and s. 180), Mr. Gibson for the plaintiff argues that there is nevertheless a duty on a driver to use due care to avoid a collision with a pedestrian on a highway.

**32**  The plaintiff argues that although the *Motor Vehicle Act* contains a set of rules for the safe use of the road by pedestrians, motorists and cyclists, there is an overriding duty of care for all users.

**33**  The plaintiff says that the defendant, who saw the plaintiff in the roadway waiting to be picked up, is liable because the accident could have been avoided had the defendant driven his vehicle with the "slightest degree of care in the circumstances". The plaintiff says that, considering all the evidence, the defendant should be found to have been "showing off", and, while not intending to hit the plaintiff, wanted to drive as close to the plaintiff as possible without hitting him. The plaintiff's counsel argues that the defendant made a dreadful miscalculation, and either misjudged his manoeuvre or startled the plaintiff, who panicked and walked into, rather than away from, the defendant's vehicle.

***The Defendant's Position***

**34**  The defendant says that the plaintiff, in complete disregard for his own safety, was standing on the street and, instead of watching the defendant's vehicle, chose to turn away and speak with his friend. The defendant says that had the plaintiff not moved, he would have avoided the accident.

**35**  According to the defendant, the plaintiff was standing in the road for about a minute before the defendant approached. There were no markings or crosswalk on the road where the plaintiff was standing. The plaintiff saw the defendant's vehicle speed up, however he did not pay proper attention to the defendant, instead the plaintiff turned away to talk to his friend. There was nothing preventing the plaintiff from moving out of the way either before or after he saw the defendant driving towards him from a block away. Nothing prevented the plaintiff moving to a place of safety as the defendant's vehicle approached him.

**36**  The defendant testified that he intended to drive around the plaintiff, and that as he steered to his left (south), the plaintiff also moved in a southbound direction. The defendant said that he applied the brakes as quickly as possible, but that he hit the plaintiff, and his car ended up a foot from the curb. The defendant said that he was travelling at 30 kph before he applied his brakes, and that the plaintiff had moved far enough to the south that the defendant could no longer drive around him.

**37**  Counsel for the defendant, Mr. Deering, argues that I should find that the plaintiff moved into the path of the defendant's vehicle. He says that I ought to reject the plaintiff's version at trial that he did not move, as the plaintiff previously gave a statement to ICBC that he moved two steps. Moreover, the plaintiff's counsel read into evidence from the discovery of the defendant that the plaintiff tried to move in a southward direction, or a direction to the defendant's left and towards the park.

**38**  Counsel for the defendant says that there is a duty on the part of both pedestrians and drivers to exercise due care for their own safety and the safety of others. The defendant relies on *Moses v. Kim*, [*2009 BCCA 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3PH-00000-00&context=), where the Court of Appeal upheld an apportionment of liability of 65% against a pedestrian who was struck by the defendant's vehicle.

**39**  The defendant's counsel argues that the defendant was the dominant driver, and that he had the right to expect that his right of way would be respected. He argues that the defendant was entitled to continue in that expectation that he had the right of way until it ought to have been evident that the plaintiff was going to disregard the law and only then was the dominant driver under a duty to avoid the collision. The defendant submits that he did not drive without due care and attention, or without consideration for those using the highway, or at a speed excessive to the road and weather conditions. The defendant argues that the issues of whether the speed limit was 30 kph or 50 kph, and whether it was dusk or not, are not relevant as, on the evidence, the defendant was travelling at 30 kph as he approached the plaintiff.

**40**  The defendant, relying on ss. 179(2), 180, and 181 of the *Motor Vehicle Act*, says that the accident was the result of the plaintiff's own folly because he failed to observe the approaching vehicle on a continuous or intermittent basis, he failed to take steps to move into a place of safety, he failed to yield the right of way, and he stepped directly into the path of the defendant's vehicle.

**41**  In summary, the defendant says that, in an area where there was neither a marked roadway nor a crosswalk, the plaintiff left a place of safety that was on either side of the road, contrary to the *Motor Vehicle Act*, knew the defendant's vehicle was approaching for at least 20 seconds and for over 600 feet, and, notwithstanding that the vehicle would hit him if he did not move, chose not to look at the vehicle again until it was a car length away. The defendant argues that if the plaintiff had looked earlier, he could easily have moved out of the way to the north or to the south.

**42**  The defendant contends that he did all that he could to avoid the collision, and that the plaintiff should be found entirely at fault. He argues in the alternative that if liability is apportioned, the plaintiff should be found 75% at fault.

**Discussion of Liability**

**43**  This case addresses the duties of a driver and a pedestrian in an unusual case.

**44**  This accident occurred when the plaintiff, a pedestrian, was standing on a roadway waiting to be picked up by the driver who eventually struck him and injured him.

**45**  Counsel referred to the following sections of the *Motor Vehicle Act*:

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.

(2) 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.

...

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.

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.

182(1) If there is a sidewalk that is reasonably passable on either or both sides of a highway, a pedestrian must not walk on a roadway.

(2) If there is no sidewalk, a pedestrian walking along or on a highway must walk only on the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction.

(3) A person must not be on a roadway to solicit a ride, employment or business from an occupant of a vehicle.

...

**46**  Under the *Motor Vehicle Act*, it appears clear that the defendant had an obligation to drive with due care and attention and reasonable consideration for others using the highway. Section 179(1) does not apply as the plaintiff was not in a crosswalk. However, Mr. Deering, counsel for the defendant, argues that the plaintiff violated s. 179(2) by walking into the path of the vehicle, which was too close for the driver to practicably yield the right of way. Under s. 180, there is an obligation on a pedestrian, when not crossing in a crosswalk, to yield the right of way to a vehicle. Nevertheless, a driver must exercise due care to avoid colliding with the pedestrian.

**47**  In *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=) at 203, the Court of Appeal considered the provision of the *Motor Vehicle Act* in a case where a pedestrian was struck at a crosswalk:

Firstly, s. 181(1) and (2) [now essentially ss. 179(1) and (2)] do not constitute an exclusive code relating to rights-of-way between pedestrians and vehicles. They are not a substitute for the common law duty of care owed by pedestrian and drivers to exercise due care for their own safety and the safety of others.

**48**  In *Cook v. Teh*, Anderson J.A. referred, at 203-4, to the decision of Estey J. in *British Columbia Electric Railway Co. v. Farrer*, [*[1955] S.C.R. 757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YN-00000-00&context=), concerning the provisions of the *Motor Vehicle Act*. Estey J. said, at 762 of those reasons: "The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care".

**49**  This accident occurred between a vehicle and a pedestrian on a "highway", as that term is used in the *Motor Vehicle Act*.

**50**  The defendant was picking up the plaintiff from outside a home he was visiting. As the defendant approached, he saw the plaintiff on the street, from a considerable distance away. Both parties had an obligation to exercise due care.

**51**  The accident occurred when the defendant, on a straight stretch of road in front of a park, struck the plaintiff, who was standing there waiting to be picked up by the defendant. There was an issue at trial whether it was dusk at the time of the accident and whether, if so, the speed limit, which was otherwise 30 kph, was then 50 kph. Although the weight of the evidence suggests that it was not dusk, I do not find that factor to be material. In this case, I accept the evidence that, at the time the defendant started to brake, he was going 30 kph, an appropriate speed, before dusk. Even if it was dusk, the plaintiff was clearly visible to the defendant.

**52**  On the evidence, I find that until just before the accident, the plaintiff, who had initially seen the defendant, remained in about the same spot near the centre of the road, facing his friend Mr. Vojvodic, looking towards him talking, as the defendant's vehicle approached. The defendant saw the plaintiff. There was no indication to the defendant in the time leading up to the collision that the plaintiff was about to move off the road either to the north or to the south. Accordingly, the plaintiff was a stationary object in the middle of the road as the defendant arrived. Driving up and stopping before a stationary object (the plaintiff) is a very simple and straightforward driving manoeuvre that is executed by all drivers daily, particularly when this object (the plaintiff) is seen by the driver for a lengthy period of time, and many feet ahead, in front of him on the road.

**53**  It appears that the plaintiff was simply standing near the middle of the road. I think he expected to get into the passenger seat behind the defendant driver. The plaintiff had, however, taken his eye off the defendant's car. I find that he, reasonably, did not expect that the defendant would approach him at any significant speed, at least within the last short distance to reach the plaintiff. However, regardless of the defendant's speed as he approached the plaintiff, by the time he was almost upon the plaintiff and applied his brakes, the defendant, by his own admission, was still travelling at 30 kph.

**54**  I find, on a consideration of all of the evidence, that the defendant intended to drive close to the plaintiff and to pass by him to the south, however the defendant made the manoeuvre either so close to the plaintiff or at such a speed that the plaintiff moved to avoid the collision. Rather than avoiding the accident, the plaintiff likely moved into the path of the defendant's vehicle.

**55**  There is no doubt that the defendant was negligent and caused the accident. I find on the evidence that had the plaintiff not moved immediately before the accident, the defendant still would have had to steer his vehicle sharply to the left to avoid the collision. In other words, the defendant could not have avoided the collision by simply applying his brakes immediately before the plaintiff moved. The defendant was planning to swing to his left at the last second and drive around the plaintiff. The accident was the result a very risky and dangerous approach by the defendant.

**56**  I find that the defendant was "horsing around" or "showing off" for his friends by this manoeuvre. While the evidence of Ms. Buric did not accord with the evidence of both the plaintiff and the defendant, in that she testified to seeing the defendant speeding and doing sweeping manoeuvres before the accident, her evidence is consistent with my finding that the defendant was "clowning around". The plaintiff testified that the defendant had been speeding, but that he then appeared to slow down and flash his headlights as he approached.

**57**  The defendant did not intentionally strike the plaintiff, however he took an enormous risk by driving up to him at speed, knowing that he had to swerve and count on the plaintiff not moving to avoid a collision. Any reasonable driver would have approached a person in front of them on the street with only enough speed to be able to safely stop well short of that person.

**58**  The collision occurred because of a very dangerous and reckless situation that the defendant created. Although Mr. Deering said that the defendant did in fact drive with due care and attention, I disagree. I find it extremely careless of the defendant to have driven such that he was braking at 30 kph in the vicinity of the plaintiff, and would have only missed him only if the plaintiff remained stationary.

**59**  While the plaintiff says he did not move before the accident, I find he did, and that he moved to the south at the last second to try to avoid the accident. Although Mr. Deering suggests that the plaintiff stepped out into the defendant's path of travel, in fact, the plaintiff moved to the side of the street on which one would not expect the defendant to be driving. The defendant says that there was insufficient room for him to go between the plaintiff and the parked cars, and that may be so, but that does not justify the driving manoeuvre undertaken by the defendant.

**60**  The more difficult question is whether there is any contributory ***negligence*** on the part of the plaintiff. No cases involving facts quite like these were cited to me.

**61**  Mr. Deering relies on *Moses v. Kim*. In that case, a collision between the defendant's vehicle and the plaintiff occurred when the plaintiff was attempting to cross the Trans-Canada Highway. The Court of Appeal upheld a 35%/65% apportionment of damages in favour of the driver and found liability. Madam Justice D. Smith held that neither the *Motor Vehicle Act* nor the common law test for the duty of care on the dominant and servient users of the highway, as expressed 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.), creates an absolute code, but instead reflect concurrent duties of care on both the dominant and servient users of a highway. The apportionment of liability arose when the trial judge found that the driver failed to keep a proper outlook, and had a duty to reduce his speed when it became reasonably apparent that the plaintiff was crossing the highway and not yielding the right of way to the approaching driver. The defendant in this case says that similar considerations apply here if the defendant is found to be negligent.

**62**  The plaintiff says that I should have regard for *Guilani v. Saville*, [*1999 BCCA 768*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1VB-00000-00&context=), for guidance on the issue of apportionment of fault. In that very different case, the plaintiff, after a confrontation with the defendant, stood on a roadway he anticipated the defendant would return along, in order to obtain the license plate number of the defendant's vehicle. However, the defendant sped up and collided with the plaintiff who was standing on the road, and argued that the plaintiff had ample room to stand clear of the defendant's vehicle. The Court of Appeal found no contributory ***negligence*** on the part of the plaintiff.

**63**  I did not find either of these two authorities to be instructive on the facts.

**64**  Was the plaintiff contributorily negligent in standing in the street and not keeping a proper lookout as the defendant approached? Ordinarily, standing in a roadway would be negligent. The plaintiff saw the defendant's vehicle approaching from about 600 feet away, or twenty seconds or so before the defendant's vehicle hit the plaintiff, and thus the plaintiff could easily have moved out of the way.

**65**  Given that the plaintiff saw the defendant, and the defendant saw the plaintiff, who remained in the middle of the roadway, not moving, and given that the purpose of the defendant driving to the home on West 20th Avenue was to pick up the plaintiff, I think it was reasonable for the plaintiff to assume that the defendant would easily stop short of him.

**66**  The defendant says it is crucial that the plaintiff turned away to talk to his friend, and did not pay proper attention to the vehicle that was approaching. However, this was not a vehicle that would pass him, nor did the plaintiff reasonably expect this vehicle would pass him, but rather one that the plaintiff expected to stop for him. It was not a situation where the plaintiff was unsure whether the defendant had seen him, nor one where the plaintiff was entering the roadway to cross in front of the defendant. The evidence is clear that the plaintiff was seen by the defendant, and the plaintiff did not move from where the defendant has seen him.

**67**  On the evidence in this case, the only traffic that summer evening was the defendant's vehicle, which was arriving to pick up the plaintiff. I expect that it is not an unusual occurrence for people to enter or stand on a quiet, residential street when they are waiting to be picked up by friends or family. A person standing on the street has an obligation to exercise care, but is he partially at fault if he does not stand back off the road, in the absence of any indication that the person driving towards them is going to "horse around" or "play chicken"? I do not think so.

**68**  I think that the plaintiff reasonably expected the defendant to drive up to him and stop. I do not think that it was careless for the plaintiff to turn to talk to his friend and take his eye off the defendant, because it was not reasonable for the plaintiff to anticipate the possibility that the defendant would drive up to him at 30 kph, and then turn sharply to avoid him. Moreover, I think that it is a reasonable inference from the evidence that the plaintiff was startled by the defendant driving close to him and attempting to go around him. The defendant says that had the plaintiff stayed in the same place, the accident would not have occurred. Although that may be true, I think the defendant ought to have known that this was an extremely risky manoeuvre, and that a startled pedestrian suddenly moving, in those circumstances, could hardly be a surprise to the driver. The fact that the plaintiff moved before the collision could not be contributory ***negligence*** on his part.

**69**  The defendant says that the plaintiff had a complete disregard for his own safety by standing in the street, and continuing to do so once he had seen the defendant, and instead of watching the defendant, chose to turn away and speak to his friend. I do not think that the vehicle driven by the defendant potentially posed any realistic danger to the plaintiff. I find that the plaintiff did not expect that the defendant would do anything other than drive up to him and stop. No doubt the defendant, at the last moment, was trying to do everything in his ability to avoid the impact, however that was only because a hazard was created by the defendant's reckless approach.

**70**  I find that the defendant was negligent and entirely at fault for the accident. There is no contributory ***negligence*** on the part of the plaintiff. If I am wrong In that conclusion, I would only apportion 10% fault to the plaintiff.

**2. DAMAGES**

**Introduction**

**71**  The parties have agreed on non-pecuniary damages. The central issues that remain are the plaintiff's loss of earning capacity and the cost of future care.

**72**  The parties have vastly different views of the appropriate damages for these heads. The plaintiff's counsel says that his client should be awarded $1.3 million for loss of earning capacity and $1.3 million for cost of future care. The defendant says that the award for loss of earning capacity should be somewhere in range of $250,000 - $450,000, and the proper assessment of the cost of future care is about $250,000.

**73**  The defendant also argues that the plaintiff has failed to mitigate his damages by ignoring advice that he would benefit from psychiatric treatment and medication for his anxiety. The defendant says the medical evidence shows that treating the plaintiff for anxiety will precipitate a partial or full recovery of the symptoms of chronic pain and sleep disorder, which the defendant says the plaintiff alleges are significant contributors to his alleged disability. For this failure to mitigate the defendant seeks a 25% reduction. The plaintiff denies that he has failed to mitigate his damages or that the defendant has discharged his onus to show that another course of treatment was recommended to the plaintiff which he unreasonably failed to follow and, if followed, would have improved his condition.

1. **LOSS OF EARNING CAPACITY**

**74**  There is no dispute that the plaintiff suffered a serious knee injury and an impairment of his earning capacity. However, the plaintiff says that the knee injury, together with his chronic pain, anxiety, headaches and sleep difficulties, are so significant that they make him competitively unemployable. The defendant, on the other hand, says the plaintiff is employable, capable of at least part-time work, and that, with the passage of time and treatment, issues such as anxiety, sleep difficulty, and chronic pain will resolve and improve. Although the law concerning recovery for loss or impairment of earning capacity is not really at issue, and I will describe it shortly, its proper application here, the parties argue, leads to significantly different results.

**The applicable law**

**75**  It would be useful to set out some of the guiding principles on the assessment of damages for loss of earning capacity.

**76**  In *Moore v. Brown*, [*2010 BCCA 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2RR-00000-00&context=), the Court of Appeal said, at para. 39:

The approach to be taken in assessing an award for impaired earning capacity was summarized by Huddart J. in *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=), [*84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=):

[8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *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=) (S.C.C.); *Parypa v. Wickware* [*(1999), 65 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=) (B.C.C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

...

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (B.C.C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.)]; *Parypa v. Wickware, supra.* The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

...

[18] The assessment of damages is a matter of judgment, not calculation. ...

**77**  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=), Low and Smith JJ.A., writing for the majority, summarized the relevant principles in assessing damages for loss of future earning capacity:

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

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

**78**  Mr. Justice Finch, as he then was, described a list of further specific considerations 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=) at para. 8 (S.C.), which may be taken into account in making an assessment according to the capital asset approach:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**79**  In the case at bar, I find, and it is not disputed, that the plaintiff has suffered an impairment of his income earning capacity. The difficult question is what is, based on all of the evidence, the proper assessment of the damages to be awarded to the plaintiff for that loss.

**Pre-accident condition and circumstances**

**80**  The plaintiff, now 30 years old, was born in the former Yugoslavia, his parents being mechanical engineers, and the family moved to Canada in 1994. He required English assistance when he entered high school and completed his high school in 1997 with average marks.

**81**  After attending Douglas College, but not graduating, he worked at miscellaneous jobs such as employment at a gas station, construction, valet company work, and delivering flyers. In 2002, he started work with RISO, Inc., an international company based in Japan that produces and sells digital photocopiers and high end printers. The plaintiff had been employed at RISO for about 2 1/2 years at the time of the accident. At RISO, the plaintiff serviced photocopiers and digital presses, as well as assisting sales people doing demonstrations. His job title at RISO was a photocopier technician. The job involved walking, several hours of driving each shift, repetitive lifting, and, with some less frequency, heavy lifting and working in sustained awkward positions.

**82**  The plaintiff testified that, at the time of the accident, he was not entirely happy at RISO, as he felt that he should have received a pay increase, and he was considering leaving if he did not progress. Although he testified to considering leaving RISO for better opportunities, he had not actually taken any active steps to leave, such as sending out resumes to any future employers.

**83**  The plaintiff's gross income rose to $36,419 in 2004, including a car allowance. In 2003, inclusive of a car allowance, his gross income was $34,822.

**84**  The plaintiff is single. Prior to the accident, he had moved back in with his mother to help her pay her mortgage.

**85**  On the evidence, the plaintiff appears to be a reasonably intelligent man with an interest and strong aptitude in computers, as well as an interest in music. Before the accident, he took a "Brainbench" test for which he obtained the top marks among RISO technicians. He studies and plays the flamenco guitar at a relatively high level. Prior to the accident, he was active and enjoyed soccer and skiing, as well as table tennis, ice hockey, and working out in the gym.

**86**  The plaintiff had some knee ligament problems from sports injuries prior to 2004, but I find that there were no significant issues in the year leading up to the accident that would have affected his income earning capacity.

**87**  The plaintiff is an intense person. In terms of pre-accident medical conditions, he had developed irritable bowel syndrome (IBS) after his father passed away from a heart attack in 1999. Although there was some suggestion in the evidence that it might have predated 1999, I find that his IBS problem began in 1999. His symptoms from IBS flare up from time to time. When his symptoms flared up, he worked overtime or longer hours to get his work done. The flare-ups of his IBS condition appear to have occurred relatively infrequently.

**Overview of his claimed injuries**

**88**  The purpose of the review of the injuries that the plaintiff suffered is not to revisit the issue of non-pecuniary damages, which was agreed, but for the purpose of the assessment of his loss of earning capacity and cost of future care.

**89**  The injuries suffered by the plaintiff were summarized by Dr. Anton, a physiatrist, in his medical report of August 21, 2008:

1. multiple injuries to the right knee including
2. a patellar dislocation with a residual osteocondral defect in the articular (joint) surface of the patella;
3. an impacted fracture of the lateral femoral condyle;
4. evulsion of the anterior cruciate ligament from the tibial spine;
5. a lateral tibial-plateau fracture, and
6. a bucket handle tear in the anterior portion of the lateral meniscus;
7. a closed head injury including a laceration, nasal fracture, and probable mild traumatic brain injury;
8. a fracture of the proximal fibula of the right leg;
9. an injury to the left shoulder involving the supraspinatis tendon of the rotator cuff and anterosuperior glenoid labrum; and
10. multiple soft tissue injuries including a probable soft tissue injury to the cervical spine.

**90**  The nature, extent, and cause of the plaintiff's continuing injuries and complaints are critical to the determination of his claim for loss of earning capacity.

**91**  The plaintiff's most serious physical injury was the damage to his right knee, which required surgery on four occasions by Dr. Pierre Guy, an orthopaedic surgeon. The plaintiff also required shoulder surgery in 2008 by Dr. Gilbert, which surgery was successfully completed. In more recent times, the plaintiff has developed and has complained of hip pain.

**92**  The knee injury was described by the doctors as serious and complex, and is significant for the loss of earning capacity claim, because it affects and continues to affect his ability to bend his knee, go up or down stairs, or crouch, squat, kneel, or run without pain. As a result of his knee injury, notwithstanding the successful surgeries, it is now apparent, with his knee pain, and difficulty crouching and bending, that he would not be able to continue employment as a copier repair person, which was what he had done at RISO before the accident.

**93**  I find that the plaintiff continues to suffer from pain to his knee and that further surgical options are limited until much later. A total knee replacement at a much later age appears to be the only possible surgical solution to deal with ongoing pain and discomfort.

**94**  The complicating factor that makes the assessment of the loss of earning capacity more difficult is the fact that the plaintiff has had persistent symptoms beyond the knee pain, which his counsel argues are caused by the accident. These include headaches, chronic pain, anxiety, and sleeping difficulties, coupled with his knee, shoulder and hip problems.

**95**  The defendant concedes that, at present, the plaintiff can only work part-time (the plaintiff's counsel says that he is competitively unemployable). However, the defendant suggests that with time and treatment, the plaintiff will improve his pain, relieve his anxiety, and alleviate his sleeping and headache difficulties. The defendant's counsel goes on to say that, given that the knee repair was well done and the knee joint is otherwise good, the loss of earning capacity claim is much less than the plaintiff contends. The defendant argues that the plaintiff's pre-existing condition or earning capacity was already reduced by the IBS condition that he suffers from.

**96**  I find that the plaintiff is, and was before the accident, an intense person. He was accurately described by several witnesses as being a perfectionist. I find that he did not have any serious underlying psychological problems before the accident that would have affected his earning capacity, but he did, as I have mentioned, suffer from IBS that occasionally flared up and caused him to miss work, although he would, apparently, catch up on his work after the flare up ended.

**97**  The plaintiff, as I mentioned, has a musical interest and a computer interest and a skill in both areas. In 2008 he took an introductory course in audio and studio and recording design and after completing that then enrolled in a full-time course in audio design and music production at Harbourside Institute of Technology, which was to be completed at a time after the evidence had been heard at trial.

**98**  The assessment of this head of damages concerns an analysis of various injuries and problems the plaintiff suffers from, their cause, and their impact on him in the future. I will start with a discussion of his knee injury and then turn to his other difficulties. I will describe the chronology of those other difficulties from the perspective of the family doctor, who oversaw the treatment of the plaintiff's ongoing pain, headaches, and sleeping difficulties. Each of those conditions, the plaintiff asserts, impact on his ability to work and hence his earning capacity.

**The knee injuries and surgeries**

**99**  The plaintiff's most serious injury was to his knee.

**100**  The nature of the injury, the surgeries, and the prognosis for the plaintiff was described in the evidence of two orthopaedic surgeons, Dr. Guy, called by the plaintiff, and Dr. Pat McConkey, called by the defendant. The knee injury was also described by Dr. Anton.

**101**  The knee joint was described as being made up of three joints: the patellofemoral joint, the lateral knee joint or outer aspect, and the medial knee joint or inner aspect, and although there was some question about this, I find that there was no evidence of present osteoarthritic degeneration on any of the actual weight-bearing surfaces.

**102**  Following the accident, Dr. Guy performed surgery on May 28, 2005. On June 22, 2006, Dr. Guy performed a right knee arthroscopy, where he debrided the patella and removed hardware from the right distal femur and right proximal femur, and found patellofemoral osteoarthritis with grade 3-4 changes on the under surface of the patella. The plaintiff had further arthroscopic surgery to the right knee by Dr. Guy on February 5, 2008. I describe those surgeries below in an excerpt from a report of Dr. McConkey. The plaintiff had surgery on four occasions, the last time being February 14, 2008.

**103**  Dr. McConkey, having reviewed Dr. Guy's evidence and a summary of his opinion, provided this overview:

In review Mr. Stevanovic was struck by a motor vehicle on May 28, 2005 he suffered significant and complex injury to his right knee as a result. The injuries included osteochondral injury arising from the medial articular set of the patella, fracture of the lateral femoral condyle -- impacted, avulsion of the anterior cruciate ligament with a small fragment of bone, fracture of the periphery of the lateral tibial plateau, bucket handle type tear of the anterior horn of the lateral meniscus.

Surgery was done soon after injury. Surgery in the care of Dr. Pierre Guy included repair of distal avulsion of the anterior cruciate ligament with a non absorbable suture, re-fixation of osteochondral fragment with bio-absorbable screws, elevation and fixation of impacted lateral femoral condylar fracture maintained with fully threaded cortical screw and washer, and fixation of lateral peripheral tibial plateau fracture by a threaded cortical screw and washer, repair of the anterior horn of the lateral meniscus with non absorbable sutures. At closure lateral release of the patella and medial structure advancement was done.

Because of persisting symptoms further surgery was done on June 22, 2006 for "debridement" for grade 3-4 changes at the patellar articular surface. The previously applied screws and washers to the right distal femur and right lateral proximal tibia were removed. At the time of surgery the ACL was described as "stable". The operation proceeded without complication.

There were further patellofemoral symptoms and therefore on February 5, 2008 arthroscopy of the knee was done. At the time there were "grade 3-4 changes" of the medial facet of the patella and "grade 3 changes" in the femoral groove adjacent to the patellofemoral joint. Arthroscopic lateral retinacular release was done. In the early postoperative period there was increasing pain on swelling and despite aspiration for negative cultures he was returned to the operating room on the 14th of February for removal of a clot.

**104**  Dr. McConkey agreed that not only had the plaintiff suffered a very serious complex knee injury, but the arthroscopic surgery done by Dr. Guy identified a grade 3-4 change to the underside of the patella, which was a sign of osteoarthritis. The last surgery of February 14, 2008, was essentially because of swelling developing in the right knee.

**105**  Although it is clear that, from an orthopaedic surgeon's perspective, the plaintiff's knee injuries were complex and serious, Mr. Deering argues that the damage to the knee was not as bad an injury as it might have been, and that the surgeries were ultimately successful. That is probably so. Dr. Guy agreed that there were no arthritic changes to the weight-bearing surfaces, no degenerative changes to the meniscus, and the cruciate ligaments are relatively intact. Dr. Anton agreed that there was a good result in the tibial plateau fracture. Dr. Anton agreed that with an intact meniscus, what appears to be a stable cruciate ligament, and a very good result from the tibial plateau fracture, those are good signs in terms of the risk of degenerative change in the actual weight-bearing joint. Dr. Anton agreed that by 2008, the plaintiff had regained full flexion and normal range of motion.

**106**  Nevertheless, there were serious injuries to his knee that will have significant impact on his employability and earning capacity.

**107**  The plaintiff suffered a significant injury to the patellofemoral joint, and the symptoms that the plaintiff described were consistent with the development of arthritis there. Shaving underneath the patella (which was done) can assist with pain relief, but will not cure the arthritis. The plaintiff appears to have persisting pain in this area. Dr. McConkey agreed that, based on the calcification of the bone, although it is important for the plaintiff to avoid strenuous activity to prolong the health of the joint, it creates a risk of osteoporosis or a continuation of that condition by not doing so. Dr. McConkey only indicated that there was osteoarthritis in the patellofemoral joint, but did acknowledge that arthritis is a chronic, progressive condition that can progress from one component of the knee to another.

**108**  Dr. Anton described that the plaintiff had already developed post-traumatic arthritis in his right patellofemoral joint, and said that he would probably also develop arthritis in the knee joint proper.

**109**  In terms of his right knee, which has been surgically repaired four times, the plaintiff testified that he has continuing pain in the knee. The plaintiff described "shifting", and said that the brace that he has now helps with the sideways shift, which he described as the top of his leg going over the top of the tibia.

**110**  The problems the plaintiff currently has with his knee are difficulty squatting and difficulty keeping the knee in the same place, the fact that the knee joint collapses to the inside, and there is some residual laxity of his medial collateral ligament.

**111**  In terms of activities that aggravate his knee, the plaintiff describes a situation where his leg is at a ninety degree angle, which sometimes causes pain, and he will raise his leg by putting a stool or something in front of it, or he will, if standing, put more weight on his left knee. He says he can walk further after he has been for massage therapy. Dr. McConkey agreed that the plaintiff bending his knee in a static position beyond 30 degrees for extended periods of time is going to cause problems for him. Dr. McConkey said also that stiffness and discomfort will likely occur if the plaintiff sits for a long period of time with his leg in a particular position.

**112**  Dr. McConkey gave this prognosis as part of his initial February 25, 2009 report:

Prognosis: Mr. Stevanovic suffered a significant and complex injury to his right knee as a result of the motor vehicle accident May 28, 2005. He has permanent partial disability. Overall in the short term that is five to 10 years I believe that there will be gradual improvement in some of the disabilities that relate to his knee in that I would expect him to be able to improve his strength minimally. He will likely be able to walk further with less discomfort. I expect that there will be a decrease overall in the sensation of stiffness and a minimal improvement in functional range of motion. However there will be significant deficiencies. The important persisting and permanent pathologies which will lead to impairment will include patellar chondromalacia and chondromalacia of the femoral sulcus and some element of stiffness related to patellofemoral articulation. This will make it difficult for him to develop thigh (particularly quadriceps) strength. It will limit his ability to develop strength and comfort in those activities which relate to the use of the patellofemoral joint under load such as squatting and arising from a squatting position, stair climbing up and down, running, jumping and landing activities. He will be limited in endurance activities such as long walking and particularly hiking. The discomfort arising from compression across the patellofemoral articulation will make it difficult for him to work in tight places or low down and will restrict his ability to lift weights of importance from below his waist. It is likely that there will be some persisting difficulty sitting at a desk in a greater than 90 degree knee flexed position. Sports participation in a similar fashion will be restricted. It is unlikely that he will return to any meaningful running or running sports, hiking, skating, or other jumping deceleration change of direction sports. He will likely be restricted to walking, simple working out, swimming and with some improvement in present overall functions and cycling.

In terms of employment he will be restricted to non laboring sedentary types of occupations.

**113**  Dr. Anton was asked whether the plaintiff's impairments rendered him unemployable as of his last assessment and whether it was more the physical or psychological factors. Dr. Anton said it was a combination. Dr. Anton said that pain, fatigue, anxiety, and depression have an effect on cognitive function, and those effects would be further barriers to employment. He said that the plaintiff would have to improve considerably to work competitively, even in sedentary jobs. He said he based this opinion on his findings at the time of his assessment (his last assessment being in 2008) that the plaintiff had specific physical limitations, continuing pain and fatigue.

**114**  In terms of restrictions, Dr. Guy said that the plaintiff had no limitations on activities of daily living, which he said meant he could do simple tasks such as getting up, washing and cooking. Dr. Guy said that the plaintiff could perform light activities without lifting heavy objects.

**115**  I think it is clear that there will be permanent restrictions requiring the plaintiff perform only reasonably light work activities. As Dr. Guy indicated, and as Dr. McConkey's view became, the patellofemoral joint is the major concern, and is the major cause of the plaintiff's discomfort, disabilities, and lack of function, and there will likely be some progression of wear in that joint over time.

**116**  It appears that the only viable option for the plaintiff in the future, if his symptoms become too severe, is a total knee replacement.

**117**  Both Dr. McConkey and Dr. Guy thought that if a total knee replacement was necessary, it should be put off until as late as possible, i.e. when the plaintiff reaches age 55 or later.

**118**  Although the total knee replacement should be delayed as long as possible, I think that it appears very likely in the long run. I accept Dr. Guy's opinion that in the next twenty years or so, pending a total knee replacement, it is important that the plaintiff maintain his strength, but that his pain, in any event, is likely to increase over that period.

**Treatment of the plaintiff and overview of his symptoms post accident**

**119**  Although non-pecuniary damages were agreed, in order to understand the ongoing difficulties that the plaintiff alleges and to put in context the various experts that the plaintiff saw, it is most convenient to review the evidence of the general practitioner, Dr. Mazzarella, who was generally responsible from his care since the accident.

**120**  Dr. Mazzarella was the plaintiff's general practitioner immediately following the accident. Before that, Dr. Warren was his general practitioner.

**121**  Dr. Mazzarella first saw the plaintiff on June 27, 2005, after he had been in the hospital for twelve days following the accident. The plaintiff's difficulties at that time included complaints of recurrent headaches, difficulty sleeping and what Dr. Mazzarella described as a mood disorder. Throughout the years that followed, the plaintiff continued to complain of headaches and sleeping difficulties, including an inability to get to sleep until late in the night or early in the morning. Dr. Mazzarella prescribed numerous different medications for his headache pain and disrupted sleep. The plaintiff had neck complaints and complained of anxiety and outbursts that he said did not improve. By the end of August, the plaintiff was referred to a physiatrist and an occupational therapist at the Early Response Brain Injury Services at G.F. Strong. However, he continued to have ongoing headaches and disrupted sleep issues.

**122**  In 2005, the plaintiff was referred by Dr. Mazzarella to a physiatrist, Dr. Dhawan, and by Dr. Dhawan to Dr. Raina, a consulting psychiatrist. For the first two years following the accident, Dr. Mazzarella prescribed numerous medications for sleeping difficulties, anxiety, and headaches. The plaintiff started psychotherapy with Dr. Elsie Cheung, a psychologist. Although Dr. Mazzarella quarterbacked his care, he did not consult directly with Dr. Dhawan, Dr. Raina, or Dr. Cheung. Dr. Raina took the plaintiff off Effexor and put him on another drug, Epival to prevent headaches and act as a mood stabilizer.

**123**  Through 2006, the plaintiff continued to complain of sleeping difficulties and headaches aggravated by activities. By 2007, the plaintiff continued to complain of ongoing headaches and sleep dysfunction without apparent relief. He was started on anti-depressant medication. He was referred to an ear, nose and throat specialist, Dr. Manaray, to see if his sinuses had a role in his ongoing complaint of headaches. In August 2007, he was referred to Dr. Gordon Robinson, a specialist in headache management. At this time, the plaintiff was still complaining of ongoing day/night reversal with sleep. In 2007, Dr. Guy referred the plaintiff to Dr. Bob McCormack, to discuss patellar cartilage replacement options.

**124**  By the fall of 2007, the plaintiff's medication included Remeron (45 mg nightly), Propranolol (40 mg twice a day), Gabapentin (300 mg 3 times per day), Temazepam (30 mg 1-2 tablets nightly) and a new medication, Nozinan (25 mg nightly). Dr. Mazzarella testified that these were mostly geared towards improving his sleep, but were also used in treating patients with chronic pain and components of underlying anxiety.

**125**  In December 2007, the plaintiff had an MRI for his left shoulder, which had been injured in the accident and that was repaired by Dr. Gilbert, who did a bankart repair of the left shoulder in 2008.

**126**  By February 22, 2008, after his final knee surgery, the plaintiff was prescribed Dilaudid, described by Dr. Mazzarella as a strong narcotic medication, to manage his pain symptoms. By the end of March 2008, the plaintiff had graduated from using crutches to regular weight bearing and was advised to start intensive physiotherapy to work on the quadricep strengthening and improve the tracking of his patella.

**127**  Carole Bishop, a neuropsychologist, saw the plaintiff in 2008. She recommended that he continue to see his psychiatrist to monitor his anxiety and depressive-type symptoms, as well as pharmacological issues. She noted that the plaintiff's psychologist was in a better position to comment on psychological treatment issues.

**128**  By June 2008, the plaintiff reported slow progress with the rehabilitation of his right knee, and he made contact with the UBC sleep disorder clinic. By August, after having been recommended an anti-inflammatory with a stomach lining protectant, the plaintiff reported that he had no new changes regarding his headache symptomatology.

**129**  In August 2008 Dr. Anton, whom the plaintiff had seen in 2005, 2007 and in May 2008, reported on the plaintiff's condition. Dr. Anton made a diagnosis which I will refer to later, and suggested an inter-disciplinary pain program. Dr. Mazzarella received Dr. Anton's report in November 2008.

**130**  By the fall of 2008, the plaintiff had completed a six week part-time audio visual program in sound engineering, and was considering full time enrolment for a one year program. It was an introductory course in the basics of microphone design, studio design, and a basic recording program. After the plaintiff passed this introductory class, he enrolled in a full-time course in audio engineering and music production, a four-hours per day, Monday through Friday program. Although Mr. DeMarcus, the witness from Harbourside, expected the plaintiff to pass the course, the plaintiff had missed about half the days he was allowed to miss. I will return to the course when I discuss the loss of earning capacity claim in more specificity.

**131**  Dr. Mazzarella observed that the plaintiff continued to express difficulties in reading, working at his computer and doing paperwork due to poor concentration in conjunction with sleep and headache issues. The plaintiff in November 2008 reported that he stopped one drug, Cymbalta, because it made no difference to his pain or sleep patterns.

**132**  Dr. Mazzarella reported that in December 2008, Wendy Lintott, an occupational therapist retained by the defendant's insurer for the plaintiff, called him concerning the plaintiff's absences from the program at of the Orion Health Chronic Pain and Rehab Clinic, which were apparently as a result of the plaintiff's gastro-intestinal issues. In December 2008, the discharge summary from Orion Health indicated that the plaintiff was not able to attend, or had to leave early given symptoms of increased abdominal pain or expression of fatigue and anxiety. In February 2009, the plaintiff reported to Dr. Mazzarella that he had discontinued Cymbalta (a medication suggested by Dr. Dhawan a year earlier) and Propranolol but without change to his headache patterns, and wanted to discontinue Nozanan. By 2009, he had difficulty sleeping, reporting only getting 4-5 hours of sleep per night. Dr. Mazzarella reported that the plaintiff was referred to Dr. Judith Allen, a sleep specialist at UBC Sleep Disorder clinic.

**133**  In March 2009, Dr. Mazzarella received the medical legal opinion from Dr. Riar, a psychiatrist, who had conducted an independent medical examination of the plaintiff. He noted that Dr. Riar recommended ongoing psychiatric intervention. In March 2009, Dr. Mazzarella discussed Dr. Riar's recommendation for a regular psychiatrist follow up, as well as a group cognitive behavioural therapist with the plaintiff. The plaintiff told him that he would consider the options, but in the meantime he would continue to see Elsie Cheung, his psychologist, as he had for the last two years. Dr. Mazzarella did not think the plaintiff would benefit from seeing a psychiatrist, as he had tried all the typical medications. As to group therapy, Dr. Mazzarella did not think it would be helpful, as he thought the plaintiff's anxiety increased in group settings, and that this had occurred previously at the pain clinic.

**134**  Dr. Mazzarella received an orthopaedic consultation report from Dr. McConkey, as well as a follow up report from Dr. Allen, the sleep specialist at the UBC Sleep Disorder clinic. Dr. Mazzarella noted that in 2009, the plaintiff was attending the sound engineering course for four hours per day, five days per week.

**135**  In his second report, dated July 1, 2009, Dr. Mazzarella indicated that the plaintiff did not want to pursue seeing a psychiatrist, given that he was not clinically depressed and had tried various antidepressants in the past for prolonged periods without benefit.

**136**  The plaintiff indicated to Dr. Mazzarella, as he noted in his second report, that although the surgery to his knee was complicated by post-operative infections, there was further surgery to repair the joint, and he was having ongoing and chronic right knee pain, the severity of the generalized pain seemed to have lessened.

**137**  The plaintiff had surgery on his shoulder in 2008. The left shoulder labral tear that had been repaired was showing great improvement in both the level of pain as well as improvement in shoulder functionality.

**138**  The plaintiff reported to Dr. Mazzarella during the sound engineering course that he continued to struggle with insomnia, but got more sleep than he did two years previously, and that despite his issues with sleep disturbances and chronic pain, he was doing fairly well at the sound engineering course, achieving a 70% average.

**139**  While not commenting on whether the plaintiff's "potentially pre-morbid personality traits" could have affected how he "manages a loss of control as outlined by Dr. Riar", Dr. Mazzarella said it was clear that the plaintiff had no previous psychiatric issues. In his opinion, the chronic pain conditions aggravated mood and anxiety, which in turn reinforced a perception of enhanced pain experience as well as creating some cognitive problems.

**140**  In 2008, the plaintiff complained that his hip had become more painful, sometimes while walking and sometimes while on the stationary bike. As to his right knee, the plaintiff said it was better with a brace that prevented sideways shifting, but that sitting with his leg at 90 degrees sometimes caused more pain, and that standing on the knee or walking caused pain. The plaintiff testified that he still attends massage therapy for his neck, right hip, both of his knees, and sometimes his lower back and arms. Apart from the knee pain, the plaintiff described himself as having almost daily headaches.

**141**  Dr. Mazzarella expected that the plaintiff would continue to experience physical pain from his various injuries. He could not comment with any certainty on whether the plaintiff would benefit from specific treatment and interaction with a psychiatrist or group cognitive behavioural therapy. He thought that the plaintiff had trials of various psychotropic anti-depressant medications to discover whether they improved his anxiety and depression issues. Dr. Mazzarella said in his experience, having dealt with many patients involved in motor vehicle accidents, that the closure of the legal matter allows a shift of a person's energy from a "pain centered to a functional center [sic] program".

**Chronic Pain, Anxiety, Headaches and Sleep Problems**

**142**  A difficult aspect of the case is the ongoing pain, anxiety, headaches and sleeping problems of which the plaintiff complains. Counsel for the plaintiff says that these reported problems will persist, and together with the plaintiff's physical injuries, render him competitively unemployable. Counsel for the defendant, on the other hand, suggest that the medical evidence indicates that the plaintiff will improve in the next five to ten years, that his anxiety will decrease, and that his sleep problems have already improved significantly.

1. ***Chronic pain and anxiety***

**143**  Although a number of witnesses were called on the issue of the ongoing pain of which the plaintiff complains, and the anxiety he says he incurs, the witnesses that I found to be of the most assistance in my consideration of this issue were Dr. Anton, called by the plaintiff, and Dr, Riar, a psychiatrist called by the defendant.

**144**  Dr. Anton, a physical medicine and rehabilitation expert, saw the plaintiff on three occasions. He reviewed the physical evidence and the subjective complaints of the plaintiff. He recommended that the plaintiff be referred to a new psychiatrist, or back to Dr. Raj Raina, a psychiatrist he had earlier seen, because he sensed the plaintiff was suffering from a psychological condition, such as an anxiety disorder.

**145**  Dr. Anton was of the opinion that the plaintiff probably satisfied the DSM IV TR criteria for the diagnosis of chronic pain disorder associated with both psychological factors and a general medical condition. Criteria for that, he said, included the presence of pain for more than six months, severe enough to warrant clinical attention, and cause significant distress or impairment of function. Psychological factors, he said, play a significant role in the onset and maintenance of the pain. He believed that the psychological issues involved in the case were a component, although that component was treatable, he said that the question is how effective will be the treatment be. However, he thought a psychiatrist could better comment on that. Dr. Anton agreed that the treatment by a psychiatrist can be of significant assistance in alleviating anxiety symptoms. Dr. Anton also agreed that the failure to seek psychiatric attention, if indicated, could or will result in less than optimal result of rehabilitation.

**146**  Dr. Anton thought that the chronic headache was a disorder that was contributing to chronic pain. He described the plaintiff's headaches as post traumatic implying that they were caused by trauma to the neck or head in the accident. Dr. Anton noted that over the three times he saw the plaintiff he had improved. Dr. Anton agreed that the goal of a chronic pain program was to allow the patient to develop strategies and tools to function better with the pain.

**147**  In his second report Dr. Anton said:

Mr. Stevanovic has multiple physical impairments arising from the direct and indirect effects of injuries suffered in the accident. Those include activity related pain in the right knee, loss of full extension of the right knee, pain in the left shoulder, decreased endurance due to deconditioning, and fatigue arising from disordered sleep. He probably also has psychological impairments, though I would defer to his treating psychologists and psychiatrists regarding specific psychiatric diagnoses.

It is in my opinion probable Mr. Stevanovic's pain, fatigue, and psychological condition also affect his attention and concentration and contribute to cognitive impairment.

Mr. Stevanovic's impairments cause restricted participation and disability for a wide range household tasks and recreational activities that were normal for him before the accident.

Mr. Stevanovic's impairments also cause disability for work. He is at this time not able to return to his former work. In fact, his fatigue, pain and associated cognitive impairments probably make him unemployable at present.

Mr. Stevanovic's prognosis for return to any sort of employment is still uncertain but should be considered guarded. Even in the best case, he will not become pain free and his pain will limit his work options. He will not be able to return to his former work or any similar work of a physical nature. He would have to improve considerably to work competitively in sedentary work.

**148**  The plaintiff did not lead a report of a psychiatrist, although he introduced a report of a psychologist, Elsie Cheung, who has provided considerable counselling to the plaintiff over a lengthy period. The plaintiff saw a psychiatrist, Dr. Raina, for a period of time, but no report from that doctor was introduced in evidence.

**149**  Dr. Riar, a psychiatrist with an interest in forensic psychiatry, was called by the defendant. He works with patients with chronic pain, seeing three or four such patients per week. He provides expert opinions approximately equally to both defence and plaintiff's counsel and was qualified to give opinion evidence in the area of psychiatry.

**150**  He saw the plaintiff for two hours in July 2008. Dr. Riar thought that the plaintiff had recovered completely from the effect of his mild traumatic brain injury within a few months, and his complaints of cognitive difficulties, behaviour, and emotional problems were not the product of organic brain injury. Upon a consideration of all the evidence in this case, I accept his opinion that to the extent that the plaintiff suffered a mild brain injury from hitting his head in the accident, those problems shortly resolved.

**151**  Dr. Riar said that he believed the plaintiff's chronic pain disorder was perpetuated and maintained significantly by psychological factors, as well as his underlying medical condition. He thought that the plaintiff should attend a group, rather than individual, treatment for anxiety disorder. He thought that the plaintiff remained vulnerable for anxiety in the future because he has a constitutional vulnerability for it. He felt that his chronic pain will lessen once there is improvement in his anxiety and stress. (Dr. Bishop, a neuropsychologist, commented that the plaintiff was not as forthcoming about his pre-motor vehicle anxiety as he was about his post motor vehicle anxiety. Dr. Riar commented about the cause of his post-accident anxiety).

**152**  Dr. Riar wrote as follows:

On the issue of causation of his physical injuries, I believe that the accident in question was responsible for his initial injuries and I will leave it to the other experts to comment on his ongoing physical issues. Having said that, I believe that Mr. Stevanovic's chronic pain disorder is perpetuated and maintained significantly by psychological factors, as well as underlying medical condition.

On the issue of causation of his anxiety disorders, there is mention of him having some anxiety/vulnerability for anxiety, in Dr. Bishop's report, but besides that, I am not aware of any serious psychiatric problems prior to the accident, which makes me conclude that the accident and its sequella is most likely responsible for bringing on his anxiety symptoms. As far as symptoms of ongoing cognitive and behavior disturbances are concerned, I believe that his anxiety, sleep disturbances, pains and other stressors like not working are mainly responsible rather than any effect of the mild brain injury he most likely sustained as a result of the incident in question.

On the issue of treatment, again, I will leave it to the other experts to comment on the need for any physical intervention. As far as psychiatric intervention is concerned, I believe that it is paramount, and so far, interventions with one on one psychotherapy, and use of various psychotropic medications have not made a significant improvement. I believe that it will be beneficial for him to attend a group treatment program for anxiety, where a cognitive behaviour approach should be implemented to tackle his various anxiety related symptoms and attitudes. At the same time, he should be seeing a psychiatrist, and his medication should be reviewed and proper compliance should be achieved. Other beneficial intervention will be concluding this litigation, as this will enhance his recovery by taking the stress and any tendency to take a sick role for secondary gain away.

As far as psychiatric disability is concerned, I believe that at the time of my interview, Mr. Stevanovic was at least partially disabled due to his chronic pains, as well as protracted anxiety. As far as his short-term prognosis, I felt that it was guarded and he would continue to have these symptoms for the next 6 to 8 months, but with intervention, the functioning can be improved. As far as long-term prognosis for his anxiety, I feel that it is favorable but he is vulnerable for future episodes of anxiety and this has to do with his constitutional vulnerability, rather than any effect of the accident. As far as chronic pains are concerned, there will be improvement in his symptoms, and his ability to deal with his chronic pain after the resolution of his anxiety symptoms, and it does not seem that they will completely leave him for another year or two.

**153**  Dr. Riar was aware that the plaintiff was being treated regularly by a registered psychologist, Elsie Cheung. Dr. Riar recognized that he had received extensive cognitive behavioural therapy from Dr. Cheung but said that is why he thought that he should try different strategies.

**154**  Dr. Riar had diagnosed a mild traumatic brain injury (that had resolved), an anxiety disorder (a generalized anxiety disorder) and a chronic pain disorder. Dr. Riar was asked on cross-examination whether the plaintiff's general anxiety disorder was caused by the motor vehicle accident. He agreed it was his view that the stressors and pain the plaintiff experienced as a result of the accident led to his anxiety. Dr. Riar added there was no psychological medical condition or psychiatric medical condition impacting on the plaintiff's ability to function at the time of the motor vehicle accident. When asked whether losing the ability to engage in his favourite sports would also add to the plaintiff's anxiety symptoms, Dr. Riar agreed, saying that the accident and the pain caused stress on the plaintiff which led to him having the anxiety disorder. In terms of the plaintiff's anxiety disorder, Dr. Riar added that it is now "independent ... of his pains; it was started with them, but it's independent". Dr. Riar agreed that if the plaintiff's knee pain was increasing over time, that would impact on his ability to sleep. He agreed that if the plaintiff's knee pain increased over time, that there may be a possibility that he is at risk for further psychiatric disorders or mood disorders.

**155**  Dr. Riar was asked "Would you agree that Mr. Stevanovic would have to have substantial improvement in his condition before he could be employable?". Dr. Riar responded in the affirmative, particularly with respect to the plaintiff's anxiety.

***(ii) Headaches***

**156**  The plaintiff called Dr. Robinson, an expert in the field of neurology with a particular speciality in managing and treating headache pain. Dr. Robinson, who saw the plaintiff on one occasion, did not think his headaches were caused by a head injury. He came to the conclusion that his recurring headaches were chronic (i.e. the condition had gone on longer than three months) and were related primarily to a neck injury.

**157**  Dr. Robinson observed that the plaintiff had explored almost all of the potential treatments for chronic headaches related to neck injury, but they had been unsuccessful. He said that headaches are a subjective experience. Based on his belief that the plaintiff had head and neck injuries as a result of the accident, the temporal nature of the headaches, and the absence of pre-accident headaches, he concluded that they were chronic and related primarily to a neck injury. He indicated on cross-examination that substantial anxiety disorders and an associated lack of sleep are two factors that, if treated, are potential treatment options to mitigate headaches.

**158**  Dr. Tessler, a neurologist whose report was filed by the defendant, said that the plaintiff's concussive injury was likely a transient physiological disturbance of the brain. He said that his ongoing headaches may be related to cervical soft tissue injury or the head injury. He said that the plaintiff had not responded well to medication, but would improve with the passage of time. However, he observed that the plaintiff will likely have ongoing headaches.

***(iii) Sleep problems***

**159**  The plaintiff complains of ongoing sleep problems and the resulting fatigue he has suffered. The plaintiff reported this problem to Dr. Mazzarella, it appears, as early as July 2005. The plaintiff indicated that his headaches occasionally interfere with his sleep.

**160**  The plaintiff says he gets four to five hours of sleep per night, and has gone to the sleep clinic at UBC, where he has seen Dr. Allan for treatment. He takes melatonin and keeps a sleep diary to assist in his sleep.

**161**  The parties each called witnesses who are sleep experts. The plaintiff called Dr. Avinder Minhas, and the defendant called Dr. Judy Allen. The study of sleep disorders appears to be a relatively new area of study.

**162**  The experts disagreed on the cause of the plaintiff's apparent sleep problem.

**163**  Dr. Minhas, called by the plaintiff, was tendered as an expert in the field of psychiatry, internal medicine, and sleep disorder medicine. He described sleep disorder medicine as a field which deals with disorders related to sleep: difficulties falling asleep, staying asleep, or insufficient sleep, among other things. He runs the sleep laboratory in Richmond. The plaintiff was referred to Dr. Minhas in 2008 by Dr. Dhawan, a physiatrist who was treating the plaintiff. Dr. Minhas prepared reports dated May 3, 2006 and July 12, 2009.

**164**  Dr. Minhas opined that the plaintiff has chronic refractory insomnia, which he thought was a direct consequence of the motor vehicle accident. He said the plaintiff has chronic pain related to this accident, and also has chronic anxiety with ruminations at night. Dr. Minhas said that the plaintiff most probably had a traumatic brain injury during this accident. The pain, anxiety and trauma to his brain were the most probable reasons why the plaintiff cannot sleep adequately at night. In Dr. Minhas' view, it would be difficult to assign weight to these individual factors in the causation of the plaintiff's sleep problems. Any and all of these three factors can produce psycho-physiological insomnia, which Dr. Minhas said is an acquired behaviour and can assume a life of its own.

**165**  Although Dr. Minhas thought that the pain, anxiety and trauma to the brain were the most probable reasons as to why the plaintiff could not sleep adequately at night, he said that if the traumatic brain injury was not a factor, any of the conditions described (anxiety, pain) could cause the condition that the plaintiff has. Dr. Minhas thought that chronic pain was notoriously difficult to treat, but some people, he said, do very well.

**166**  When Dr. Minhas saw the plaintiff again in 2009, it was not for treatment purposes, but only for an independent consultation for litigation purposes.

**167**  Dr. Minhas was asked on cross-examination about the Epworth scale, which is a subjective measure of a person' sleepiness during the daytime. During those tests, the plaintiff's results indicated that he was not sleepy during the day. Dr. Minhas was asked to reconcile that there were two Epworth scale tests showing a lack of sleepiness with the conclusion the plaintiff has a chronic sleep problem. Dr. Minhas replied that the test cannot be used in isolation to determine if the plaintiff was getting enough sleep.

**168**  The plaintiff was referred to Dr. Judith Allen by Dr. Mazzarella. Dr. Allen is a psychiatrist with her main area of practice in the area of mood disorders and anxiety. She was qualified to testify as an expert to give opinion evidence in the area of psychiatry and as a doctor with a special interest and experience in sleep disorders. Dr. Allen prepared reports dated January 28 and May 20, 2009.

**169**  She reported that during the day the plaintiff reported feeling fatigued, anxious, and that his concentration is poor. He attributes his fatigue and poor concentration to poor sleep at night, despite the fact he has an ongoing pain issue. She said that most patients with chronic pain will complain of feeling fatigued, anxious and having poor concentration. She felt that chronic pain was therefore an equally valid explanation for his daytime symptoms, as opposed to insomnia or secondary to disrupted sleep at night.

**170**  Dr. Allen stated her belief that the plaintiff has sleep state misperception, given the plaintiff's perception that he is only sleeping four hours per night, but yet has absolutely no excessive daytime sleepiness.

**171**  Dr. Allen described sleep state misperception as a condition where a patient believes they do not sleep as much as they do, in fact, sleep. She said that the plaintiff reported only sleeping four hours per night. However, people sleeping less than six hours per night on the average tend to fall asleep during the day, and the plaintiff did not have that complaint. Dr. Allen booked an actograph, a contraption that looks like a wristwatch, which can give a good estimate of the length of sleep, time in bed, and time of sleep throughout the day, as well as naps. Dr. Allen testified that this is an "at home" study, so it was more reflective of a person's normal sleep pattern. She said that in the plaintiff's case, the subjective findings and the objective findings did not match, because the plaintiff claimed to be awake for a longer period of time than the actograph indicated. On cross-examination, she said that anxiety can develop as a result of insomnia, and also, anxiety can cause insomnia.

**172**  Dr. Allen agreed that sleep state misperception is not synonymous with malingering, and is a condition that itself can cause anxiety symptoms.

**173**  In her May discharge summary, Dr. Allen wrote

At follow up he reverted to spending 7-8 hours in bed and again was having longer periods of time to fall asleep. While pursuing the sleep restriction he was falling asleep within 10-15 minutes. He also disputed the findings of the sleep study. He had five extremely brief awakenings during the night, all of which he claimed were much longer because he was aware of being awake for a long period of time. This is impossible. At follow up he continued to complain of anxiety, not being able to get interested in things, variable appetite and poor energy and concentration.

**174**  Dr. Allen said the plaintiff's complaints do not sound like phase shifted sleeping pattern, although she could not rule that out entirely, as his sleep diary was out of date, and she described him as a relatively poor historian about his sleep. Phase sleep disorders relate to the timing of sleep rather than actual sleep itself.

**175**  She agreed that, in general, chronic pain can be a potential underlying cause of insomnia. As the treating physician, she had not been shown any psychiatric opinions. She would not dispute that if the plaintiff was diagnosed by a psychiatrist as having a pain disorder or a generalized anxiety disorder and an adjustment disorder, that he would have a significant sleeping difficulty if those were true diagnoses.

**176**  Dr. Minhas in reply to Dr. Allen's belief that the plaintiff may have sleep state misperception, encouraged caution, saying that such a patient may have fragmented sleep, which requires a very specialized EEG testing to discover.

**177**  Dr. Minhas testified that because there was a question of the actograph malfunctioning with respect to possible sleep state misperception, he would have had the plaintiff maintain a sleep diary for two weeks, discarded the diagnosis of delayed sleep phase syndrome, and begin to consider other causes. He said he got the impression Dr. Allen did not consider the plaintiff's pain issue. Dr. Minhas was asked why he did not run tests, if he thought that Dr. Allen's testing might be flawed. He said that, as he understood it, there was no time for more testing of the plaintiff, and since the plaintiff was being treated by Dr. Allen and not by him, he left it to Dr. Allen and UBC Hospital.

**178**  Dr. Allen testified that she does not know why the plaintiff has developed phase delayed sleep syndrome, if that is his condition. She has not necessarily seen that condition develop in other patients with head injuries.

**179**  The expert evidence concerning the plaintiff's apparent sleep difficulties is inconclusive as to whether the plaintiff is actually lacking sleep, is simply misperceiving that he is lacking sleep, or is suffering fatigue from chronic pain.

**Mr. Stevanovic's physical capabilities**

**180**  I have set out above the evidence of Dr. McConkey, Dr. Guy, and the plaintiff on his physical limitations by reason of his physical injuries.

**181**  As to the plaintiff's functional capacity, plaintiff's counsel called Louise Craig, a physiotherapist and clinician who worked with Dr. Hartzell. She worked under Dr. Hartzell's direction and did an assessment of the plaintiff on June 1, 2009 using the program called the Matheson Functional Evaluator. Ms. Craig was tendered to administer functional capacity evaluations. The Matheson Functional Pain Scale that she used is a subjective report.

**182**  Ms. Craig made a summary of the plaintiff's physical abilities, including his sitting, standing, walking, lower limb coordination including stair climbing, grip strength and dexterity, reaching, and so forth. She did not give an opinion on whether the plaintiff could do these things on a sustained basis. She agreed that the plaintiff's perception is that he is in the lowest 5% of healthy people who are employed. Some of the tests that were performed by the plaintiff included demonstrating an ability to ascend or descend two flights of stairs without handrail support, which the plaintiff successfully did.

**183**  Ms. Craig agreed on cross-examination that based on his own perception, it appears the plaintiff was able to vacuum for a period of time, sweep for a period of time, and go down stairs without external assistance. The plaintiff perceived that he could do some painting at eye level for a period of time and could go grocery shopping. Her observations noted that, in the testing, he was able to demonstrate the ability to perform sustained arm reach at waist and sitting for two hours and fifteen minutes.

**184**  The plaintiff called Dr. Walter Hartzell, who has practiced occupational medicine since 1973. He was tendered as an expert in the field of occupational medicine, in particular to give opinion evidence about the plaintiff's fitness to work and capacity to work. I ruled that Dr. Hartzell was qualified to give evidence in the area of occupational medicine, but was not qualified to give opinions that express a psychological or psychiatric opinion. As a result, certain paragraphs of his report were struck out.

**185**  During the course of Dr. Hartzell's evidence, Mr. Deering acknowledged that there is no dispute that the plaintiff has a functional disability, and there is no dispute he cannot carry on his employment with RISO that he had before the accident. Nevertheless, the extent of any continuing physical disability was in issue for the loss of earning capacity question. The plaintiff was about five or six weeks into his new retraining program at Harbourside when he was assessed in June 2009 by Dr. Hartzell.

**186**  Dr. Hartzell opined that the plaintiff:

"has a permanent functional impairment of his right lower limb and requires a brace for sustained mobility. It is my opinion that this would restrict him to sedentary occupations and would prevent him from working in hazardous environments which would require difficult footing or work on ladders, gangways, or scaffolding".

**187**  In terms of whether the plaintiff was suited to the occupation of a sound engineer, Dr. Hartzell said at some point "he should be physically capable of working in sedentary occupations to which he is vocationally suited", but Dr. Hartzell would defer to a vocational consultant regarding the plaintiff's mental, psychological cognitive capacity and his aptitudes for a career in this field. He opined that the plaintiff had a permanent functional impairment of his right lower limb which will significantly limit his employability from a physical point of view. Dr. Hartzell was of the view that the plaintiff at the time was deconditioned and should engage in a physical rehabilitation program with supervision.

**188**  Aram J. Heilbrunn, a physiotherapist, was called by the plaintiff but not as an expert witness. He had treated the plaintiff for knee-related sports injuries to both knees prior to the accident, and acted as his physiotherapist following the accident. Mr. Heilbrunn was called only as to his observations in his sessions with the plaintiff. The movements that he observed that caused the plaintiff pain, as reported to Mr. Heilbrunn, were with his right knee when he crouches, kneels, or stands for a prolonged period, when he walks for a prolonged period, and he also commented on an inability to run or lift heavy objects. On every occasion the plaintiff came to see Mr. Heilbrunn, he reported knee pain. The plaintiff on a number of occasions complained of lower back pain and right hip pain. He complained of left shoulder pain over a prolonged period of time until he had shoulder surgery for his left shoulder. Mr. Heilbrunn testified of the plaintiff's regular complaints of headaches and neck pain, but more specifically headaches. In terms of the last three months before trial, he said that the plaintiff complained of clicking, popping and shifting in his right knee, pain in his right hip, inability to spend long periods of time on his feet due to right knee pain, and an inability to participate in sports.

**The sound engineering program**

**189**  This evidence is important as it shows the effort of the plaintiff to be retrained in an area where he might find employment. The plaintiff recognized his physical limitations in doing "live sound", which involves carrying equipment, but thought there were options for studio or home studio work.

**190**  The plaintiff called Chris Demarcus, an audio engineer and a program director at Harbourside Institute of Technology, where the plaintiff has taken courses. He teaches computer, computer science classes, and music business classes.

**191**  Harbourside is a private career training institute, a trade school with an "element of an art school involved". They train people to set up microphones and be audio engineers from large concerts to small studios and clubs.

**192**  When the plaintiff met Mr. Demarcus, he wanted to do live sound, which involves heavy lifting, or studio recording, and that is what 50% of the students do. The plaintiff also expressed to Mr. Demarcus his interest in studio work in music studios but only 1% of students graduating from the sound engineer program are able to obtain such work.

**193**  Based on the plaintiff's performance in the part-time course, Mr. Demarcus thought that he was a good candidate for the full time course, as he was "very technical". In the full-time course, the students attend school four hours per day for five days, and there are 8-16 hours of open time each week when students can work on projects. The plaintiff began attending there in April 2009 in the full-time program.

**194**  Mr. Demarcus said that the plaintiff had a 71-72% grade in the program to date, which put him in the lower middle of the class. He said that the plaintiff did not hand in half of his assignments on time, or at all. He described the plaintiff as "completely technical, definitely not a salesman", and that he was not driven, not a self promoter and not outgoing.

**195**  In terms of operating the sound board or console at a live performance, Mr. Demarcus said that was something that a person works his way up to. Interns doing live sound work engage in heavy physical work, such as often carrying rolled up lengths of cables and large trunks of equipment.

**196**  Apart from live sound, other jobs for students are starting their own production companies. The hardest part of this, Mr. Demarcus said, was going out and raising the financial capital. Music producers, Mr. Demarcus testified, are "never at home" as they are always in the studio or at an event.

**197**  He described those who go into business on their own this way:

Incredibly outgoing, ambitious, and also just incredibly driven. It's something that you have to be very driven into. Also they're both technically skilled which -- and artistically skilled but socially skilled.

**198**  Mr. Demarcus testified that a potential employer would like the plaintiff's technical ability, but his inability to perform heavy lifting and stay focused for twelve hours could be problematic, in his view. Mr. Demarcus said he might not even hire the plaintiff as an intern. He described his skill level as good but not extremely high. However, he found the plaintiff to be a very hard worker and a good problem solver.

**Psychological Counselling**

**199**  I described earlier the referral of the plaintiff to Elsie Cheung, a psychologist who works with many chronic pain patients. She has not testified before and after working at the Worker's Compensation Board has been in private practice as a psychologist since 2003.

**200**  The plaintiff was referred to Ms. Cheung by a doctor at GF Strong. She has conducted approximately 90 one-hour sessions with the plaintiff. Her first session with the plaintiff was in November of 2005. Following her assessment of the plaintiff, Ms. Cheung has provided ongoing psychological counselling and treatment by way of education about chronic pain, pain management strategies, anxiety management techniques, sleep hygiene techniques, memory aids, encouragement of hobbies and future vocational options. In her report of March 26, 2008 she said:

In summarizing therapy progress to date, Mr. Stevanovic has made progress with a.) overall ability to manage his anxiety; b.) increased ability to complete tasks with less procrastination; c.) return to driving (although he continues to feel wary for pedestrians while driving); d.) acceptance of the possible permanence of his knee problem; d.) development of new hobbies mainly of flamenco guitar and associated culture; and e.) plans for retraining such as the sound engineer course. Mr. Stevanovic continues to have headaches, and sleep and pain management difficulties. He continues to feels his cognitive abilities have not returned to pre-injury levels. He also has health concerns of an upset appetite and corresponding weight loss.

In a further report dated July 8, 2009, she said

I am in agreement that Mr. Stevanovic has been left with a vulnerability to future episodes of anxiety. However, any constitutional vulnerability for anxiety historically was dealt with by coping techniques of keeping busy with sports, an avenue that is no longer available to him. In my opinion, Mr. Stevanovic's increased vulnerability is resulting from any constitutional condition towards anxiety that has been further exacerbated by ongoing difficulties with pain, sleep, and anxiety, factors seen as referable to the accident. Mr. Stevanovic now has to face a future compromised by pain, sleep, cognitive and anxiety difficulties.

**201**  She understood that psychotropic medication was prescribed by his family doctor, Dr. Mazzarella, by Dr. Dhawan, and early on by a psychiatrist, Dr. Raina. She indicated he had not been under a psychiatrist's care from 2007 on. She recalled him telling her that the narcotic medications upset his stomach. On re-examination she was asked:

1. Okay. Did you in your sessions encourage him to attend a psychiatrist independent of the treatment that you were providing?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, because throughout the sessions he mentioned a variety of drugs he was taking and how much problem that he was having with the medication. It doesn't seem like medication was going to be a fruitful avenue. |  |

**Expert vocational evidence**

**202**  Each party called a vocational expert to testify as to the employability of the plaintiff.

**203**  The plaintiff called John Lawless and the defendant called Joseph Hohman.

**204**  Mr. Lawless, a psychologist, administered certain tests to the plaintiff aimed to measure an employee's skills and interests. Most of his opinions are provided for plaintiffs. He thought that the testing indicated that the plaintiff was suited for skilled or technical employment, and was most satisfied doing work described by what is referred to as the artistic occupational (or interest) theme. The other possible themes from the testing are realistic, investigative, social, enterprising, and conventional. He opined that the plaintiff was restricted from the work that he did at RISO, which requires strength and awkward body positions. Although intellectually capable of more skilled occupations, such as network operator, audio recording technician, mechanical engineering technologist and computer programmer, Mr. Lawless felt that with the pain and fatigue he has, the plaintiff could not manage these jobs, as he had a maximum comfortable sitting tolerance of two hours.

**205**  He indicated that if the plaintiff's problems restrict him from physically demanding occupations and from more skilled and technical ones, there were few occupations he could consider. Mr. Lawless expressed the opinion that entry level service occupations were not as strenuous, but he questioned whether the plaintiff could handle full shifts given headache, fatigue and other issues.

**206**  In Mr. Lawless' opinion, the plaintiff was competitively unemployable. He said:

It's not to say they're absolutely unemployable and cannot work. It is that some very forgiving and benevolent employer might give them a very accommodated work to do and that they could do under very easy conditions, like, flexible and reduced hours, and comfortable chairs, and letting them take a lot of time off.

**207**  Although Mr. Lawless thought that the plaintiff had the intellectual capacity for passing university undergraduate classes to train to be a computer programmer, he said that such professionals often put in more than forty hours per week, and employers want to know prior to hiring a candidate if they have difficulties sitting. He agreed that the plaintiff has transferrable skills in computer and computer-related areas. The plaintiff had originally wanted to be an engineer but apparently did not have the interest, although Mr. Lawless thought that he had the capability.

**208**  The defendant called Joseph Hohmann, who was qualified as an expert vocational consultant in the area of vocational assessment, with a focus on rehabilitation. He provides reports for both sides in litigation, relatively balanced for plaintiffs and defendants, he said.

**209**  Mr. Hohmann did not see the plaintiff but read the medical reports. He understood the plaintiff's limitations to be his right knee, with additional concerns regarding pain, anxiety and sleep disruption.

**210**  He said that Mr. Lawless focused on one occupational theme (artistic), whereas he considered others, including a number that he called investigative and realistic. He said that Mr. Lawless did a limited amount of study but it showed an interest in the investigative theme at second and third level jobs. He testified that:

Dr. McConkey has said that sitting, prolonged sitting with the knee flexed greater than 90 degrees would be difficult, and I was simply saying that many jobs may be sedentary classification but wouldn't require the individual to sit with the knee flexed to that extent for prolonged periods. They're sufficiently flexible to accommodate stretching the knee out or getting up and moving around when you need to or standing for short periods, and I think that's important to look at jobs in that regard rather than being chained to a desk for eight hours because that would be very rare.

He said in his report that Mr. Lawless had ruled out sedentary jobs such as network operator, audio recording technician, mechanical engineer technologist and computer programmer without exploring the flexibility of these jobs to allow a person to move around or adjust sitting posture to accommodate the plaintiff's right knee limitations.

**211**  Mr. Hohmann opined that the plaintiff receiving successful treatment of anxiety and other conditions, with positive gain in the cognitive level of function, would have a corresponding positive impact on his vocational options. He testified that Mr. Lawless had given only limited consideration to the plaintiff's transferrable skills in computer software and hardware, keyboarding, and network design; the fact that he had completed two years university on a science engineering transfer program; and that he held a certification as a Microsoft System engineer.

**212**  Mr. Hohmann also said that Mr. Lawless' opinion that the plaintiff is competitively unemployable fails to make allowance for vocational rehabilitation intervention. He felt that, although he had not interviewed, or done a full vocational assessment, on the plaintiff, he was motivated, had maintained what he called "vocational momentum" and had significant transferrable skills in areas of less physically demanding occupations. Vocational momentum is a term Mr. Hohmann coined to refer to a person going to work, or school, each day and maintaining that momentum, something he said injured people sometimes lose. He also pointed to the plaintiff's ability to complete a substantial training program. Four hours per day with study outside the class, albeit with some difficulty, indicates vocational motivation, he said. He observed that while the plaintiff pursues the audio engineering program at Harbourside, many of the hourly paid jobs in this area are quite physically demanding, and that the plaintiff might wish to consider setting up his own recording studio. He mentioned another possibility being the business management side of the music industry which would be on the sedentary, light level of activity, side of work. He suggested computer programming, while requiring upgrading for the plaintiff, as an area with flexibility in terms of being able to stand and move as required. Website design is an area where his computer skills were assets. Mr. Hohmann mentioned hands-on work, like instrument repair, electrician technician benchwork, or drafting, as the plaintiff is familiar with autoCad software.

**213**  Mr. Hohmann said that "it is my opinion that Mr. Stevanovic has significant limitations affecting his vocational prospects, but that he has some potential for employment. Based on information regarding his limitations, this employment is likely to be on a part time basis at the present time." He indicated whether the plaintiff will be able to advance beyond this depends on his treatment outcome. Mr. Hohmann agreed that the plaintiff not completing half of his assignments at Harbourside was a "red flag".

**214**  In reply, Mr. Lawless testified about how realistic he thought some options proposed by Mr. Hohmann were. He testified that owning your own recording studio was like owning your own business; there are many problems with starting up in the notoriously difficult music industry and thus this suggestion he thought was not realistic. He said that being an entrepreneur in the music business is unrealistic for the plaintiff as he has never worked in the industry, and has had no experience outside the classroom. With the plaintiff's mood difficulties and anxiety issues, Mr. Lawless suggested that life for the plaintiff as an entrepreneur was unrealistic. In terms of computer programming he said that the employees are hired right out of university and the candidates must not have limitations for sitting as the plaintiff does. Mr. Lawless described work as a computer programmer as very demanding. Insofar as website design, Mr. Lawless said that although it was a little lighter than network technician work, it still involved being "parked" in a chair for 40-60 hours a week. Drafting is an area that requires a two year college diploma to start. He said on cross-examination that the music industry is shrinking and in terms of seeking an office job he said that a nine month program at Harbourside but no experience in music or business generally will not lead to a job.

**Credibility of the plaintiff**

**215**  In terms of the loss of earning capacity, the question of the plaintiff's credibility is important because the plaintiff's impaired earning capacity arose not only from the physical injuries but by reason of his ongoing complaints of chronic pain, anxiety, sleep difficulties and headaches that are based on his own subjective reporting.

**216**  Mr. Deering made a number of submissions concerning the plaintiff's credibility. They largely relate to prior statements concerning the accident and reports of his prior health issues to doctors.

**217**  The defendant's counsel argued that the plaintiff's evidence that he did not move before he was hit by the defendant's car was contradicted by a statement that the plaintiff gave to ICBC that he took a "small step or two" to his right to get out of the way. Furthermore, his evidence at trial was arguably different than his statement to ICBC, which did not contain a reference to the defendant flashing his lights as he approached to indicate he saw the plaintiff. I agree that these were differences, and, although it did not affect my assessment of liability, I have nevertheless taken them into consideration in the weight I give to the plaintiff's evidence in determining the question of damages.

**218**  The defendant's counsel submits that the plaintiff failed to disclose his prior IBS condition to Dr. Hartzell, and also argues that the plaintiff's evidence of his previous medical history to Dr. Carole Bishop is inconsistent with his sister's report to Dr. Bishop. I do not consider this to be a significant point. The plaintiff, I find, has given his history of IBS problems to numerous doctors who have seen him in this case and to the extent that he did not mention it to Dr. Hartzell, I do not consider it significant. Moreover, I do not see the plaintiff's challenge of his sister's report to Dr. Bishop that he was "highly reactive to stress, typically responding with stomach problems to various stressors" as giving rise to a significant discrepancy at all.

**219**  Mr. Deering argued that the plaintiff denied having an alteration in his sense of smell or taste to Dr. Tessler, but he told Ms. Landy that he had an alteration in his sense of smell and taste. The plaintiff's counsel argues that the plaintiff denied having a current loss of smell when he was interviewed by Ms. Landy. Mr. Deering points out that his report to Ms. Landy of whether medication helped was contradictory to what he told Dr. Hartzell.

**220**  The defendant's counsel says that the plaintiff testified that he was unable to complete sessions with a pain clinic, but yet was able to board an airplane to Serbia in January 2009. The plaintiff says that the suggestion that he was not ill during his attendance at the pain clinic is unwarranted, and the evidence was that he was sick and purchased the ticket to Serbia only days before his departure.

**221**  The final point made by the defendant's counsel was that the plaintiff gave contradictory evidence at trial and in what he said to Dr. Cheung and Dr. Bishop over whether he was looking for work outside RISO at the time of the accident.

**222**  Taking into consideration the whole of the evidence and the matters pointed out by the defendant's counsel, I recognize that there were some inconsistencies between the plaintiff's evidence at trial and what he may have said to doctors and expert witnesses on occasion. As well, the plaintiff appeared not to always have a good memory of what he had been told by doctors. However, on the whole of the evidence, I do not find the discrepancies were significant enough to affect my overall assessment of the plaintiff's evidence, which I generally found to be credible.

**Financial Evidence**

**223**  As I noted earlier, the determination of damages under this head is an assessment, not a calculation.

**224**  In *Pallos v. Insurance Corporation of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) at 271 (C.A.), Finch J.A., as he then was, described various approaches to a loss of capacity claim. He noted various approaches in the cases that had attempted to put a dollar value on the loss of capacity to earn income and said

... 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 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. [emphasis added]

**225**  As stated above, this issue is not a calculation of the income that the plaintiff might lose in the future. Nevertheless, the parties referred to certain present value calculations as a starting point, or as illustrations of the magnitude of the possible claim under certain circumstances.

**226**  The plaintiff introduced evidence of an accountant, Campbell Stafford, at trial. His evidence was based on the assumption that the plaintiff's income would have been $40,000-$45,000 in 2005. Mr. Gibson in his final argument only made passing reference to Mr. Stafford's evidence, other than to mention in reply that Mr. Stafford's calculation, in his view, underestimated the loss that the plaintiff will suffer, and Mr. Gibson suggested that Mr. Stafford's calculations should be used cautiously.

**227**  Mr. Stafford's evidence was not particularly illuminating. Based on the assumption that the plaintiff was competitively unemployable after the accident, would not be working any more to the age of 65, and would have had an income of $40,000-$45,000 in 2009 and a 0.5% or 1% annual real compensation growth thereafter that his future loss had a present value, according to Mr. Stafford, in the range of $838,000-$1,011,000.

**228**  Mr. Gibson in his submissions at the end of the trial did not rely on Mr. Stafford's calculations. He made submissions that were simply based on a number of present value calculations based on different scenarios calculated on the basis of lost income per year for 35 years from age 30-65.

**229**  Using an annual salary of $62,000 with a multiplier of 23.1452 (multiplier for 35 years at a 2.5% discount rate, the rate approved under the *Law and Equity Act*, *R.S.B.C. 1996, c. 253*), the loss of capacity claim, assuming no residual earning capacity, according to Mr. Gibson would be $1,382,098. Mr. Gibson argued that, assuming the plaintiff was able to earn $10,000 per year working part-time with minimal contract work, which he argued is the defendant's best case scenario, this would still leave a present value loss of $1,159,179.

**230**  Furthermore, Mr. Gibson argued that the Court should consider positive contingencies, such as the fact that the plaintiff may have earned much more than his employment income at RISO at the time of the accident. He referred to the evidence of Rade Cvetkovic as an example. Mr. Gibson argued that Mr. Cvetkovic was offered a position on the newly developed IT team with RISO, where he would be travelling from Vancouver to the west coast of the U.S. He was offered a salary of $75,000 USD, and was told by the manager that, with bonuses, his actual salary would likely total $100,000 USD. Mr. Cvetkovic believed that the plaintiff's personality made him perfect for the technology consultant position, as he was qualified and good with people.

**231**  Mr. Gibson argues that, on the basis of the same multiplier of 23.1452, if the plaintiff lost $75,000 per year until age 65, the present value of that would be approximately $1.735 million. At $100,000 per year the present value of the amount of lost income would be $2.341 million.

**232**  I note for example that using an income of $32,000, instead of the plaintiff's examples of $62,000, $75,000, or $100,000, with the same multiplier of 23.1452, the present value of that income stream from trial until the plaintiff is 65 would be $740,646.

**233**  I repeat what I have earlier said that these calculations are only examples of the present value of lost income over a period of time. The determination of the loss of earning capacity is an assessment on all of the evidence.

**Will the plaintiff improve?**

**234**  The extent to which the plaintiff will improve or may improve is important to the loss of earning capacity question, as well as the cost of future care. There is evidence that suggests that his conditions may improve. Since the course of future events is unknown, allowance must be made for the positive and negative contingencies upon which the award is based.

**235**  Dr. Mazzarella thought that getting closure on this aspect of the plaintiff's life would possibly allow him to put his energy and focus into improving his functional levels and activities.

**236**  Dr. Anton thought that the prognosis for return to any type of work was guarded, as even on the best scenario, he would not become pain free. Dr. Riar had a more optimistic prognosis but it itself was guarded and he said:

As far as psychiatric disability is concerned, I believe that at the time of my interview, Mr. Stevanovic was at least partially disabled due to his chronic pains, as well as protracted anxiety. As far as his short-term prognosis, I felt that it was guarded and he would continue to have these symptoms for the next 6 to 8 months, but with intervention, the functioning can be improved. As far as long-term prognosis for his anxiety, I feel that it is favorable but he is vulnerable for future episodes of anxiety and this has to do with his constitutional vulnerability, rather than any effect of the accident. As far as chronic pains are concerned, there will be improvement in his symptoms, and his ability to deal with his chronic pain after the resolution of his anxiety symptoms, and it does not seem that they will completely leave him for another year or two.

**237**  On the evidence at trial, I find there is a reasonable prospect the plaintiff will improve, particularly with his anxiety and sleeping difficulties, which will reduce his chronic pain and headaches and thereby improve his work capacity over time.

**Arguments of the plaintiff and defendants**

***The plaintiff's position***

**238**  The plaintiff argues that, given the medical and lay evidence, the plaintiff should be awarded $1,300,000 as a reasonable assessment of lost earning capacity, taking into account positive and negative contingencies, the possibility of some modest residual earning capacity, and the unlikely success of the plaintiff's current program at Harbourside securing him gainful employment.

**239**  The plaintiff's argument is that he has suffered a substantial loss of earning capacity, and even the defendant does not suggest he is presently capable of doing anything other than part-time work. Before the accident, the plaintiff was very intelligent, as shown by his top performance in a company-wide examination, had valuable technical skills, and demonstrated ambition. His IBS is a medical condition that pre-existed the accident and, in Mr. Gibson's submission, confirms that the plaintiff was essentially a "thin skull". The plaintiff, as a result of his injuries and pain, suffers from chronic insomnia, leaving him fatigued and moody, and causing significant difficulty completing assignments. The plaintiff, in Mr. Gibson's submission, has an entrenched anxiety disorder despite regular medical contact with a psychologist and use of medication as adjusted over time by Dr. Mazzarella. From the plaintiff's perspective, the pain disorder is getting worse and is likely to interfere with his ability to work at all in the future. Mr. Gibson argues that Dr. Guy confirmed that the pain the plaintiff has experienced will increase over time. Mr. Gibson submits that if the plaintiff is barely functioning with extensive support, it is not remotely possible that his ability to work will improve.

**240**  Mr. Gibson argues that although a knee injury allows the possibility of sedentary work, the plaintiff's increasing pain over time, and little in the way of treatment options until a total knee replacement when he is aged 50-55, will continue to interfere with his ability to earn income. The plaintiff's ongoing and increasing pain, which also will continue to contribute to the plaintiff's fatigue and cognitive symptoms, will continue to affect his level of anxiety. His serious headaches are also likely to continue.

**241**  Mr. Gibson says there are many caveats that have to be placed on the plaintiff's potential for securing successful employment, because he cannot take on greater than part-time work, work that causes him stress or has significant deadlines, work that will aggravate knee pain if he has to bend at 30 degrees or greater, and work that involves sitting, standing, possibly driving, walking, running, squatting, kneeling, crouching, stooping or crawling. He points to the reluctance of employers to hire the plaintiff because of cost to their medical plans, his potential for lateness, and his requirements for accommodation, as employers prefer healthy people without limitations and productivity issues.

**242**  Although the plaintiff could not find any authority involving a young person with a devastating orthopaedic injury, Mr. Gibson argues that, having an eye to the calculations he referred to in his argument, and based on the principles underlying the assessment of loss of earning capacity, the award he seeks of $1.3 million, he says, is a conservative award.

***The defendant's position***

**243**  The defendant's position is that the assessment of diminished earning capacity does not provide for arithmetic perfection. Mr. Deering submits that the realistic range of damages should be somewhere between $250,000 - $450,000.

**244**  The defendant says that the medical evidence suggests that the plaintiff, although only capable of part-time employment now, will improve. A total knee replacement, based on Dr. McConkey's evidence, will not come about until the latter part of the plaintiff's working life, at which time it will provide a disruption of only three to six months.

**245**  Mr. Deering says the plaintiff has computer skills, has the ability to sit and drive, and, although restricted, has functional ability in his knee.

**246**  The defendant submits that it is reasonable to assume that the income the plaintiff will be capable of making following his retraining will equal or exceed what he was earning as a technician installing and repairing printers and photocopiers.

**247**  Mr. Deering says the evidence is that there is marked improvement in the knee and the muscle mass on the leg that was injured during the accident. The defendant argues that the plaintiff's sleep problems are treatable and the evidence suggests most people recover. He suggests that once the litigation is resolved the stress which leads to the perpetuation of pain will likely be removed.

**248**  Mr. Deering questions the relevance or appropriateness of the financial present value calculations advanced by Mr. Gibson, whether through Mr. Stafford's evidence or in his argument. Mr. Deering argues Mr. Stafford's evidence should be disregarded, as it was based on the plaintiff not being able to work and not earning any income from the date of the trial forward.

**249**  The defendant does not suggest the plaintiff is presently able to work full-time. Mr. Deering says it has to be recognized the plaintiff needs to be able to stretch to relieve his discomfort; however he points out that the plaintiff has been going to school 20 hours per week and doing homework 10-15 hours per week. He says that while some accommodation must be made to allow the plaintiff to stretch to relieve discomfort, the plaintiff is clearly capable of functioning in a working environment for 20-30 hours per week. The defendant recognizes the plaintiff cannot do heavy work, however he now has additional skills and the skills to get in the door in the sound industry.

**250**  His submission is that the plaintiff's income earning capacity has been diminished by between 25%-40%.

**Assessment of loss of earning capacity**

**251**  The question for me is the assessment of damages for the plaintiff's loss of earning capacity as a result of the injuries suffered by the plaintiff in the accident.

**252**  Again, I stress that this determination is an assessment, and not a calculation. I am mindful that the calculations advanced by counsel in argument are at best only starting points, or some idea based on certain scenarios of the possible magnitude of the loss that may have been suffered by the plaintiff.

**253**  The defendant's counsel was critical, and for good reason, of the various calculations that were put forward by the plaintiff. Mr. Gibson advanced the present value of $1.3 million which was based on no income until retirement and on a salary far greater than the plaintiff was making at the time of the accident. Similarly, the expert witness called by the plaintiff presented calculations that showed a total loss of income that was based on a higher salary than he was earning, and regular salary increases. Of course, the plaintiff might have earned substantially more in real dollars over time as he advanced in a career.

**254**  The defendant is correct that a precise calculation is neither possible nor the appropriate way to assess the plaintiff's loss.

**255**  What is the impact of the defendant's ***negligence*** that caused the plaintiff's injuries on the plaintiff's earning capacity? The assessment involves a consideration of all of the evidence and a consideration of numerous factors, including positive and negative contingencies. As noted in *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 9, real and substantial "[p]robabilities and possibilities, chances, opportunities and risks must be considered".

**256**  The plaintiff was and remains a reasonably intelligent and motivated person, who has good skills and aptitude for computer use.

**257**  The main physical injury which impacts on the plaintiff's earning capacity is his knee injury. It was a serious injury. It required four surgeries. The major symptoms in terms of disability and continuing pain, relate to the patellofemoral articulation.

**258**  The knee injury prevents the plaintiff from doing work that involves excessive and repetitive joint loading movements and repetitive knee impact activities. The evidence shows that the plaintiff is restricted from carrying heavy weights, squatting or kneeling. From a physical capacity perspective, the plaintiff will be restricted to sedentary work in the future. Clearly the injury has a significant impact on the plaintiff's earning capacity, as it affects many of the jobs that he might otherwise have been capable of doing. Given the existing level of arthritis, Dr. Guy indicated that the plaintiff would suffer pain in activities where he bends the knee and puts force through it such as going up and down stairs, getting out of a chair, or crouching, kneeling or running. He has been rendered less capable overall to earn income from all types of employment.

**259**  Specifically, the injury and its consequences affect his capacity to do the type of work that he did before the accident as a copier and printer technician. That is because the injury prevents the bending and crouching without pain that is required for that type of work.

**260**  What is the prognosis for the years ahead?

**261**  There is some dispute in the evidence whether the plaintiff's knee condition will improve or deteriorate in the future.

**262**  The evidence is that the repair to the plaintiff's knee was good and the plaintiff's right knee has good range of motion. The evidence indicates that to control pain in an arthritic knee, it is important to keep the quadriceps muscles strong and to avoid activities that put too much force through the knee. The defendant suggests that it is a positive thing that the plaintiff has undergone a quadriceps strengthening program that improves the strength of the leg and its function. I expect that the plaintiff will continue to train and exercise to try to maintain optimal knee and leg function, but even with that exercise program the plaintiff still suffers knee pain and will continue to suffer such pain.

**263**  The evidence of the experts indicates that the plaintiff has osteoarthritis in the patellofemoral joint, which is a post traumatic condition from the accident, and a chronic progressive condition. There is, I find, a risk that it will spread to other areas of the knee.

**264**  Dr. Guy testified that in the x-rays that he had done there was no osteoarthritic deterioration in the medial or lateral knee joint, as opposed to the patellofemoral, which has osteoarthritic changes. However, he had not seen the last x-ray that Dr. McConkey had seen.

**265**  Mr. Gibson argues that an x-ray taken a year after the last surgery indicates loss of joint space in the medial joint, the weight bearing joint, and the likelihood Mr. Gibson argues is for deterioration, not improvement in his knee over the next five to ten years.

**266**  Although pressed on cross-examination by Mr. Gibson that the recently produced x-ray indicated narrowing in the medial joint, Dr. McConkey did not agree that it indicated osteoarthritis in that joint. However, he did agree that, although there was no osteoarthritis in the remainder of the joint in the tibeofemoral articulation, there was a risk it could develop.

**267**  Dr. McConkey thought there would be gradual improvements in some of the disabilities that relate to the plaintiff's knee, and he would be able to improve his strength minimally. He made this observation when he saw the plaintiff in early 2009 and thought that he would be improved in the short run following his course of several operations that lead to dysfunction and muscle weakness.

**268**  Dr. McConkey initially took the view that there was no need for a total knee replacement. He changed that view because the patellofemoral joint, he said, was the major concern and major cause for the plaintiff's discomfort, disability and lack of function. He said that the current general medical advice with respect to injuries of this type to the patellofemoral joint, because other treatments have variable success, is, in time, a possible total knee replacement for the plaintiff.

**269**  Dr. McConkey thought that the plaintiff's function and discomfort level would be static or improve over the next ten years, and he did not think that a knee replacement would occur before the plaintiff turned 55 years old. Dr. McConkey agreed that, despite rehabilitating himself from a stamina and strength perspective, if the plaintiff's pain plateaued or increased, further improvement might be unrealistic. In fact, he thought the plaintiff probably has to abide by the restrictions on his knee to assist in its longevity.

**270**  Dr. Guy expects the knee pain that the plaintiff suffers from will increase over the next twenty years.

**271**  Notwithstanding efforts to strengthen the leg, I find that it is probable that the plaintiff's knee pain will increase over time.

**272**  The surgical options to limit pain are limited. Dr. Guy said that the total knee replacement should be delayed as long as possible, with age 50- 55 being the lower age limit he would consider. Dr. McConkey shared that view.

**273**  My conclusion is that the plaintiff is essentially limited to sedentary work that does not involve activities that load his knee such as bending, lifting weights or climbing stairs. The evidence indicates that, notwithstanding four surgeries and notwithstanding an active exercise program to maintain the strength of his leg and limit pain in the knee joint, the plaintiff will continue to have pain in that joint, largely in the patellofemoral joint. That pain will be treated by medication, and the only viable surgical solution will be a total knee replacement, which both surgeons agree should be put off as long as possible (until the plaintiff is likely greater than age 50-55).

**274**  The injury to his knee, and the ongoing pain and restrictions, have substantially diminished the plaintiff's earning capacity. He is less competitive in the job market. He is quite restricted in the type of physical work he can perform.

**275**  The more difficult aspect in this case is the effect of anxiety, headaches, chronic pain, and sleep issues on the income earning capacity of the plaintiff. Presently all of those issues have some impact. Because of the subjective nature of those complaints, the credibility of the plaintiff as to whether he suffers from symptoms of that sort and the degree to which he suffers ongoing pain from his knee injury is important.

**276**  As I noted earlier in these reasons, I generally found the plaintiff to be a credible witness and I generally accept his evidence.

**277**  I accept that coupled with his physical injuries, the headaches, anxiety, chronic pain and sleep difficulties will impact on his earning capacity. However, I think there is, on the evidence, a realistic prospect that the impact of these conditions on his ability to earn income will lessen over time.

**278**  A number of factors suggest that these elements will not have as much impact in the future as they presently do. Although there is conflict in the evidence of the sleep disorder doctors, I find that the plaintiff does not accurately perceive the amount of sleep that he actually gets. I expect that further treatment from the sleep disorder clinic will likely result in further improvement in this aspect of the plaintiff's condition, and will improve his earning capacity.

**279**  In terms of the expert evidence on the issue of anxiety and chronic pain, I found the evidence of Dr. Anton and Dr. Riar to be of the most assistance. Dr. Anton in his report recommended psychological counselling and observed that psychological factors, including anxiety, play a significant role in the onset and maintenance of chronic pain. Dr. Anton agreed that anxiety may be a common part of chronic pain and that it was treatable, if not curable, and that, although he prescribes medication for anxiety, he would defer to a psychiatrist for specific pharmacological treatment in anxiety disorders.

**280**  Dr. Riar thought that psychiatric intervention was paramount for the plaintiff and that it will be beneficial for the plaintiff to attend a group treatment program for anxiety, as well as to have his medication reviewed by a psychiatrist. Dr. Riar's short term view was guarded but thought his functioning could be improved. He thought the plaintiff's long term prognosis for anxiety was favourable, but that he was vulnerable for future episodes of anxiety due to his constitutional vulnerability, rather than any effect of the accident. He did not think the plaintiff's anxiety symptoms would leave him for another year or two. As Dr. Riar put it in his report, there will be improvement in the plaintiff's symptoms of chronic pain and his ability to deal with chronic pain after resolution of his anxiety symptoms. Dr. Riar did not think the plaintiff's prognosis for improvement depended on improvement in his underlying headaches and right knee pain, as he said that the plaintiff's headaches were more in keeping with his emotional issues. In terms of his anxiety, he said that if his knee deteriorates and the pain increases, that is the pain disorder but if his anxiety gets better he is able to deal with the pain better, or as he put it, lessen it. Dr. Riar thought relieving his anxiety disorder will improve the plaintiff's headaches.

**281**  I appreciate that the plaintiff has had psychiatric assistance and tried different medications with the assistance of Dr. Mazzarella and Dr. Raina, and received counselling from Dr. Cheung, but, notwithstanding Dr. Mazzarella's caution, I think that with the guidance of a psychiatrist, group treatment, and adjusting medication in consultation with a psychiatrist, improvement will probably be made as noted by Dr. Riar.

**282**  I also expect, as Dr. Mazzarella does, that the plaintiff's compounding anxiety will lessen once this litigation is concluded.

**283**  The plaintiff has IBS, but that is a condition that pre-dated the accident. Although troublesome for the plaintiff, he was able to make up for lost time due to IBS by working overtime.

**284**  In any event, the defendant must take the plaintiff the way he found him. The question is the extent to which the plaintiff's pre-accident income earning capacity was affected by the accident.

**285**  I have taken into consideration the evidence of the two vocational consultants who had different opinions on the employability of the plaintiff. I have set that out above. Both opinions are entitled to weight. A significant difference between them is that while Mr. Lawless thought that there were jobs the plaintiff was otherwise capable of doing, given his intellectual abilities and skills, there were no occupations that would not be seriously affected by either his physical, cognitive or emotional issues.

**286**  Mr. Hohmann, who did not see the plaintiff nor interview him, differed with Mr. Lawless in believing that most employers could accommodate a person who has to have a knee partially or fully extended, that with successful treatment the cognitive limitations may be removed with a corresponding positive impact on his cognitive functions, and that he is motivated and actively demonstrating his ability by the course at Harbourside. He thought the test results show high intellectual functioning and that the plaintiff might want to consider his own recording studio, the business management side of the music industry and computer programming and website design.

**287**  I think the plaintiff's progress at the classes he has taken at Harbourside is some measure of his capacity to do work, at least on a part-time basis. I expect many employers will provide an employee the ability to stretch his leg and walk around. However, the program that the plaintiff took at Harbourside does not suggest many jobs that he could easily do: most jobs in sound engineering start with live performance work that is much heavier than he able to do, and the prospect of the plaintiff opening his own studio is unrealistic and counter to the trends of the music industry. The suggestion that the plaintiff could go into business for himself also appears inconsistent with the plaintiff's personality.

**288**  It should be kept in mind that although Mr. Lawless thought that the plaintiff was competitively unemployable, even Mr. Hohmann said that the plaintiff has "significant limitations affecting his vocational aspects, but that he has some potential for employment". Mr. Hohmann thought that whether he could advance beyond part-time would depend on the treatment outcome. While I found Mr. Lawless to be overly negative on the plaintiff's employability, given the plaintiff's intelligence and skills, and as I expect many employers will be reasonably accommodating, I found Mr. Hohmann's view of what the plaintiff is able to do to be overly optimistic. Given the plaintiff's skills, his demonstrated work at school, and his determination, I think that he presently has some capacity to do part-time work and I expect that capacity, particularly given his intelligence and computer skills, will improve to some degree when the trial is over, particularly with treatment.

**289**  I also should take into consideration that, in terms of impaired earning capacity of the plaintiff, it appears likely that at some point (perhaps at age 50-60), the plaintiff will have a total knee replacement, and there will be a disruption in his work life of upwards to six months.

**290**  Counsel for the plaintiff points out that in assessing the loss, the plaintiff should not be compensated on the basis that he had capacity only to work as a copier repairer. Of course, it is true that the assessment of his loss is the extent to which his capacity to do earn employment from all sources is affected. At the time of the accident, the plaintiff was a young man who was capable of pursuing different careers, as well as more promising prospects at RISO. Some of the possibilities for a person of the plaintiff's technical skills were described by Mr. Cvetkovic and in Mr. Matushewski's evidence. Mr. Matushewski is currently the Western Regional Sales Manager for RISO.

**291**  The assessment of the impaired earning capacity is the effect it has on his ability to pursue opportunities in all fields of endeavour. Although the plaintiff may have earned just under $2,500 per month, as well as a car allowance of $450 per month at the time of the accident, without the accident his intelligence and aptitude permitted other jobs to realistically be on the horizon for him. The defendant points out that the plaintiff was unhappy with the level of pay at RISO, but this is really an argument that the plaintiff would not have simply earned the income stream from lifelong employment at RISO. He may have gone elsewhere and earned more, or less. As I indicated earlier, the various scenarios that the parties set out are no more than possible starting points. Each had flaws, and they do not provide an answer. However, they provide useful information based on certain assumptions.

**292**  The question is the assessment of damages for the significant impairment of the plaintiff's income earning capacity. In my assessment, I take into consideration my expectation there will be some improvement in his condition in the future in terms of sleep, headaches and anxiety, and in the result its effect on his chronic pain, and his ability to function in the workplace.

**293**  Taking into account all of the evidence, remembering this is an assessment and not a calculation, being mindful of the applicable law, taking account positive and negative considerations, and making an award that is fair to both sides, I award the plaintiff for loss of earning capacity the sum of $600,000.

1. **COST OF FUTURE CARE**

**294**  There is really no dispute about the law concerning the award of cost of future care, notwithstanding the parties' vast disagreement on the quantum of the award.

**295**  In *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.), McLachlin J., as she then was, said, at p. 78:

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 on the medical evidence to promote the mental and physical health of the plaintiff.

**296**  Although it has been said that the test in *Milina* means that the care must relate to the health needs and not simply the enjoyment of life of the plaintiff, the fact that costs be medically justified does not require that a medical doctor provide evidence of the specific care that the plaintiff requires. It may be provided by a rehabilitation expert. The weight to be given to the recommendation depends on the expertise of the person recommending it: *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.) at para 182.

**297**  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=), Masuhara J. observed:

[70] At the outset, I note that the cost of future care award is "by its nature notional and not a precise accounting exercise to determine the strict minimum" required by the plaintiff: *Strachan (Guardian ad Litem of) v. Reynolds*, [*2006 BCSC 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=). In *Courdin v. Meyers* [*(2005), 37 B.C.L.R. (4th) 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=), [*2005 BCCA 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=) at para. 34, our Court of Appeal endorsed the following approach to dealing with the many imponderable factors and contingencies in assessing damages in this category;

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.

(Krangle (Guardian ad litem of) v. Brisco, [*[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=), [*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.)

...

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at para. 35), or for items or services that it is unlikely he will use in the future.

**298**  As noted by D.M. Smith J., as she then was, in *Bystedt (Guardian ad litem of) v. Hay*, [*2001 BCSC 1735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4GD-00000-00&context=) at para. 162:

The test for an award of future care is "whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money". ...

She went on to say, at para. 163, that the award must be "based on an objective test of what is moderate and fair to both parties".

**299**  The plaintiff called a registered nurse, Janet Landy, an expert in rehabilitation nursing and life care planning, to provide a review of the items of care that the plaintiff, in her opinion, needs through his lifetime. The plaintiff also introduced the report of Mr. Darren Benning, to assist in the quantification of the pecuniary damages. Mr. Benning is the president of a consulting economics firm that provides litigation support for these sorts of claims.

**300**  The defendants called Laura Smith to review the report of Ms. Landy, and to provide her opinion on Ms. Landy's recommendations. Ms. Smith is a certified life care planner and a qualified rehabilitation professional with a degree in medical rehabilitation, as well as being registered to practice as an occupational therapist. Ms. Smith gave her evidence by way of video deposition. The defendant also introduced the report of Mark Szekely, a consulting economist who provided certain present value calculations in connection with the plaintiff's cost of future care claim.

**Plaintiff's Position**

**301**  Ms. Landy recommended the following (I have marked with an asterisk the care items that are not disputed by the defendant):

1. a one-to-one rehabilitation support worker for 48 weeks each year (20 hours per week);

(b)\* 25-30 hours annually for physiotherapy consultation for ongoing hands-on assessment and evaluation and indirect training and supervision of the rehabilitation support worker/kinesiologist to follow through with a prescribed physiotherapy program;

1. massage therapy for 2 hours per week for 48 weeks;

(d)\* cost of prescription medication, i.e. Gabapentin 300 mg at a monthly cost of $64.82;

(e)\* psychological consultation for an hour every two weeks, decreasing in years 2 and 3 and further decreasing in year 4;

(f)\* vocational consultation for $10,000 - $15,000 plus GST based on 100-150 hours at an hourly rate of $100 per hour;

(g)\* occupational therapy consultation - 24 hours, or 2 hours monthly;

(h)\* ongoing medical consultations - as this is provided through the Medical Services Plan of B.C., no costs are projected by the plaintiff;

1. activities of daily living:

i.\* knee brace replaced every 5 years - annual cost between $220-$251.20;

ii.\* wall mounted grab bars - $110-$125 plus GST and PST;

1. bath assist to avoid slipping - annual cost $240-$280;
2. mobilization device or scooter for travelling longer distances and recommended for future purchase 10-15 years post-injury - annual cost $562.50-$750, including batteries, commencing year to $400;
3. contingency funding for installation of a stair glide system should the plaintiff reside in a two storey home - $6,00-$7,500 with no anticipated replacement, annual maintenance cost $500;
4. contingency funding for purchase of external rear-mounted scooter to back of car - $2,200 plus taxes, replacement recommended every 8-10 years;
5. interior home maintenance for light cleaning, given the plaintiff's restriction in repetitive motion (kneeling bending stooping crouching climbing) based on an hourly rate of $29-$32 plus taxes, the recommendation is including covering the holiday time between $6,032-$6,056 per annum;
6. exterior home maintenance, contingency funding for window washing, lawn maintenance, snow removal, etc. This is presented by the plaintiff's expert at Lawn Maintenance Etc. of four hours monthly at an hourly rate of $35 totalling annually $1,680, and for handyman tasks 2 hours monthly $600 per annum at $25 per hour;
7. funding is recommended for professional financial management services to be addressed by an economic consultant.

**302**  The plaintiff's expert, Mr. Benning, used a multiplier of 23.036 pursuant to the regulations under the *Law and Equity Act* to determine the present value of the care costs. He assumed a normal life expectancy for the plaintiff. His total of the present value of the future care expenses applicable to the plaintiff was $1,797,567. Some of the more significant expenses, based on Ms. Landy's recommendations, were: the one-to-one rehabilitation support worker which at $50,400 per annum, including taxes, had a present value of $1,161,036; the massage therapist at an annual cost of $7,680 was $176,920; the occupational therapy consultant at an annual cost of $2,520 had a present value of $58,052; interior home maintenance at an annual cost of $6,661 had a present value of $148,918; and exterior home maintenance with an annual cost of $2,394 had a present value of $53,520. The last two home maintenance items were calculated to age 80.

**303**  The plaintiff's counsel said in argument that the costs claimed were reasonable and that, even if the plaintiff utilizes only ten hours of rehabilitation assistance support per week into the distant future, the present value of rehabilitation support at cost would be $580,518. Mr. Gibson says that ten hours per week is only half of what Ms. Landy recommended and, given the medical evidence that has developed since the reports were provided to Ms. Landy about the need for assistance from a trained kinesiologist, as well as the risks for emotional and psychological deterioration, he argues the chances are that the plaintiff will need more support. Mr. Gibson says that taking into account the reduced rehabilitation assistance (from twenty hours per week down to ten), the fact that childcare expenses have not been considered, and the fact that a pain clinic and other medications have not been considered, the sum of $1.3 million for cost of future care is overall a reasonable assessment of the cost of future care.

**Defendant's Position**

**304**  Ms. Smith disagreed with Ms. Landy's recommendation for one-to-one rehabilitation support over the plaintiff's lifetime. She reviewed Dr. Hartzell's and Ms. Lintott's report, and recommended a level of independence in self-directed activity that does not warrant the need for one-to-one support worker.

**305**  Insofar as Ms. Landy's recommendation for 25-30 hours of physiotherapy intervention annually for his life, Ms. Smith recommended that over his life he may require 24 hours per year and agrees with this recommendation, as well as funding for a yearly fitness pass. Ms. Smith disputed the need for a massage therapist, other than for intermittent attendance, but agreed with the medication requirements. In terms of the psychological counselling, she said that required certain clarification, however the defendant in its recommended amount was prepared to provide for psychological counselling. She noted that the funding proposed by Ms. Landy of 100-150 hours for vocational counselling or 8-12.5 hours per month over a twelve year period, or 4-6 hours over a two year period, may or may not be required depending on the plaintiff's success in his audio engineering program. This amount, however, is not disputed by the defendant.

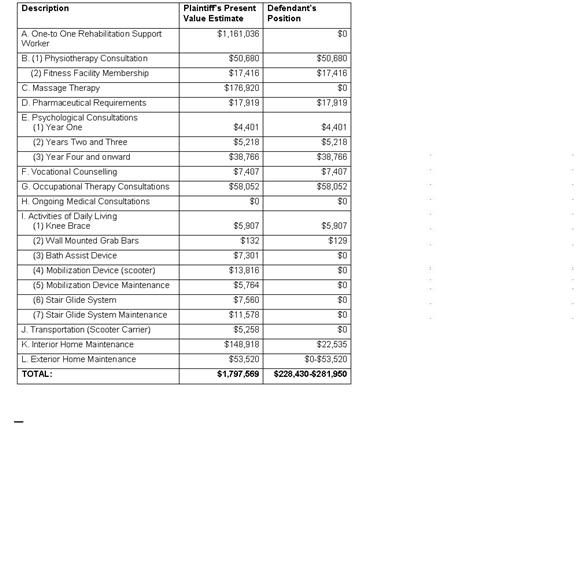
**306**  In terms of the remaining recommendations, Ms. Smith agreed with the recommendation for ongoing rehabilitation case management, the knee brace recommended by Dr. McConkey, and the recommendation for wall mounted bars. She disagreed with the bath assist device, the recommendation for the scooter or a scooter lift, and the stair glide system. In terms of internal household assistance, Ms. Smith argued that a more appropriate rate was $20 per hour for four hours, and not the cost Ms. Landy set out of four hours at a cost of $29-$32. The handyman cost or extended home maintenance cost is, in Ms. Smith's view, only a potential cost. She disagreed with the recommendation that the plaintiff needs assistance with financial management.

**307**  Depending on whether exterior house maintenance was included, Mr. Deering's submission was that the present value of the future case costs, as determined by Mr. Szekely, that were reasonable, would be between $228,428 and $281,949.

**308**  Accordingly, the defendant's position was that $250,000 was the appropriate award for the cost of future care.

**Discussion**

**309**  Where does the dispute about cost of future care lie? Apart from the items that the plaintiff said should have been included but were not, the main items in dispute appear on the chart below. I have inserted the present value amounts claimed by the plaintiff, and the amounts agreed with by the defendant:



**310**  I assess the cost of future care claims as follows.

***Rehabilitation Support Worker***

**311**  The most significant claim for cost of future care and the one most in dispute is the provision of a one-to-one rehabilitation support worker or a kinesiologist. The theory behind the claim at twenty hours per week (or even at ten hours per week) is that in order to prevent deterioration of the knee and resulting pain and psychological overlay there is a need for ongoing regular intervention to protect the health of the plaintiff's knee and prevent deterioration. The defendant disputes the necessity for a one-to-one rehabilitation support worker (item A) at all.

**312**  The defendant does, however agree that there should be a regular consultation of 25-30 hours of physiotherapy intervention per year with a physiotherapist at an annual cost of $2,200 with a present value of $50,680 and a yearly pass to a community based fitness facility at $17,416. In other words, the defendant argues that, given the support available in item B above, item A is unnecessary.

**313**  I note that the defendant agrees with Ms. Landy's recommendation at item G for a rehabilitation case management which the plaintiff says is for "rehabilitation service intervention to provide a consistent level of continual monitoring, organizational and planning support as well as functional assistance in the activities of daily life".

**314**  Ms. Landy says the question of twenty hours, or even ten hours per week of a rehabilitation support worker is "to ensure follow through with a prescribed program of physical conditioning and activation, a consistent level of monitoring of emotional status and to provide structure for the day". The plaintiff's argument came down to the need to have a rehabilitation aide work with the plaintiff to ensure that he properly exercises to maintain his leg strength and not damage his knee in order that further damage to the knee and pain can be lessened and future chronic pain avoided.

**315**  The plaintiff says that the defendant's approach is contrary to the law on the cost of future care and is asking that the plaintiff fend for himself. The plaintiff relies on the evidence of Dr. Anton that the plaintiff should exercise firstly to maintain the function of the knee, secondly to possibly slow the development of arthritis and thirdly because of the psychological benefit of exercise. The plaintiff points to the importance of certain stretches to help maintain the knee's function as long as possible, which requires some require expert assistance. Ms. Landy said that the goal is to maintain consistency and the correct technique. Her plan was for the physiotherapist to design the program and the kinesiologist or rehabilitation worker to ensure the follow through. Mr. Gibson points out that the doctors agreed that proper stretching and an exercise program is a good idea.

**316**  The witnesses called by the defendant, Laura Smith and Wendy Lintott, challenged this claim.

**317**  The defendant does not dispute the need for a proper exercise regime, but says that the future costs of a physiotherapist and a membership in a fitness centre are what is reasonable in the circumstances. With that assistance, the defendant argues that the plaintiff is capable of exercising on his own. Dr. Hartzell, an occupation health physician called by the plaintiff, suggested a physiotherapist with a psychologist skilled in self directed pain management techniques and an exercise therapist for three months, to be followed by a maintenance program with periodic supervision by a kinesiologist.

**318**  I do not find the plaintiff's claim to be reasonable at ten or twenty hours per week. The plaintiff, under the guidance of the physiotherapist, with some assistance from a trainer at the outset, will be able to maintain on his own a safe and healthy exercise regime to maximize the strength of the knee and not damage it.

**319**  I think that the evidence shows that some support from a trainer or rehabilitation worker (in addition to regular physiotherapy consultation and a gym membership) is useful for the plaintiff's health in that it allows him to strengthen his leg and knee, preventing further injury by exercising incorrectly, and providing assistance to do exercises that the plaintiff cannot do on his own.

**320**  As Dr. Anton noted, "you need to do the right exercise and the right techniques, and generally, at least initially, it is appropriate to have it supervised by a physiotherapist or a kinesiologist to make sure your technique is correct".

**321**  I find that some initial support should be provided for the plaintiff. Given his ability to exercise and follow directions, I find that one hour of a trainer or rehabilitation worker per week for three years, and twenty hours therefore at other times, is what is justified and appropriate on the evidence.

**322**  Accordingly, I would allow for Item A, at an approximate cost of $60.00 per hour, the sum of $20,000.

***Massage therapy***

**323**  The next item in dispute is massage therapy for which over the plaintiff's life at an annual cost of $7,680, he claims the sum of $176,920. The defendant says that no award should be made under this head.

**324**  Ms. Landy testified that, in consultation with Danica Crawford, she recommended massage therapy two or three times per week, which results in the amount claimed. She said that the plaintiff found that the massage therapy he has been having has been beneficial. The plaintiff's counsel pointed to the evidence of the plaintiff that the massage therapy relieves neck tension, improves his headaches and that the therapy is for his neck, right hip, both knees, his lower back and sometimes his arms.

**325**  Mr. Deering argued that there was no medical basis in the evidence for this claim. Ms. Landy agreed that none of his doctors had recommended massage, nor did she speak to them about it. This recommendation was based on the view of the plaintiff's present massage therapist. There was no report from the massage therapist explaining the basis for this recommendation.

**326**  Laura Smith, the occupational therapist, said she was unable to find any recommendation in the reports from any doctors for massage therapy, and pointed out there was no report from any massage therapist.

**327**  I did not see the required medical support in the evidence for this item as a cost of future care to promote the health needs of the plaintiff.

**328**  The other areas of controversy between the parties were under the general categories of activities of daily living and home maintenance. These appear in items I (3, 4, 5, 6, and 7), J, and K above.

***Bath assist device***

**329**  The bath assist device that was recommended by Ms Landy, is a portable device that allows a person to use a bath by essentially being lowered into the bath without putting weight on his right leg. It is portable and needs to be replaced every five years.

**330**  Ms. Smith said that he was not having difficulty bathing on a daily basis and there was no recommendation that it was needed for safety.

**331**  I think there is medical justification shown for this expense, but only some prospect for its need in the future. On the basis that there is a realistic possibility that this cost will be incurred, I allow $4,000 for this cost.

***Mobilization device and maintenance***

**332**  The plaintiff claims a mobilization device for travelling over longer distances, to be purchased 10-15 years post injury and replaced every 8-9 years. The purchase costs has a present value of $13,816 with an annual cost of maintenance having a present value of $5,764.

**333**  This device does not appear to have been recommended by Dr. Anton or any other doctor. The argument appears to be that it would be useful after a total knee replacement, when that is necessary, or if the plaintiff felt comfortable using it for long distances if his knee deteriorates.

**334**  I do not find that this cost meets the test for cost of future care as being medically required, or that it would be used by the plaintiff. As such, the scooter maintenance and the scooter carrier also are not allowed.

***Stair glide system and maintenance for stair glide system***

**335**  It was recommended by Ms. Landy that he receive a sum for a stair glide system in the event that he purchases a two-level home. The cost is a one-time amount of $5,764 plus maintenance after the first year with a present value of $7,560.

**336**  The defendant opposes this largely, it appears, because there is no recommendation for it from a doctor and because the plaintiff lives in a one story apartment and will likely purchase a home, if he does, that is on one level. This is a cost that the plaintiff may incur in the future. I expect that the plaintiff will attempt to reside in a one-story residence whether he rents or purchases, but he may end up residing in a multi-level dwelling, where this device could be of assistance to maintain the health of his knee.

**337**  I find that this is a reasonable cost of future care, and based on the reasonable possibility of the costs being incurred, I would allow the sum of $1,500.

***Interior home maintenance***

**338**  The plaintiff claims the annual cost of interior home maintenance of $6,661 up to age 80 for a present value of $148,918. Ms. Landy, because of the plaintiff's restrictions from kneeling, bending, stooping and crouching, recommended four hours per week at a rate of $29-$32 plus HST.

**339**  Dr. Anton noted the household tasks with which the plaintiff would have difficulty included washing floors, cleaning the bathtub, and taking laundry up and down stairs.

**340**  The defendant, by his witness Ms. Smith, said that an hourly rate of $20 was more realistic - between $15 and $25 - and recommended one hour per week, or two hours every two weeks, for a annual cost of $960 and a present value calculation of $22,535. Ms. Lintott said and appropriate range for the cost of this service was $15-$28 per hour.

**341**  I find that for the household tasks which the plaintiff is unable to do, two hours every two weeks is reasonable, and, considering the evidence about the variable rates for a housekeeper, I would allow the sum of $25,000.

***Exterior Home Maintenance***

**342**  The plaintiff claims the annual sum of $2,394 with a present value of $53,520 for exterior home maintenance. Ms. Landy explained that it was the plaintiff's goal to own a home and that all the heavier tasks of exterior home maintenance will not be possible as he ages. The defendant does not dispute the quantum but disputes whether it should be awarded at all. Ms. Landy agreed that if he purchased a strata unit that exterior maintenance would be handled by the strata corporation.

**343**  This is a cost that may never be incurred by the plaintiff. As noted, I expect he will try to avoid living in accommodation that presents extra challenges to his knee. It is a realistic possibility he will incur this cost. In assessing the possibility, I allow the plaintiff the sum of $20,000.

**Conclusion of the Cost of Future Care**

**344**  Accordingly, for the reasons I have set out above, I assess the cost of future care at the sum of $275,000.

1. **MITIGATION**

**345**  The defendant advances an argument that the plaintiff's damages should be reduced because he had failed to mitigate his damages. Mr. Deering put it this way in his written argument:

Despite the clear advice from Dr Riar, Dr. Bishop and Dr Anton that the plaintiff would benefit from psychiatric treatment, the plaintiff has chosen to ignore this recommendation. The decision delayed, hindered and perhaps exacerbated the plaintiff's anxiety.

**346**  There is no dispute that the plaintiff had a duty to act reasonably to mitigate his loss. The burden is on the defendant on this issue. The defendant's counsel acknowledges that he must prove not only that the plaintiff failed to follow recommended medical treatment but that if he had followed it, it probably would have been effective.

**347**  The defendant seeks a reduction of 25% but candidly told me the authorities indicate a 10% reduction at the most.

**348**  The defendant said that the plaintiff's anxiety was a pre-existing problem, and it precipitates chronic pain and sleep problems. The defendant argues that treating the anxiety will lead to a partial or full recover of the symptoms of chronic pain and sleep disorder. Mr. Deering said that proper treatment for the plaintiff requires medication prescribed by a psychiatrist as well as cognitive therapy.

**349**  The defendant said that the plaintiff will be provided cost of future care for counselling and psychiatric care, which is critical, but Mr. Deering says that the plaintiff's failure to mitigate was in not seeking psychiatric assistance since 2006.

**350**  Counsel for the plaintiff says that the mitigation defence is simply not made out on the evidence. Mr. Gibson argues that the plaintiff clearly followed his family physician's advice and medication suggestions, and there is no evidence at all that there were specific medications that would have altered the plaintiff's course of health. Mr. Gibson said that over the period since the accident, the plaintiff has been on over 15 different medications. He sought extensive psychological counseling, and there was no specific direction that he attend another psychiatrist. Mr. Gibson pointed out that the pain clinic the plaintiff attended did not consider any psychiatric intervention to be necessary. Mr. Gibson points out that the occupational therapist retained by the defendant to assist the plaintiff did not recommend psychiatric intervention. Mr. Gibson argues that the plaintiff has tried medication, physiotherapy, counseling, and numerous ways to aid his recovery.

**351**  I find that the defendant has not proven that the plaintiff failed to mitigate his damages. The plaintiff followed a course of treatment directed by his general practitioner, upon whom he attended regularly. That included a course of medication that was prescribed for him by his doctor and by a psychiatrist whom he saw for a time. The plaintiff did not ignore Dr. Riar's recommendation, but appears to have considered it carefully and on reasonable grounds, with Dr. Mazzarella's concurrence, did not then follow it.

**352**  In all the circumstances, the defendant has not proven the plaintiff failed to act reasonably in mitigating his damages.

**CONCLUSION**

**353**  There will be judgment in favour of the plaintiff in accordance with these reasons. The parties have liberty to speak to the quantum of costs.

J.S. SIGURDSON J.

**End of Document**

[***Thomas v. Bounds, [2009] B.C.J. No. 676***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S46T-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

I.C. Meiklem J.

Heard: September 9-12 and 15-18, 2008.

Judgment: April 3, 2009.

Docket: 38419

Registry: Kamloops

**[2009] B.C.J. No. 676** | [*2009 BCSC 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SM-00000-00&context=) | [*176 A.C.W.S. (3d) 1033*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SM-00000-00&context=)

Between James Victor Thomas, Plaintiff, and Jeffrey Bounds, Defendant

(101 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Considerations impacting on award — Pre-existing injury — Contributory *negligence* — Action for personal injuries suffered in a 2005 motor vehicle accident allowed in part — Total damages of $195,775 awarded — Plaintiff stopped for traffic on slippery road and his vehicle ended up at an angle — Defendant was unable to stop and rear-ended plaintiff - Plaintiff found one-third negligent — Plaintiff's vulnerable pre-existing back condition likely would have become debilitating in any event — 10 per cent contingency applied.**

**Damages — Types of damages — For personal injuries — Calculation — Contingencies — Considerations — Aggravation of pre-existing injury — Cost of future are — Loss of earning capacity — Retroactive loss of income — Non-pecuniary loss — Pain and suffering — Action for personal injuries suffered in a 2005 motor vehicle accident allowed in part — Total damages of $195,775 awarded - Plaintiff, 53, suffered soft tissue injuries to his back — Prior thoracic back injury — Plaintiff worked in many physical jobs and was a manager for Indian Band at time of accident — Non-pecuniary damages of $72,000 awarded — Loss of income was $92,820 — Loss of income capacity assessed at $125,000.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Motor vehicles — Speed — Action for personal injuries suffered in a 2005 motor vehicle accident allowed in part — Plaintiff came to stop at angle after skidding on slippery road to stop — Defendant rear-ended plaintiff — Angled position of plaintiff's vehicle contributed to collision — Plaintiff found one third negligent.**

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| --- |
| Action for personal injuries suffered in a 2005 motor vehicle accident. The roads were slippery and snow covered. In an attempt to stop slowly for traffic ahead of him, the plaintiff pumped the brakes and went to a skid. The plaintiff managed to come to a stop at a 45 degree angle to the line of travel. He was then struck in the right rear corner and bumper area by the defendant. The defendant testified he was approximately 100 metres from the plaintiff's vehicle when he first lost traction in his efforts to stop his van. The defendant denied any ***negligence*** on his part. The plaintiff, now 53, suffered soft tissue injuries to his back and was off work for one month. Prior to his return to work, his employment contract with an Indian Band was terminated. The plaintiff returned to university. The plaintiff had a history of many injuries from rodeo bull riding and had injured his lower thoracic back at work. Prior to the accident, the plaintiff worked as a horse rancher, horse trainer, horse exerciser, hay farmer and recreational facilities manager. As a result of the accident, he could not longer perform these jobs.  HELD: Action allowed in part.  Total damages of $195,775 were awarded. The defendant was negligent. The limited view of the roadway ahead, together with the downhill grade and the slippery road surface, called for both the defendant and the plaintiff to be driving with greater caution than they were. The plaintiff's speed and failing to take account of the limited sight line and downhill grade resulted in him stopping his pickup in a manner that was unsafe for him. The angled position of his vehicle on the overpass was a contributing cause of the collision. The plaintiff was found one-third negligent. There was a very real possibility that his pre-existing very vulnerable back condition would have become debilitating at some point in the future regardless of this accident resulting in a 10 per cent contingency reduction. The accident aggravated the plaintiff's thoracic back pain. The aggravation of his pre-existing back condition would continue to cause him significant pain and suffering and had had relatively profound affect on his lifestyle. The plaintiff's non-pecuniary damages were assessed at a reduced amount of $72,000. The total income loss after reduction for taxes and employment insurance was $92,820. There was a substantial possibility that the plaintiff would have had a foreshortened working life in physically demanding work on a competitive basis even without this accident, as a result of the cumulative effect of previous back injuries and the degenerative processes at work. His loss of income capacity was assessed at $125,000. Costs of future care for psychological counseling and the purchase of a recliner was assessed at $1,935. |

**Counsel**

Counsel for the Plaintiff: D.A. Paulsen.

Counsel for the Defendant: E.A. Harris.

**Reasons for Judgment**

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| --- |
| **I.C. MEIKLEM J.** |

**1**   This trial involves determining liability and assessing the quantum of damages for injuries allegedly sustained by Mr. Thomas in a motor vehicle accident in Kamloops on January 6, 2005. I will deal with the liability issue first.

**The Accident**

**2**  Mr. Thomas was driving a 1987 Ford F250 pickup truck with the four-wheel-drive engaged. His truck was equipped with all-season tires that were purchased 4-5 months previously. He was returning to his home on East Shuswap Road following a mid-afternoon trip to a video store in the Sahali area. He entered Highway 1 eastbound from Summit Drive then proceeded to the exit and overpass connector to Highway 5 northbound. The posted speed advisory on that exit and the overpass over Highway 1 was 60 km/h. Mr. Thomas had his four-speed manual transmission in third gear and the road conditions were slippery, so he was avoiding the use of his brakes. He testified at trial that his speed was 25 to 30 km/h as he entered the on-ramp and overpass, but he acknowledged that his estimate of approximately 35 to 40 km/h given to the Insurance Corporation of British Columbia within a week after the accident was a more accurate recollection.

**3**  As Mr. Thomas entered the bridge portion of the single lane overpass, he noticed a line of vehicles stopped at the northern end of that overpass at a distance of 70 to 100 yards. The overpass bridge sloped downward for northbound traffic, and the bridge deck was snow-covered concrete. Mr. Thomas resorted to pumping his brakes and he went into a skid but managed to come to a stop approximately 10 feet before the point where he would have struck the vehicle in front of him. His vehicle came to rest at an angle of at least 45 degrees, perhaps more, to the line of travel, having pivoted clockwise, and a few seconds later it was struck in the right rear corner and bumper area by Mr. Bounds' 1996 Ford Aerostar van.

**4**  Mr. Thomas testified that this was 1 to 3 seconds later, but he had estimated 5-10 seconds in his statement to the insurer and at his examination for discovery. Mr. Bounds estimated the time lapse from when he first saw the Thomas vehicle "buck" to a stop (the same point at which he applied his brakes and lost traction) to the impact as about 8 seconds. An accurate time lapse might be useful in determining Mr. Bounds' speed if other factors were known, but there are many unknown factors, and no accident reconstruction evidence was tendered.

**5**  Mr. Thomas testified that the initial impact pushed his truck up against the railing and it bounced off. The photographs show front bumper impact, as well as a broken front left turn lamp lens, suggesting that his truck was at greater than a 90 degree angle to the railing at some point of impact.

**6**  Mr. Bounds testified that he had picked up one of his children at a school on Summit Drive and was travelling about 70 km/h as he proceeded down Highway 1 from Summit Drive. He said that he glanced at his speedometer as he approached one of the 60 km/h advisory signs and noted he was travelling at "around" 55 km/h at that point. His van was equipped with all-season tires purchased approximately 1 1/2 years earlier. He said at trial that he was comfortable with his vehicle's handling and had experienced no slipperiness or loss of traction, although the highway was snow covered. When it was suggested in cross-examination that he knew the roads were slippery, he said they may have been, but he had good traction up until he applied the brakes and skidded. On examination for discovery he had volunteered that "They were snow covered, a little bit slippery."

**7**  There is a "slippery when wet" sign and icon after the second speed advisory sign and at the beginning of the curve onto the overpass.

**8**  Mr. Bounds had observed the Thomas vehicle ahead of him as he exited Highway 1 and approached the overpass, but he said that the Thomas vehicle was sufficiently far ahead of his that he was unconcerned about the distance between them and he could not recall whether he was gaining or losing distance on the Thomas vehicle. When Mr. Bounds was approximately at the beginning of the guard railing on the overpass, he observed the Thomas vehicle "bucking" to a stop approximately 3/4 of the way along the railed bridge portion. This portion is 143 metres long, so according to his testimony, he was approximately 100 metres from the Thomas vehicle when he first lost traction in his efforts to stop his van.

**9**  There was no expert evidence reconstructing the impact speed from the extent of damage to the vehicles, but from the photographs of the damage, the fact that both vehicles were written off rather than repaired and the fact that both airbags in the defendant's van deployed, it can be inferred that there was still significant momentum to the defendant's vehicle at the time of impact. Mr. Bounds' vehicle did not skid the entire 100 meter distance, because he said he steered to the left to attempt to find better traction in the snow to the left of the travelled portion and braked intermittently. He also referred to hoping to be able to pass to the left of the Thomas vehicle. He could not remember whether or not his vehicle had climbed the curb near the railing.

**10**  The single lane of travel was 4.3 metres wide between marked lines (probably not visible at the time). There was a white fog line approximately 1 metre from the cement curb to the east side of the lane and a yellow line approximately .8 metres from a curb on the west side of the lane. Between the curb and the guard railing on each side there was a narrow area similar to a sidewalk level with the top of the curb which appears on the photographic evidence to be approximately the same width as the .8 metre distance measured from the yellow line to the curb. The distance between the curbs on each side of the bridge was therefore approximately 6.1 metres.

**Discussion of the Liability Issue**

**11**  Mr. Bounds argues that there is no evidence that he was over-driving the road conditions, no evidence of excessive speed, no evidence of following too closely, no evidence that different evasive manoeuvres would have made a difference, in short, no evidence of any failure to meet the required standard of care in all of the circumstances. He suggests that the fact that Mr. Thomas also lost control of his vehicle while apparently travelling slower negates the suggestion that speed was a factor in the defendant's skid. Alternatively, he argues that Mr. Thomas was contributorily negligent in not putting weight in the back of his pickup, and in losing control of his own vehicle.

**12**  The plaintiff argues that Mr. Bounds' sliding out of control into Mr. Thomas' stopped vehicle gives rise to an inference of ***negligence*** on his part in that he was either not sufficiently attentive to the road conditions or that he was driving too fast, or both. Such an inference was found in ***Savinkoff v. Seggewiss***, [*[1996] B.C.J. No. 1328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1SV-00000-00&context=) (BCCA) on somewhat comparable facts. The defendant in that case did not attribute his skid and loss of control on a curve to anything other than slippery road conditions, and the court found that he had not negated the inference by evidence explaining how the accident could have happened without ***negligence***. The court in ***Savinkoff*** referred to, and quoted from, the case of ***Hackman v. Vecchio*** [*(1969), 4 D.L.R. (3d) 444*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G24F-00000-00&context=) (B.C.C.A.) where the court held, on the facts of that case, where the defendant slid onto the wrong side of the road in extremely slippery road conditions, that the defendant could only explain how that could have happened without ***negligence*** by showing "that he did not expect ice at that point and had no reason to expect it, for if he ought to have foreseen it, he was bound to drive slowly enough to avoid skidding upon it."

**13**  There is a factual distinction between those cases and the case before the court in that we are not concerned here simply with the foreseeability of a particularly slippery section of roadway, but also with the foreseeability of the necessity to stop part way through a slippery highway overpass because of the sudden sighting of an obstacle. The need to come to a complete stop due to the presence of the stationery line-up of cars that confronted each of Mr. Thomas and Mr. Bounds as they rounded the curving southerly end of the overpass was obviously not in fact foreseen by either of them.

**14**  The question is whether a reasonably prudent driver in the circumstances should have foreseen the possibility of an obstacle or hazard at the far extremity of his or her line of sight and driven at a speed that would permit a safe stop, taking into consideration all the factors that would affect stopping distance, including the slipperiness of the road surface. In my view the answer to that question is "yes".

**15**  I do not accept the defendant's argument that "given that Mr. Thomas lost control at an arguably slower speed than Mr. Bounds, it cannot be said that speed was a factor in the skid." Speed was clearly a factor in Mr. Thomas' skid and loss of control as well. The fact that Mr. Thomas lost control at a slower speed and with newer tires simply highlights how little traction was available due to the slipperiness and the downhill grade of the overpass.

**16**  I accept Mr. Bounds' evidence that he saw the Thomas vehicle "buck" before or as it came to a stop and I infer from that fact that Mr. Thomas' vehicle had bumped into the right hand side curb, which probably caused or contributed to the pivoting of the pickup and also helped to slow it down.

**17**  It would have been helpful to have some of the photographic evidence supplemented with measurements of the sight lines at the various stations, but from photographs 7, 8 and 9 at Tab 2 of Exhibit 2, taken together with the given measurement of the guard rail as 143 metres, it appears that from before and into the curve at the southern end of the overpass, a driver's view of the roadway ahead is limited to approximately 100 metres or less. This is due in part to the left side guard rail, which consists of three horizontal rails, which were also covered with snow on the day of the accident.

**18**  It was probably an unusual circumstance that traffic would be backed up to the point that it was on the day in question, due, apparently to an accident to the north of the overpass, but the possibility of obstacles or hazards on a single lane bridge or overpass should always be in the mind of the reasonably prudent driver. If not a line of backed-up traffic, the obstacle might just as easily have been an incapacitated vehicle or wildlife.

**19**  In my view, the limited view of the roadway ahead, together with the downhill grade and the slippery road surface, called for both the defendant and the plaintiff to be driving with greater caution than they were, as each came onto the slippery concrete-surfaced overpass. All of the conditions save and except the obstacles which came into view suddenly at the furthermost point in their field of vision of the roadway were known or ought to have been known to both drivers.

**20**  Mr. Thomas was driving more slowly than Mr. Bounds, because, I find, of his greater awareness of the true slipperiness of the road, but he still lost control on account of his speed and failing to take account of the limited sight line and downhill grade, and that resulted in him stopping his pickup in a manner that was unsafe for him. I find that the at-rest position of his pickup on the overpass was a contributing cause of the collision and thus his injuries. I infer that, but for the obstruction created by the angled position of his truck across the lane of travel, Mr. Bounds probably would have been able to ultimately avoid the collision by passing to the left of the Thomas vehicle as he futilely tried to do.

**Conclusion on Liability**

**21**  I find both parties negligent and apportion fault for the accident and the plaintiff's injuries in the proportion of two-thirds to the defendant and one-third to the plaintiff.

**The Plaintiff's Injuries and Medical Treatment**

**22**  Mr. Thomas did not notice any injuries to himself at the scene. He was wearing his lap and shoulder seat belts. His truck was driveable and he drove Mr. Bounds and his two children to a garage. From his wife's testimony I gather that he then called her and she caught a ride to the garage and drove his vehicle home. He said that he did not feel well when he arrived at home. He had struck his head and had a headache and his wife did his horse feeding chores that evening. Over the next couple of days his headaches persisted and he felt lower back stiffness that moved to the mid-back and neck within a week or two and settled there. He made an appointment and eventually saw his family physician Dr. Fike two weeks after the accident, on January 20, 2005. Dr. Fike noted mild decreased rotation of the thoracic spine and recommended physiotherapy and Extra Strength Tylenol.

**23**  The accident occurred during a week that Mr. Thomas had booked off as a vacation from his job as manager of Mount Paul Centre where he was employed by the Kamloops Indian Band ("KIB"). He had actually changed his tenure from employee to contractor the day prior to the accident. He was unable to resume his duties for approximately one month because of his sore mid-back and then began going to the facility for a few hours per day. Prior to his return, he had, on January 27, 2005, received 30 days notice terminating his contract of employment. This notice informed him that because of the uncertainty of his return relating to his injuries as well as "because of operational concerns", the Band Council had "decided to accelerate the planned posting of the manager's position." I will return to this subject when discussing the wage loss claim.

**24**  Mr. Thomas attended his physician's office again in relation to his back injury on January 25, 2005, receiving prescriptions for Tylenol #3 and Flexeril. These were renewed on February 3, 2005, at which time Mr. Thomas reported that he could not sit for very long and had decreased range of motion in his back because of stiffness and some pain, and reported that he was working intermittently less than full days.

**25**  Mr. Thomas attended 21 sessions of physiotherapy during the months of January to April 2005, and attended at his physician's clinic approximately every three weeks. Different anti-inflammatory drugs were prescribed. On April 27, 2005, Dr. Fike noted that Mr. Thomas reported his back was still sore and fairly unchanged over the past several months, that he was having difficulty doing much work on the farm and the pain was localized in the muscles above and below the left scapula. Continued physiotherapy was recommended and was pursued for 18 more sessions until, by July 15, 2005, it was proving unhelpful. Mr. Thomas told Dr. Fike that pool exercises actually aggravated his back pain. Dr. Fike recommended it be discontinued, and referred Mr. Thomas for a rheumatology assessment.

**26**  Mr. Thomas was examined by a rheumatologist on three occasions between October 31, 2005 and March 2006.

**27**  On March 14, 2006, Dr. Fike referred Mr. Thomas to Dr. Faridi for a neurosurgical opinion, and Mr. Thomas first saw Dr. Faridi on May 18, 2006. Records reviewed at that time by Dr. Faridi included x-rays and a January 2006 MRI scan that showed an old compression fracture of the T7 vertebra and recorded previous chronic pain syndrome in 1991, 1992, and 1994.

**28**  Dr. Faridi's June 26, 2008 report includes the following comments on his first examination:

Tandem gait was normal, reflexes were normal in both upper and lower extremity, there were no clonus, no Hoffman sign and the range of the motion of the neck was normal.

The importance of these findings indicate that patient doesn't have any compression of the spinal cord.

Patient had difficulty lifting both legs which caused pain in the interscapular region and there was moderate tenderness in the interscapular region.

Also I noticed that this patient did not have any specific pain behaviour and his walking was not affected by the pain, but turning on the examination table was affected by pain. My impression was that this patient had chronic pain syndrome which was localized to interscapular region and this pain has recurred after the patient's car accident.

At that time, we discussed various treatments for the chronic pain including reassurance, exercises and massaging, medication and possibility of the cortisone injection and rhizotomy.

**29**  Mr. Thomas returned to see Dr. Faridi one year later, May 17, 2007. Dr. Faridi noted that the findings were the same as one year earlier and that Mr. Thomas was specifically requesting the percutaneous radiofrequency facet rhizotomy for pain relief. Dr. Faridi's medical report continues:

On October 31, 2007, patient had percutaneous radiofrequency facet rhizotomy under general anesthesia from T5-T6 to L2-L3 bilaterally. Patient tolerated the procedure quite well and he left the hospital in good condition.

On December 6, 2007, patient came to the office. He indicated that the procedure had made him worse, his back was more still, he was having headaches and he was not able to sleep. I assured the patient that none of these complications could be related to the procedure, but perhaps incidental aggravation of the chronic pain could happen for any reason, including the rhizotomy, but I have not seen this condition very often.

This patient wrote a letter to me on February 17, 2008, copy of that letter also has been sent to Mr. Paulsen. Basically he said that he had improved compared to his previous condition, which to my understanding is that his worsening, after the procedure, had improved to about 80 to 85% and he was trying to go back to work and also go back to University.

This patient also has been seen by Dr. Navratil in the past and the history from Dr. Navratil, which is part of the referral letter, also indicates that patient has myofascial pain along the spine including the interscapular region, cervical region and lumbar region and also having headaches.

In summary, this patient was quite an active person according to himself, was involved in a motor vehicle accident in January 2005. The exact nature of the accident is not known to me. In April, the patient's x-ray showed that patient had 25% fracture of T7 which also was diagnosed in 1991. The MRI scan from January 2006 showed that patient had mild degenerative changes at C5-C6 and C6-C7 and also anterior compression of T7 dorsal vertebra without any impingement of the spinal cord.

This patient's examination was consistent with a myofascial type pain or chronic pain or persistent pain.

**30**  Dr. Faridi set out his prognosis at page 5 of his June 26, 2008 report:

PROGNOSIS: Prognosis of the chronic pain is very guarded. A chronic pain normally lasts very long. I have no numbers to give except from my own experience. The average length of the chronic pain could be between 5 to 10 years depending on the severity of the pain.

Complete recovery from the chronic pain is possible, but is not common. People normally are left with some sort of pain, but they are able to deal with that pain and I believe at least about 40% of the patients, who have chronic pain and are not working for almost a year at the time of the presentation, are able to go back to work, but if they have been off work for more than 2-3 years, possibility of them returning to work is unlikely.

In conclusion, this patient is suffering from chronic, persistent pain. He also has an old T7 compression fracture. The chronic pain basically is localized to that area, but, at present time, the fracture has healed and I don't believe the pain is arising from the fracture. The prognosis of the chronic pain is guarded and unpredictable, but, in all likelihood, this patient will not be able to return to work.

**31**  The plaintiff and his wife moved to Tucson, Arizona in the summer of 2006, planning to take advantage of a course in race track management offered at the University of Arizona. Mr. Thomas received 4 trigger point injections and 7 physiotherapy sessions in September and October 2006 at the Campus Health Services.

**32**  Dr. Boyce, an orthopaedic surgeon, conducted an independent medical examination of the plaintiff for the defendant in May or June 2008. (His June 26, 2008 report does not specify the date of examination.) He was not required for cross-examination. Dr. Boyce had noted subjective pain restricting movement when he asked the plaintiff to flex and extend his back, and noted tenderness on palpation in the area of the mid to lower thoracic spine and along the parathoracic musculature. He was of the opinion that Mr. Thomas suffered a soft tissue injury, "mostly musculotendinous and ligamentous with a pre-existing mid back vertebral injury which would predispose him to a prolonged convalescence."

**The Plaintiff's Pre-accident Health Status**

**33**  The plaintiff has a prior history of many injuries. He competed in rodeo bull riding, bare-back bronc riding, and to a limited extent steer wrestling, starting in high school and continuing to the professional level. He says he was not permanently disabled by any rodeo injuries, but he broke a leg on his first bull ride and had other breaks later. His most serious rodeo injury was in the late 1970's when he broke ribs on both sides and punctured a lung, none of which stopped him from returning to ride broncs. He denies any specific injury to his back from rodeoing, but he says he was not aware of the old compression fracture to his T7 vertebra until this litigation, so there remains the possibility that it was injured that long ago.

**34**  During and after his rodeo days, Mr. Thomas worked in the tire service business and recalled straining his upper back swinging a 40 pound hammer. He did not recall any Worker's Compensation claims arising out of back injury in the tire industry, but acknowledged same when shown claim documents for a claim in October 1986 and another in March 1989. The former injury was pulling his back out of place while taking a tire off a rim, causing severe pain to the mid-back, and the latter was injuring his lower thoracic back while losing his grip and falling over backward onto a 6" by 6" block.

**35**  Mr. Thomas' most significant previous work injury would appear to be while working as a driller's helper in July 1991, when he fell 15 to 20 feet from a drill tower, landing on his back. He described his injuries at that time as hurting the middle of his back and breaking ribs on the right side. X-rays taken at that time showed an old minor wedge compression fracture at about the 7th thoracic vertebral body.

**36**  Mr. Thomas remained off work on wage loss compensation for over a year. The Workers' Compensation Board ("WCB") decided to terminate benefits as of August 9, 1992, but Mr. Thomas appealed that decision and the appeal was heard and decided against him in September 1993. Mr. Thomas told the Review Board in September 1993 that his condition remained essentially unchanged from the time his wage loss benefits were terminated to the date of the hearing, and that he was unable to ride horseback or go dancing and the quality of his life had been drastically affected.

**37**  After the termination of wage loss benefits but while the appeal was pending, Mr. Thomas was referred by his family doctor (now deceased) to Dr. Catherine Calder, a Physical Medicine and Rehabilitation practitioner, for a second opinion regarding his thoracic back pain and its management. She authored a report dated August 18, 1992, and was called as a witness at trial by the defendant to revisit her comments. The significant symptom she noted was continued interscapular and neck pain, and she diagnosed myofascial pain syndrome, which she would now call chronic regional pain. Dr. Calder's report noted that she spent a fair bit of time presenting Mr. Thomas "with models, illustrations, and a bit of a 'pep talk' for the next chapter of taking inventory of his talents and alternative life opportunities. I also counselled him on the heavy nature of diamond drilling and other heavy labour, and how most of these jobs are terminal needing gradation into an alternative employment by age 50. In a sense he has had medical retirement forced upon him, but seems somewhat more aware of his choices and options."

**38**  Dr. Calder said it was rare for her to comment in that fashion, and her use of the phrase "forced upon" was strong, but she wanted to give a "heads up" to Mr. Thomas and his other doctors of the option of retraining and to impress upon them the need for a decision, considering his limitations already evident at age 35.

**39**  The plaintiff did heed that advice to a minor degree and enrolled to finish high school through GED, which he thought would better his chances to get more local work than was available to him as a driller's helper. He agreed on cross-examination that he was not then physically able to return to that occupation but thought that he would have been at a later point in time. He dropped the GED effort after about six weeks when he succeeded in being elected as a Band Councillor. He was successfully re-elected three times, and sought the job as manager of Mount Paul Centre only after he was eventually defeated at the polls.

**40**  Mr. Thomas was involved in an altercation at the Band office on May 5, 1993 and attended his doctor's office on May 7, reporting that his mid-back pain, chronic since his injury in July 1991, had been worsened by that altercation. He reduced his time in the Band office to half time until June 7, 1993.

**41**  Mr. Thomas attended his doctor on December 13, 1993 regarding persistent pain in the right scapular area, and again on March 24, 1994 he attended regarding a flare up of pain between his shoulder blades after working on his car. At this time he asked for another second opinion referral to see if anything could be done, and he was referred to a Dr. Sundby, whom he saw in August 1994. Dr. Sundby noted degenerative changes in all areas of Mr. Thomas' back and suggested a bone scan and a complete myelogram to check on whether a thoracic disc was involved. These investigations were done and all were negative

**42**  Mr. Thomas pursued a separate WCB claim in respect of attributing the myofascial pain syndrome diagnosed by Dr. Calder to his fall from the drill tower, but that claim was denied in 1994.

**43**  There is an unfortunate gap in Mr. Thomas' medical records from late 1994 until Dr. Fike became his family doctor in December 2000, because his previous doctor's records were apparently destroyed.

**44**  Dr. Fike's medical report states that he did not treat Mr. Thomas for any job or farm related injuries prior to this accident. That comment has to be qualified slightly, because he acknowledged that his clinical notes record a visit in January 2002 relating to pain from rolling bales, together with his patient's report that his back was tight every day. Those notes also record a visit in February 2002 when Mr. Thomas said the muscles under his scapulae were tight all the time.

**45**  The plaintiff's wife's testimony provided details on activities, work history and dates of various events in their life that was generally more reliable than the plaintiff's testimony on such matters. Mr. Thomas' evidence that the assault in the Band office was during his second term as Band councillor did not seem likely, given that it was documented in May 1993, and Mrs. Thomas' recollection of it being during his first term as councillor seems more correct. But his recollection that he was off a couple of weeks is closer to the documented one month of half time, than is Mrs. Thomas' recollection that his injury resolved in 3 or 4 days.

**46**  By Mrs. Thomas' account, the spring following the plaintiff's fall from the drill tower they started producing hay and raising thoroughbred horses on their ten acre hobby farm. In the fall of 1992, after the WCB wage loss benefits terminated, they earned some money harvesting firewood, utilizing a hydraulic wood splitter.

**The "Thin Skull" v. "Crumbling Skull" Issue**

**47**  The defendant cited the recent case of ***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=) where at para. 46 the difference between the "thin skull" and "crumbling" skull was set out:

[46] This case illustrates the difference between a "thin skull" and a "crumbling skull":

\* A finding that the plaintiff has a thin skull results if the injuries resulting from the defendant's ***negligence*** are unexpectedly severe owing to a pre-existing condition. In such a case, the defendants are still liable for the full extent of the injuries.

\* A plaintiff will be found to have a crumbling skull if the pre-existing condition was inherent in his original position and would have manifested debilitating effects anyway. In that situation, the defendants are not liable to compensate the plaintiff for these debilitating effects.

**48**  An even more recent case where the concepts are aptly defined in similar terms is ***Filsinger v. ICBC*** [*2009 BCSC 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3P5-00000-00&context=), at paras. 24 to 26:

[24] The defendant does not go so far as to deny that the accident caused or contributed to the plaintiff's injuries. The concern is as to the extent. The issue is whether this is a "thin skull" or a "crumbling skull" situation. Both address the circumstances of a pre-existing condition, and its effect upon the accident victim. The law is that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the accident: ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 35, [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The court requires "a measurable risk" or "a real or substantial possibility and not speculation" that the pre-existing condition would have manifested in the future regardless of the plaintiff's ***negligence***. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: ***Athey v. Leonati***, at para. 27.

[25] The injury is deemed "thin skull" when there is a pre-existing condition that is not active or symptomatic at the time of the accident, and that was unlikely to become active but for the accident.

[26] A "crumbling skull" injury is also one where there is a pre-existing condition, but one which is active or likely to become active. If the injury is proven to be of a thin skull nature, then the defendant is liable for all the plaintiff's injuries resulting from the accident. If it is of a crumbling skull nature, then the plaintiff is liable only to the extent that the accident caused an aggravation to the existing condition.

**49**  In the ***Filsinger*** case, the court decided that the plaintiff's shoulder injuries should be classified as the result of a latent vulnerability that was not actively pre-existing, but that his pre-existing lower back condition was either inherent in the plaintiff or a result of a previous work-related accident.

**50**  In the ***Gilmour*** case the court found on a balance of probabilities that the plaintiff's pre-existing lumbar spine condition would have detrimentally affected the plaintiff in the future regardless of the defendant's ***negligence***. In that case the court decided on a date by which that would probably have occurred in the absence of the ***negligence***. In the ***Filsinger*** case, a different approach was taken and a contingency reduction of 20% was applied to the non-pecuniary and future earning capacity awards to account for the possibility that the losses claimed would have occurred in the absence of ***negligence***.

**51**  Dr. Faridi testified that he used the phraseology "this pain has recurred after the patient's car accident", because he believes the plaintiff was not having pain before the accident. Dr. Faridi did not expand on the source of his belief, which remains obscure and non-persuasive to me. On cross-examination Dr. Faridi was very defensive of his statement, but when asked to assume certain facts similar to the evidence heard, he acknowledged that he might say "90% aggravated" rather than "recurred".

**52**  The plaintiff and his wife and stepson all testified to the effect that although he did not avoid doing his work and recreation on account of pain prior to the accident, (as he clearly had for at least three years following the July 1991 fall) there was always some pain, and he would complain every once in a while.

**53**  In any case, the test for a "crumbling skull" type of assessment to apply does not necessarily require that the pre-existing condition be active to any particular degree, but only that there is a real or substantial possibility that it will become active and detrimentally affect the plaintiff in the future even without the negligent event. In this case, considering the serious and protracted nature of the mid-back injury in 1991, the previous aggravations from relatively minor events such as the office altercation, falling from a chair, rolling bales, the persistent and constant tightness complained of in 2002, the degenerative conditions noted in his spine, and the persistence of symptoms in proximity to the compression-fractured T7 vertebra, I find that there is a very real possibility that Mr. Thomas' pre-existing very vulnerable back condition would have become debilitating at some point in the future regardless of this accident.

**54**  I find that a contingency reduction in the amount of 10% in respect of those heads of damage with an otherwise incalculable component of future loss, including non-pecuniary damages, will appropriately take account of the pre-existing condition of the plaintiff. I do not find it necessary to apply that contingency reduction to the loss of future earning capacity, because in making that assessment I will be specifically considering how long the plaintiff's working life would have been in the absence of the accident.

**Non-pecuniary Damages**

**55**  While this accident was clearly not the genesis of Mr. Thomas' thoracic back pain, I am satisfied that it caused a significant aggravation of his very vulnerable pre-existing back condition. The effects of that aggravation are chronic persistent pain. Although there is a prospect that he will recover from this trauma as he did from the more significant trauma of the fall onto his back from a height 15 or 20 feet, there is no certainty to that, and no medical expert has ventured further than Dr. Boyce, the defendant's orthopaedic surgeon expounding on soft tissue injury, who says "I would suspect that he should have overall functional improvement."

**56**  Dr. Faridi opined in his June 26, 2008 report (some of which is quoted above in para. 30) that Mr. Thomas will likely not be able to return to work. His opinion had been sought in March 2008, and at that time Dr. Faridi said it was difficult for him to indicate if the patient could go back to work or not. He did not explain what changed his approach to that issue in the three intervening months, during which he had not apparently seen the plaintiff.

**57**  Dr. Fike said, in his June 30, 2008 report:

At this point, certainly this man is unemployable. I cannot see any employer willing to hire someone who cannot sit for more than 30 minutes, who cannot stand for more than an hour, who must lie down often, and sometimes cannot report to work because his back is so tight and sore in the morning. I am not prepared at this time to make a statement regarding permanent disability, but without some other type of therapy being offered to him (therapy I am not aware of), I do not see that time alone has made any improvement in his condition. In fact, he states that he is weaker since his rhizotomy than before.

**58**  I cannot attach much independent weight to the statement in Dr. Fike's report that before the accident his patient was very active physically, doing a lot of physical work on his farm raising horses and in his job managing the KXA facilities and racetrack. This is probably gleaned from self-reporting from Mr. Thomas and is therefore non-corroborative. However, I am satisfied on the evidence directly from Mr. Thomas and his wife and step-son that Mr. Thomas was quite physically active, considering that there were some residual limitations from the effects of his work injuries to his back. Other evidence establishes that the Thomas family acreage produced as many as three hay crops per year, and that this involved not only the harvesting, but moving irrigation pipes during the growth phase. Mr. Thomas also harvested hay on the land of others on a sharecropping basis. He also enjoyed hunting and fishing, which in his case, as an Aboriginal, used to involve dip-netting in rivers. He has tried hunting once since the accident, but even the jostling in a vehicle is intolerable as recreation.

**59**  The plaintiff presented evidence of the results of a functional capacity evaluation performed in June 2008 by occupational therapist Nancy Scullion of Interior Rehabilitation Services. Mr. Thomas was assessed at three locations: in the clinic, at his former work site at the Kamloops Exhibition grounds, and at his 10 acre property in Kamloops. He could not be assessed in his home, because it (together with contents, including financial records which would have been important evidence in this case) was destroyed by fire in June 2007. The results of Ms. Scullion's evaluation were that Mr. Thomas presented with limited tolerance for:

-sustained above eye level reaching;

-sustained neck extension work postures;

-sustained and repetitive bending;

-sustained and repetitive squatting and crouching;

-sustained and prolonged low level work;

-completion of sustained and repetitive floor to eye level work;

and also presented with:

-inability to complete lifting or carrying tasks beyond the *Limited* or *Sedentary* categories on an *Occasional* basis:

-inability to walk or sit on more than an *Occasional* basis.

**60**  Ms. Scullion's conclusion was that the plaintiff does not meet the physical demands associated with the occupations that he participated in prior to the accident, namely horse rancher, horse trainer, horse exerciser, hay farmer or recreational facilities manager. Her findings and utilization of the Dictionary of Occupational Titles and National Occupational Classification suggest that Mr. Thomas may meet the physical demands of the occupations of Horse Identifier, with some additional support to assure the horses did not quickly rear their heads, and may also meet the physical demands of Horse Race Starter as well as Race Track Steward on a part-time basis provided he was able to change his physical positions frequently and his need to lift or carry was limited.

**61**  Mr. Thomas' residual employability potential was also assessed by Dr. Gordon Wallace, a psychological and vocational rehabilitation consultant. This assessment also took place in June 2008. Dr. Wallace had Ms. Scullion's functional capacity evaluation in hand at the time of his assessment, and he also administered his own psychological and vocational test batteries.

**62**  Dr. Wallace provided a very thorough written report and was cross-examined at trial. In essence it is his opinion that, apart from the significant difficulties that Mr. Thomas has experienced in attending his university classes in Arizona due to his chronic pain, setting a pace that would prolong that nominal 4 year program by as much as 50 per cent, Mr. Thomas does not have the intellectual ability to successfully complete the university degree program in racetrack management that he has embarked upon. When informed that Mr. Thomas is receiving contingent funding from the Kamloops Indian Band that is repayable in the event that he does not successfully complete the program, he said that he would definitely advise Mr. Thomas to change directions and strive for either direct entry employment in low skilled service oriented occupations or less challenging re-training. He had previously identified the latter option as including shorter college level programs in Canada within the business management and administration fields. Mr. Thomas' age was a significant factor in Dr. Wallace's assessment of his employability and his re-training options.

**63**  I conclude that the aggravation of Mr. Thomas' pre-existing back condition in the January 2005 accident has caused, and will continue to cause him significant pain and suffering and has had relatively profound affect on his lifestyle.

**64**  The assessment of the appropriate non-pecuniary award should take into account the awards in comparable cases, and I have been referred by the plaintiff to recent cases where awards in the range of $80,000 to $90,000 were made, namely:

***Gold v. Joe***, [*[2008] B.C.J. No. 1254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G363-00000-00&context=), [*2008 BCSC 865*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G363-00000-00&context=);

***De Cenzo v. Williams***, [*[2006] B.C.J. No. 2861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2NW-00000-00&context=) Vancouver Registry No. M031024

***Bedwell v. McGill***, [*[2006] B.C.J. No. 498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23S1-00000-00&context=) Vancouver Registry No. M013797

***Steward v. Berezan***, [*[2005] B.C.J. No. 2838*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S313-00000-00&context=) New Westminster Registry No. S071314

***Dawson v. Gee***, [*[2000] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X207-00000-00&context=) Vancouver Registry No. B966216

**65**  The defendant submits that the appropriate award for non-pecuniary damages is in the vicinity of $30,000 and has cited the following cases as comparables:

***Jackson v. Hennessy et al***, [*2003 BCSC 663*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X317-00000-00&context=)

***Presley v. Prasad***, [*[1988] B.C.J. No. 606*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6091-00000-00&context=)

**66**  In my opinion, the cases cited by the plaintiff are much more comparable to his situation than are the ones cited by the defendant.

**67**  I assess the plaintiff's non-pecuniary damages at $80,000, which will be reduced to $72,000 by the 10% contingency determined in para. 54 of these reasons and, of course, will then be subject to apportionment for contributory ***negligence***.

**Past Income Loss**

**68**  It is common ground that the injuries Mr. Thomas sustained in the accident and his consequent inability to perform his job duties was one of the reasons that his last management contract, due to expire on March 31, 2005, was terminated effective February 25, 2005.

**69**  The January 5, 2005 contract provided for 30 days notice of termination by either party and for an extension by mutual agreement for a term not exceeding a further 3 months. Mr. Thomas had been hired initially effective March 1, 2004 for a three month term to end May 31, 2004, and in May 2004, his employment was extended for a fixed term to March 31, 2005, by a decision of the Band Council. His monthly salary during both terms was $2,800.

**70**  The change to contractual status on January 5, 2005 came about to accommodate Mr. Thomas' desire to increase his income to $1,530.76 bi-weekly, after there had been discussions wherein he threatened to resign, which by his and his wife's account was a ploy to renegotiate his salary, rather than a dissatisfaction with the job.

**71**  The evidence persuades me that it is likely that if he had not been injured, Mr. Thomas would have worked until March 31, 2005, but that it is unlikely that he would have been offered the 3 month extension contemplated in the contract at the end of March 2005. The Council had issues with the management of the Mount Paul Centre and operational concerns that centred on record keeping and planning. As a result of Mr. Thomas' termination, the Band accelerated its original plans to post the permanent management position, which is why Mr. Thomas' employment was for a fixed term in the first place. While the Director of Operations, Mr. McGregor, complimented Mr. Thomas in his termination letter on his dedication and efforts to the growth of the Centre, and he invited Mr. Thomas to apply when the job posting was made, his testimony strongly suggested that it would not be likely that Mr. Thomas' skill set would have met the permanent job requirements. He said that Mr. Thomas' skills were mainly the horse racing business and he was more of a promoter than a manager.

**72**  In the result, Mr. Thomas did not apply for the permanent job, feeling that he was not physically capable of performing the job duties. The position was eliminated in September 2007, in any event.

**73**  In terms of past income loss relating specifically to his management job with the Kamloops Indian Band up to March 31, 2005, I measure that at 12 weeks at the bi-weekly rate of $1,530.76, that is the sum of $9,184.56.

**74**  For the period between April 1, 2005 and the end of trial date of September 19, 2008, the best that can be done is to impute an income based on the fragmentary evidence available or by resorting to statistical data. Mr. Thomas may have succeeded in obtaining some other employment with the KIB but that is speculative. The plaintiff suggests that his income could be imputed as that of the average B.C. male with an education consistent with that of Mr. Thomas, less contingencies for average risks.

**75**  The defendant points out all that is wrong with the state of the evidence and the expert economist's assumptions and the plaintiff's submissions on this head of damage, but the defendant takes no position on what the proper measure of damages is or how it should be determined, and simply asserts that the plaintiff has not proven this loss adequately.

**76**  The data provided by Associated Economic Consultants Ltd. based on statistically simulated models informs the plaintiff's submissions. Based on that data, the plaintiff finds support for the submission that the present value of the plaintiff's income loss, if it included all of 2005 and up to the date of trial would be $140,955, assuming full-time, full-year employment, and including adjustments for effects of choices and risks, or $163,402 if adjusted only for average risks on the assumption that Mr. Thomas would not have chosen to be out of the work force. If the portion of those amounts attributable to 2005 is reduced to commence with April 1, 2005, there would, by my calculations, be a reduction of those cumulative amounts to approximately $132,127 and $153,176 respectively. I find the lower of these amounts to be more realistic in Mr. Thomas' case in relation to losses prior to trial.

**77**  I note for comparative purposes that Mr. Thomas' monthly salary in what he called his "dream job" before he negotiated the contractual term to maximize his income was $2,800, which equals $33,600 per year. This would have been income tax free as earned on the reserve. I note too that prior to the accident Mr. Thomas had not been employed off reserve for approximately 13.5 years, and had not filed any income tax returns in the last twenty years.

**78**  While I am satisfied that the accident was responsible for injuries that effectively precluded the feasibility of Mr. Thomas' horse breeding enterprise, it was already well past its zenith and headed for its demise. Prior to the accident the herd had been reduced to 6 or 7 mares from the maximum 27 or 28 in 1998 or 1999 according to Mrs. Thomas, and her estimate that they still made more than the $10,000 profit per year that they had at the peak does not make sense to me. Both Mr. Thomas and his wife thought they made an annual profit, but they were unable to produce or reconstruct any documentary corroboration and I question the accuracy of their recollections. They had not made any payments on their financed haying equipment since June 2003 and that equipment was repossessed in 2005. In my assessment, to the extent that the acceleration of the demise of the horse breeding and hay harvesting enterprises was attributable to the injuries sustained in the accident, the loss is not a pecuniary loss, but more in the nature of lifestyle lost, which is better compensated for as part of the non-pecuniary award, and that is how I have treated it.

**79**  Mr. Thomas received some Employment Insurance ("EI") benefits in late 2005. The evidence in this regard consists of one monthly benefit statement and banking records showing deposits of similar amounts as that isolated statement over a three month period in late 2005. The total received appears to be $5,018. He also received $5,753.34 from working in Arizona as a horse identifier for the State of Arizona in 2007 and $3,889.38 in 2008.

**80**  To summarize, then, I assess the plaintiff's gross past wage loss to be $132,127 plus $9,184.56, less $5,018, less $5,753.34, less $3,889.38, which results in the sum of $126,650.84. The $9,184.56 component of that would have been earned on the reserve lands, so the reduction for taxes and EI contributions will only apply to $117,466.28. The economists report indicates that the reduction on that amount should be 28.8%. Therefore the total income loss after reduction for taxes and EI is $92,820.55, before the allocation as to fault.

**Loss of Future Earning Capacity**

**81**  I entertain no doubt that the well known four factors articulated 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=) all apply to Mr. Thomas. I think it is unlikely that Mr. Thomas will fully regain his pre-accident physical abilities for purposes of employment, but he perceives that he is still improving from the point he was at after the rhizotomy. He does have residual employability according to Dr. Wallace, and he has earned income in the last two years, but Dr. Wallace thinks that the probability of him obtaining and maintaining ongoing competitive employment is less than 50%.

**82**  I find that there is a substantial possibility that Mr. Thomas would have had a foreshortened working life in physically demanding work on a competitive basis even without this accident, as a result of the cumulative effect of previous back injuries and the degenerative processes at work. Dr. Calder's admonitions and references to forced retirement in 1992, when Mr. Thomas was 35, were apparently somewhat premature at the time, but Mr. Thomas' political career as a Band Councillor allowed him to limit his physically demanding work to the intermittent tasks on the farm and seasonal haying. The physical demands of the facilities management position were also intermittent. I am doubtful that in early January 2005 prior to this accident, at age 48, Mr. Thomas was competitively employable in a primarily physically demanding job, by reason of the condition of the thoracic region of his back, as well as his age. He may have been able to continue some type of managerial employment with a mix of physical tasks for a few more years, perhaps to age 55, but I think that in all probability he would have been forced by at least age 55 to reduce his work to the same level and type of work that will now be open to him at that age.

**83**  If Mr. Thomas is prudent in his choice of re-training, along the lines suggested by Dr. Wallace, he could become better qualified by age 55 to hold less physical employment than if he had clung to the more physically demanding jobs until the pre-existing condition forced him out.

**84**  I realize that Mr. Thomas has been pursuing employment in the one field that interests him the most, but not only must he re-evaluate that plan in light of Dr. Wallace's advice based on his testing, it is apparent to me that limiting his part-time employment to that same field is probably not optimizing his income earning potential. Mr. Thomas has earned an average of approximately $5,000 per year over the past two years.

**85**  One of the common approaches in assessing loss of earning capacity is to compare the present value of the likely future of the plaintiff to the present value of the future that would have been likely if the accident had not happened. (See ***Rosvold v. Dunlop*** [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at paragraph 11.) That is only possible in this case in the roughest way, if at all. Unlike many cases where the plaintiff's pre-accident future is known or determinable, in this case there is great uncertainty in determining what Mr. Thomas would have done after his job expired if he had not been injured.

**86**  Various methods of approaching the assessment under this head of damage were described 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=), and it was acknowledged in that description that in the end they all seem equally arbitrary.

**87**  The approach I think is best suited to the assessment in this case, given my findings in para. 82 above, is a variation of the first method described in ***Palmer,*** but bears in mind that the assessment of the loss of this capital asset is not intended to be a mathematical exercise. My award will roughly approximate the present value of full annual income losses until the end of the year in which Mr. Thomas reaches age 55, less a set-off for income that I anticipate he will earn.

**88**  Mr. Thomas will turn 55 years of age on September 20, 2011. Table 2 in the economist's report supplies some data on cumulative present values. The present value of the postulated income for the category including the plaintiff from the date of trial to the end of 2011 is $141,389, after adjustment for risks. I think it is more likely that Mr. Thomas will attempt retraining to take some advantage of his skills and management experience rather than seek direct entry jobs, so I think his earnings will remain very low for the next two years and the set-off should be modest, reducing the present value of income lost on this approach to approximately $125,000. That is the amount that I assess as the award for loss of future earning capacity. As mentioned previously, this amount is not subject to a discount for the contingency of the pre-existing condition causing the same loss, because that contingency has already been a major factor in the assessment.

**Cost of Future Care**

**89**  Ms. Scullion's Cost of Future Care Report provides costs for psychological counselling, physical therapy, pain management assessment and trigger point or epidural injections, a ranch hand, various medications, and a recliner chair. The initial costs, including the first year of salary ($21,000 US) and benefits ($6,300 US) for a ranch hand are $42,675 (US Dollars), plus $1,126.42 (Cdn Dollars), with ongoing costs of $30,439.33 US plus $1,126.42 Cdn.

**90**  The defendant disputes that Ms. Scullion, an occupational therapist, is qualified to prescribe physiotherapy or psychological counselling, and disputes the cost estimates of services as unsupported by any admissible evidence. The defendant also submits that the ranch hand proposal is not related to any evidence that Mr. Thomas is going to buy a ranch.

**91**  I find Ms. Scullion's recommendation of the provision of a ranch hand to be unreasonable, perhaps even preposterous. The defendant is correct in stating that her recommendation is disconnected from the evidence. All that she says in the body of her report is the following:

In view of Mr. Thomas' inability to meet the physical demands associated with the occupation of Horse Rancher, and given his desire to continue horse ranching as he enjoyed prior to the accident in question, AND given his physical limitations which prevent him from completing home maintenance activities it is recommended that he be provided with ***Ranch Hand assistance***. This individual would serve to assist with the horses as well as complete home maintenance tasks.

**92**  As I mentioned above, Mr. Thomas' horse breeding and training enterprise was waning and approaching its demise as a viable business well before the accident. It was never his primary occupation, and at its peak it may have produced a net profit of $10,000 if one accepts the unsubstantiated recollection of Mr. and Mrs. Thomas, which I did not find reliable on this subject. It was more in the nature of a self-supporting hobby while Mr. Thomas served as Band Councillor, and if I understand Mr. Thomas' motivation correctly, the importance to him of this activity was the satisfaction he gained from working with the horses himself. The loss of that is part of what the non-pecuniary award is compensating him for. The claim is also inconsistent with the rationale for the plaintiff's claim for the loss of revenue from the horse enterprise, namely that the business was lost because he could no longer do the necessary work.

**93**  Hiring a ranch hand would not be compensating the plaintiff for something he lost as a result of the accident, and in my view it certainly is not properly claimable as a cost of future care item. In order to be claimable as such, there must be a medical justification for the claim and it must be moderate and fair to both parties. (See ***Milina v. Bartsch*** [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=)). Claims for assistance for necessary home maintenance that the plaintiff normally undertakes are often allowed under this head of damage, but this recommendation is not in the same category. It is more akin to hiring an assistant to enable the plaintiff and the assistant together to fulfil the plaintiff's employment duties in order to maintain the income from that employment, while at the same time claiming the income as lost. Or, on another view, akin to hiring someone to help the plaintiff to enjoy a hobby.

**94**  There is no medical evidence before me that currently recommends or prescribes trigger point or epidural injections or physiotherapy. The plaintiff has had a great deal of physiotherapy in the past and on his report that it was not helping it was discontinued. Mrs. Thomas testified that Mr. Thomas has had injections 12 or 13 times and is sore afterwards and the relief is short lived.

**95**  I think that Ms. Scullion is probably qualified to recommend the recliner as a necessary item of equipment and her reasoning appears sound. Mr. Thomas did testify that he found a lay-out bed on an airplane flight to be less painful than a seat.

**96**  I am satisfied that the recommendation for psychological counselling is sound and I will use the direct opinion of Dr. Wallace, a registered psychologist, as to the number of sessions recommended.

**97**  As to the medications, the issue is not whether they are medically necessary, (I find that they are), but how long they will be necessary and whether alternative funding is available to Mr. Thomas through the Department of Indian Affairs. The latter issue was not canvassed until closing arguments, at which time plaintiff's counsel submitted that Mr. Thomas' coverage for medications would end if he discontinued his university studies, which seems likely to happen. This submission is not supported with evidence, and I query if that is only the case if Mr. Thomas elects to remain in the United States rather than return to the reserve lands in Kamloops, which the defendant argues (also without evidence in support) will entitle him to coverage. The defendant questions Ms. Scullion's assumption that Mr. Thomas does not have insurance, suggesting that the assumption has not been proved. I do not know who to fault for this gap in the evidence, but I am not prepared to decide the issue with finality on a guess. It is the plaintiff who can provide the evidence on insurance coverage and potential subrogation rights, so I will not include an award for the medication, but I grant leave to the plaintiff to apply to the court on the basis of affidavit evidence in the event that the parties cannot resolve that issue. It occurs to me that coverage under Part 7 might be relevant here in any event.

**98**  In summary, I allow as costs of future care, the claim in respect of psychological counselling for 12 sessions at $125 per session, and the purchase of a recliner chair at $650, for a total of $2,150. This is reduced to $1,935 after the 10% contingency discount and subject of course to apportionment.

**Special Damages**

**99**  No argument was made against the $1,693.11 claimed, and that claim is allowed.

**Summary of Awards**

**100**  I have assessed the following damages, before apportionment:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $72,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss: | $92,820.55 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of future earning capacity: | $125,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care: | $1,935.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages: | $1,693.11 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total:** | **$293,448.66** |  |

**Order**

**101**  The plaintiff is entitled to judgment against the defendant in the sum of $195,775.77 and costs. In addition to the leave granted in para. 97, the parties are at liberty to apply in respect of costs or to seek correction of any apparent computation errors in these reasons.

I.C. MEIKLEM J.

**End of Document**

[***Bannerman v. Sturrock, [2013] B.C.J. No. 1085***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20NY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.F. Kelleher J.

Heard: March 11-15, 2013.

Judgment: May 27, 2013.

Docket: M101322

Registry: Vancouver

**[2013] B.C.J. No. 1085** | [*2013 BCSC 918*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1H8-00000-00&context=)

Between Louise Marie Bannerman, Plaintiff, and Barbara Sturrock, Ronald Sturrock, Defendants

(101 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Pelvis — Arm injuries — Leg injuries — Knee — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Temporary total or partial disability — Age of claimant — Pre-existing injury — Mitigation — Application by Bannerman for damages from motor vehicle accident allowed in part — Accident caused minor injuries to arms, legs, neck and back — It caused serious hip injury and caused asymptomatic knee issue to become symptomatic — Bannerman awarded $8,891 in special damages, $90,000 in non-pecuniary damages for pain and suffering and reduced mobility, $55,000 for lost income, $20,000 for loss of future earning capacity and $20,000 for future care costs — Contingency of 20 percent deducted due to likelihood Bannerman would have required future hip and knee surgery regardless of accident — No failure to mitigate.**

**Damages — Types of damages — General damages — Categories of — Loss of income — Employees — For personal injuries — Calculation — Contingencies — Considerations — Aggravation of pre-existing injury — Duration of loss — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Pre-trial pecuniary loss — Past loss of income — Employment income — Expenses and expenditures — Home care — Housekeeping services — Transportation — Non-pecuniary loss — Pain and suffering — Affecting mobility — Application by Bannerman for damages from motor vehicle accident allowed in part — Accident caused minor injuries to arms, legs, neck and back — It caused serious hip injury and caused asymptomatic knee issue to become symptomatic — Bannerman awarded $8,891 in special damages, $90,000 in non-pecuniary damages for pain and suffering and reduced mobility, $55,000 for lost income, $20,000 for loss of future earning capacity and $20,000 for future care costs — Contingency of 20 percent deducted due to likelihood Bannerman would have required future hip and knee surgery regardless of accident — No failure to mitigate.**

**Tort law — *Negligence* — Causation — Causal connection — Motor vehicles — Application by Bannerman for damages from motor vehicle accident allowed in part — Accident caused minor injuries to arms, legs, neck and back — It caused serious hip injury and caused asymptomatic knee issue to become symptomatic — Bannerman awarded $8,891 in special damages, $90,000 in non-pecuniary damages for pain and suffering and reduced mobility, $55,000 for lost income, $20,000 for loss of future earning capacity and $20,000 for future care costs — Contingency of 20 percent deducted due to likelihood Bannerman would have required future hip and knee surgery regardless of accident — No failure to mitigate.**

|  |
| --- |
| Application by Bannerman for damages from a motor vehicle accident. The accident caused minor injuries to Bannerman's arms, legs, neck and back as well as a serious hip injury. It also caused an asymptomatic knee issue to become symptomatic. The defendant admitted liability, but contested the type and quantum of damages sought by Bannerman and argued that she failed to mitigate her damages by refusing a job offer.  HELD: The application was allowed in part.  Bannerman awarded was $8,891 in special damages. Her claims for the cost of outdoor maintenance, housecleaning and dog care were dismissed because she did not perform these tasks personally before the accident. Her claim for additional payment for a loss of housekeeping capacity was dismissed. Bannerman was compensated for amounts paid for housecleaning as special damages and there was no basis to compensate her for the fact she obtained housekeeping services at less than market rates. Bannerman was an active 76 year old and injuries to an elderly person could have a more profound effect than injuries to younger individuals. Bannerman was awarded $90,000 in non-pecuniary damages for pain and suffering and loss of mobility. Bannerman suffered a loss of income during a twenty month period of total disability of $35,000 and during a period of partial disability of $20,000. She was awarded $20,000 for loss of future earning capacity and $20,000 for the cost of future care. She did not fail to mitigate her damages. It was not unreasonable to refuse to take a position 50 miles from her home only accessible by logging roads. Bannerman would likely have required hip revision surgery and possibly knee surgery regardless of the accident. These contingencies resulted in a 20 percent deduction from all heads of damage. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Regulation, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=) Part VII of the Insurance Act,

**Counsel**

Counsel for the plaintiff: C.J. Bow.

Counsel for the defendants: D.M. Jeffrey.

**Reasons for Judgment**

|  |
| --- |
| **S.F. KELLEHER J.** |

**1**   Louise Bannerman was injured in a motor vehicle accident which took place on December 13, 2008. Her car was struck when she was driving eastbound on Highway 1, in Coquitlam, east of the Brunette Street exit. Liability is admitted. Ms. Bannerman seeks damages.

**The Plaintiff**

**2**  Ms. Bannerman was born and raised in Saskatchewan. She is 76 years old. Her education includes teacher training at the University of Saskatchewan and a number of courses toward her certified general accountancy. She has lived in a variety of places: Saskatoon, Uranium City, Williams Lake, Port Simpson, Ucluelet, Port Alberni, Port McNeil, Inuvik, and the Vancouver area. Ms. Bannerman has done a variety of accounting and bookkeeping jobs for First Nations bands and for aboriginal undertakings and more recently, for commercial businesses in the Lower Mainland. She is an enterprising woman with a positive outlook. Unlike many people her age she has, in her words, "no plans to slow down".

**3**  Ms. Bannerman was married from 1956 until 1978. She had three children. Her son is no longer living. She has grandchildren here in British Columbia and in California.

**4**  Starting in 2000, Ms. Bannerman did bookkeeping services for a number of construction companies. Her tasks included preparation of spreadsheets, cost accounting and preparation of reports such as HST and WCB returns.

**5**  Much of her work has been for Neil Rogic and companies that are controlled by him. Mr. Rogic is a successful developer and builder. She would prepare work and deliver it from her home in Coquitlam to a job site in Surrey.

**6**  In 2008, she designed a house on a lot that she purchased from Mr. Rogic. She obtained a mortgage with Mr. Rogic's co-signature. The home is large: some 2,900 square feet on 59A Avenue in Surrey. Ms. Bannerman designed it having in mind that she would be aging while living in it. The house has an elevator and a suite at the lowest level, which she described as being planned as a residence for a nurse who would care for her in her later years.

**7**  Ms. Bannerman moved into the home in May 2008. In August she was joined by her good friend, Colleen Broughton. She and Ms. Broughton had previously lived in the same apartment building in Coquitlam. They became acquainted as members of the strata council and then became friends. Ms. Broughton pays $1,400 in rent to the plaintiff.

**The Accident and its Aftermath**

**8**  The accident occurred at approximately 11:00 p.m. on December 13. The conditions were wet and snowy. Ms. Bannerman was driving her Dodge SUV in the middle lane. On her left was the HOV lane and on her right was the curb lane. Ms. Bannerman and her dog were the only occupants of her vehicle.

**9**  The plaintiff testified that she was struck from behind by the defendants' Jeep. The Jeep then lost control, hit an abutment and struck the Bannerman vehicle again.

**10**  Ms. Bannerman called the police. An ambulance attended. The paramedical attendant determined that Ms. Bannerman did not require transfer to a hospital. Ms. Bannerman testified the tow truck driver pried open her door and subsequently drove her to an exit where she was able to get a cab.

**11**  Ms. Bannerman suffered bruising and a lump on her left temple. She felt groin pain the following day.

**12**  That day, December 14, Ms. Bannerman saw her physician and complained of pain in her groin and hip. He advised her to return in a week.

**13**  On December 24, she could not get out of bed. The plaintiff called Ms. Broughton to assist her. Ms. Bannerman contacted her physician who sent her to Peace Arch Hospital for x-rays. When the doctor received the x-rays, he instructed her to proceed immediately to Vancouver General Hospital.

**14**  Ms. Bannerman had previously undergone hip replacement surgeries. She arrived at the hospital and had a series of x-rays. She was told that her surgeon, Dr. Greidanus, was away for a couple of weeks. She was given a choice of being admitted or returning home with prescription pain killers to await Dr. Greidanus' return.

**15**  Ms. Bannerman chose to stay home from December 24 to January 8. She took morphine and Tylenol 3s and was confined to a chair in her home.

**16**  Ms. Bannerman returned to the hospital on January 8. Dr. Greidanus operated on January 9.

**17**  The plaintiff's medical history is germane to an understanding of the nature of the surgery. Ms. Bannerman suffered a fractured right hip in 1989. She was treated with hemiarthroplasty, a replacement of half the hip joint. She underwent two further revisions, a full arthoplasty in 1997 and a further revision in 1999.

**18**  "Revisions", or subsequent procedures, are not uncommon. Dr. Greidanus testified that of the 450 - 500 joint replacements he performs a year, between one-third and one-half are revisions.

**19**  In 2001, Dr. Greidanus saw Ms. Bannermann for the first time. She was experiencing increasing hip pain which was caused by loosening of her right hip replacement. Dr. Greidanus performed a revision in March 2001. He inserted a longer femoral stem of some 13 inches in length instead of 5 inches.

**20**  There were subsequent episodes of dislocation. On December 30, 2002, Dr. Greidanus performed revision acetabular surgery. There were no problems with the femoral component. However, he used a larger liner in the acetabulium and a larger ball. This resulted in more stability. The procedure was successful, according to Dr. Greidanus. There were minor gait problems and a leg length discrepancy. Dr. Greidanus arranged for additional rehabilitation and shoe adjustment.

**21**  Ms. Bannerman's condition was stable for six years, until the accident.

**22**  The surgery which Dr. Greidanus performed on January 9, 2009, was complicated and extensive. It required a long incision from her pelvis nearly to her knee. The muscles and ligaments were disrupted. The femoral stem that was put in place in the 2001 surgery had broken. It had to be cut. The ingrown bottom portion of the stem had to be drilled out. A wider and longer femoral stem was inserted in the femur. The full length of the bone was then put back together and wrapped with cables.

**23**  Ms. Bannerman was transferred from Vancouver General Hospital to Holy Family Hospital, a rehabilitation facility. She spent some fifteen weeks at Holy Family. Ms. Bannerman said, and I accept, that she has a high pain threshold. Nevertheless, she said, she had terrible hip pain during this period.

**24**  In the latter part of her stay she was able to spend weekends at home. Her son-in-law, Kevin Crawford, took her home on Saturdays and drove her back to Holy Family on Sunday night or Monday morning.

**25**  After she was discharged, she continued with out-patient treatment twice a week. Ms. Broughton drove her back and forth for these appointments.

**26**  In the summer of 2009, Ms. Bannerman experienced knee pain. She recalled that she hit her left leg on the inside of the automobile in the accident. She in fact testified that she had knee pain just after the accident. Ms. Bannerman is mistaken in this regard. In her examination for discovery, which was conducted at a time closer to the time of the accident, her recollection was that the knee pain began in April or May of 2009.

**27**  Dr. Greidanus did knee surgery on November 23, 2009. Ms. Bannerman was discharged on November 27. In December she was back at Holy Family Hospital receiving rehabilitation treatment for her right hip and her left knee.

**28**  Ms. Bannerman continued with physiotherapy treatment until June 2010.

**29**  Ms. Bannerman continues to experience pain but is active again. She went on an Alaska cruise in 2011. She attends her grandsons' hockey games. She attended her grandson's wedding in California in 2011.

**30**  Ms. Bannerman testified, and I accept that she experiences pain if she sits for too long. It subsides if she elevates her feet and takes a Tylenol 3. She estimates that she take two to four Tylenol 3s on three to four days per week. She estimates a total of 100 pills per month.

**31**  Ms. Bannerman is able to walk a maximum distance of approximately three blocks. She is now able to clean bathrooms and wash dishes. She said she is leaving floor mopping to Ms. Broughton. She drives her daughter's car to shop for groceries. She is able to vacuum and sweep.

**32**  Ms. Bannerman said during her examination in chief on the first day of the trial that she could do 75 to 80 percent of what she could do before the accident. She has difficulty with stairs. She has difficulty bending to access the bottom drawer of her filing cabinet.

**33**  Attending the trial meant traveling each day from Surrey to downtown Vancouver. The week of the trial was the most activity she had experienced since the accident. She testified in cross-examination on the third day of the trial that she had learned her limitations from the trial. At that time she was quite affected by the walking, standing and sitting of the past few days.

**Causation**

**34**  The test for causation was put this way in *Resurfice Corp. v. Hanke,* [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), at paras. 21-23:

1. First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory ***negligence*** may be apportioned, as permitted by statute.
2. This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonatti*, [*[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 considered generally "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities.

1. The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of everyone": *Snell v. Farrell,* [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), at p. 327 per Sopinka J.

**35**  There is no dispute that the minor post-accident injuries and the hip injury meet the "but for" test. The defendants question the causal link between the accident and the knee injury. Ms. Bannerman encountered increased pain in her knee in April or May, four or five months after the accident. The diagnosis was left knee osteoarthritis.

**36**  Did the accident cause the need for knee surgery? Dr. Greidanus is of the opinion that it did. He stated:

... Louise sustained a significant force to the left knee in the MVA which has likely accelerated the demise of the left knee. We often see cases of blunt force or trauma to a knee which is associated with cartilage injury or "cartilage bruising" which then accelerates the degeneration of that joint. A large force applied to the articular cartilage can cause a number of the chondrocytes an earlier demise which can accelerate the process of osteoarthritis. Given the timing of the MVA, the nature of the osteoarthritis, and the need for subsequent left knee replacement it is highly probable that the MVA created a need for the left knee to have a joint replacement prosthesis at a much earlier time in the life of the patient. In addition she still [sic] ongoing soft tissue pains in the neck, spine, and soft tissues adjacent to the right hip and left knee.

**37**  Dr. Trevor Stone is an orthopaedic surgeon specializing in orthopaedic trauma and lower extremity reconstruction. He conducted an independent medical examination of Ms. Bannerman on November 2, 2012.

**38**  He concluded that the left knee problem did not arise directly from the accident but rather from a pre-existing condition that was brought to light because of her period of immobility during recuperation from the hip surgery.

Regarding the issue of the etiology of the left knee osteoarthritis I find somewhat more difficult. While I have not directly reviewed the radiographs of her left knee prior to her total knee replacement the radiograph report from May of 2009 at Vancouver General Hospital suggests tricompartmental degenerative changes, most marked in the medial compartment, severe joint space narrowing, subchondral scelerosis and marginal osteophyte formation. The interval between injury and this radiograph is approximately 5 months and I find it very unlikely that the injury had significant etiology in this development. It is possible and more probable that there was pre-existent severe arthritis but the patient was managing well and that the period of immobility while she was strict non-weight bearing for 3 - 4 months at Holy Family Hospital, that the period of recumbency lead to some generalized deconditioning and muscle atrophy and this brought to light the previously asymptomatic knee osteoarthritis.

**39**  Ms. Bannerman likely had osteoarthritis in her left knee before the accident. There were no specific complaints of knee pain after the accident. She first experienced symptoms in April or May of 2009. Dr. Greidanus agreed in cross-examination that a person with a degenerative condition may become symptomatic without a trauma. He was of the view that the accident likely caused the injury. But he also stated that weight bearing after surgery could have this effect as well. That is, he opined, that during recovery from hip surgery, Ms. Bannerman relied on her left knee much more than before.

**40**  Dr. Stone was of the view that the pre-existent severe arthritis was asymptomatic but brought to light as a result of the period of immobility at Holy Family. Dr. Stone's view is that her left knee became deconditioned during the long period of recumbency following hip surgery.

**41**  I conclude that the left knee became symptomatic and required surgery at the time as a result of the accident. The specific cause was her overreliance on the left knee because of the right hip surgery, or deconditioning of her left knee during the period of recumbency, or both.

**42**  Ms. Bannerman testified that the injuries other than her knee and hip cleared up relatively quickly. She had bruises to her arm, leg and ankle. They cleared up after a few weeks. Her neck pain persisted for a month to six weeks. She had some slight back pain.

**Special Damages**

**43**  The plaintiff is entitled to be reimbursed for expenses that are shown to be attributable to the injuries sustained by the plaintiff.

**44**  Certain items are agreed: eye glasses $705, television at Vancouver General Hospital $50.40, snow removal expenses $72, cleaning $696. There are several items which are in dispute:

1. $602 paid to Kevin Crawford for cleaning gutters and hanging Christmas lights. I accept that these expenses were incurred. The evidence does not establish, however, that the plaintiff would have performed this work in the absence of the accident.
2. $108.37 is claimed for incontinence products. The defendant argues there is no medical evidence establishing that this was caused by the accident. Ms. Bannerman testified, and I accept that there were no incontinence issues before the accident. I am satisfied this is a proper special damage claim.
3. $5,325 is claimed for personal home health care provided by Ms. Broughton. She provided assistance with personal hygiene, meal preparation, housekeeping and laundry. The claim covers two periods:
4. 15 weeks of three-day weekends when Ms. Bannerman came home from Holy Family, at $25 per day: 45 days x 25 = $1,125.
5. 105 days after discharge from Holy Family at $25 per day = $2,625.
6. 63 days in December 2009 and January 2010 while recovering from knee surgery at $25 per day = $1,575.

**45**  The defendant argues that this should be treated as an in trust claim and should fail because there is no evidence to permit the court to assess the value of the services: see *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=).

**46**  I do not regard this as an in trust claim. Ms. Broughton is not a family member. While she and Ms. Bannerman are close friends, their relationship is partly commercial; for example Ms. Broughton pays rent of $1,400 per month. Additionally, the continuous driving certainly exceeded what would be expected from a close friend.

**47**  The evidence establishes that Ms. Bannerman required the services. I take judicial notice of the fact that the market cost of live in home services far exceeds $25 per day. The claim is proper and reasonable.

1. $408.75 was paid to Dana Boyd, Ms. Broughton's granddaughter for outdoor maintenance, housecleaning and dog care. The total amount Ms. Bannerman paid to Ms. Boyd was $817.50. The defendant paid half or $408.75 for housekeeping and dog care services while the plaintiff was recovering from hip surgery.

**48**  I agree with the defendant's argument that in the absence of the accident, the plaintiff would not have performed this work. This claim is disallowed.

1. $200 is claimed for driving by Ms. Broughton. The total cost of driving is $800. This includes 20 trips to Holy Family at $20 per trip; $200 for transportation to doctors' appointments and $200 for personal transportation to financial institutions, pharmacies, hospital appointments and x-ray appointments.

**49**  The defendant has agreed to pay $600 as Part VII benefits under the *Insurance (Vehicle) Regulation,* [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=) Part VII of the *Insurance Act.*

**50**  The defendant argues that Ms. Broughton has not been paid this amount. Ms. Broughton's evidence is that she expects to be paid. These are expenses attributable to the plaintiff's injuries. The additional $200 is allowed.

1. $60 for transportation services provided by Kevin Crawford, Ms. Bannerman's son-in-law. Mr. Crawford charged $35 per trip transporting Ms. Bannerman to and from Holy Family, Vancouver General Hospital and UBC Hospital, a total of $1,155 for 33 trips. Ms. Bannerman is receiving $1,095 as Part VII thus the claim is $60. The evidence establishes all of these trips are attributable to the accident. The claim is reasonable. It is well below the cost of a taxi. $60 is awarded.
2. $2,000 is claimed for lawn cutting and snow removal in 2010, 2011 and 2012. I am not persuaded Ms. Bannerman would have removed the snow herself if accident had not occurred. The lawn cutting, on the other hand, was an activity Ms. Bannerman carried out at her former residence in Crescent Beach. The claim is reduced by $325. I award $1,675 under this heading.

**51**  Overall, the total amount of special damages (excluding the Part VII benefits mentioned in this section) is $8,891.77. This amount includes the agreed-upon items and the disputed items I have allowed above.

**Loss of "Past Housekeeping Capacity"**

**52**  The plaintiff argues there should be an award for "loss of past housekeeping capacity". This is based on the fact that the special damages are at an inexpensive rate. The plaintiff relies on *Deo v. Deo,* [*2005 BCSC 1788*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2Y2-00000-00&context=), for the proposition that there can be a separate award for lack of housekeeping capacity in the pretrial period. I do not agree that lack of capacity in the pretrial period formed the basis of an award in that case.

**53**  In any event, I am no persuaded that the plaintiff should be compensated for obtaining services at rates below the general cost of the services in the marketplace.

**Non-Pecuniary Damages**

**54**  The factors to be considered in awarding non-pecuniary damages are those listed 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 plaintiff's age, the nature of her injury, the severity and duration of pain, the 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 penalize the plaintiff.

**55**  Ms. Bannerman is a positive, energetic 76 year old who suffered a serious injury to her hip as well as other injuries in the accident. She had to withstand complicated surgery and an unusually long period of inpatient recovery both at Vancouver General Hospital and at Holy Family Hospital. She suffered considerable pain before and after the surgery. I have described above her ongoing disability resulting from the accident.

**56**  She also suffered an injury to her knee; her degenerative knee condition became symptomatic and arthoplasty was necessary.

**57**  It is clear on the evidence that Ms. Bannerman would likely have required revision hip surgery in the future even in the absence of the accident. Thus the claim for damages must be reduced: see *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=) where the court said at para. 48:

48 ... whether manifest of 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.

See also *Sanders v. Janze*, [*2009 BCSC 1059*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6227-00000-00&context=).

**58**  A revision hip surgery at some time in the future was certainly a strong possibility. However, it would not have resulted in such complex surgery with such a long and painful recovery time that Ms. Bannerman experienced because of the accident.

**59**  As well, although not a certainty, there is a distinct possibility that the plaintiff would have required knee surgery in her lifetime even without the accident.

**60**  In these circumstances, there should be a 20 percent discount to all heads of damages awarded to account for these contingencies.

**61**  A number of decisions in this province cite with approval the English Court of Appeal's decision in *Frank v. Cox* (1967), 111 Sol. Jo. 670, where the court observed that in some ways injuries to older people have a more profound effect than injuries to younger people:

I take the view myself that when one has a person in advancing years, in some respects an impairment of movement may perhaps be more serious than it is with a younger person. It is true, as Mr. Chedlow has stressed, that he has not got as many years before him through which he has to live with this discomfort, pain and impairment of movement. But it is important to bear in mind that as one advances in life one's pleasures and activities particularly do become more limited, and any substantial impairment in the limited amount of activity and movement which a person can undertake, in my view, become all the more serious on that account ...

**62**  A number of awards of this Court provide useful comparisons.

**63**  In *Broccoli v. Harris*, [*[1991] B.C.J. No. 2725*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X326-00000-00&context=) (September 25, 1991), Vancouver Registry No. C890714 (B.C.S.C.) the plaintiff suffered a fractured hip and other less serious injuries in a fall on a bus. She underwent a partial hip replacement and was hospitalized for three weeks. She was 74 at the time. Over the next four years, her pain increased and a full hip replacement became necessary. The Court found she would likely continue to have balance problems for some two more years. Non-pecuniary damages of $40,000 were awarded. Today's equivalent is $59,000.

**64**  In *Mills v. Moberg* [*(1996), 27 B.C.L.R. (3d) 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61V9-00000-00&context=) (S.C.), the plaintiff sustained a broken hip and required extensive hospitalization. She, also 76, underwent revision total hip replacement. She was hospitalized a total of six months due to the hip injury and subsequently remained reliant on a walker and was largely house bound. Madam Justice Dillon awarded $38,000 in non-pecuniary damages. Adjusted for inflation this would be $53,000.

**65**  The plaintiff referred me to *Tompkins v. Bruce*, [*2012 BCSC 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-621N-00000-00&context=). Mr. Tompkins sustained injuries in a head-on collision. Resulting treatment included a total hip replacement. The trial judge found a left knee and right knee replacements would be necessary in the future. Non-pecuniary damages of $200,000 were awarded.

**66**  Mr. Tompkins circumstances were, however, far worse than Ms. Bannerman's situation. He suffered a significant psychological mood change; he was a 50 year old tradesman whose life was "permanently and very significantly" altered by the accident:

[48] He has lost his ability to work in his trade at employment he enjoyed. He has lost a great deal of his mobility and cannot enjoy activities such as skiing, hiking, snowmobiling, slow pitch, tennis and similar activities as he once did. He cannot stand or sit for long periods of time. His mood is depressed and his anger harms his relationship with other people - particularly in the case of Nancy Larkin, his romantic partner after the accident who left him largely because of his anger and irritability. In addition, Mr. Tompkins now faces the prospect of further surgeries such as two knee surgeries, another hip replacement, the prospect that the condition of his knees and hip may get worse - and that each surgery comes with a risk of a loss of function, dangerous embolisms, scar tissue, long recovery periods and possible poor results.

**67**  In *Etson v. Loblaw,* a 76-year-old plaintiff fell and broke her hip. She underwent three surgeries including surgery to pin her hip. Her mobility deteriorated and she underwent a full hip replacement later. She was unable to resume her former lifestyle and was limited in what she could do. She remained able to drive and do things around the house. Madam Justice Fisher awarded her $90,000.

**68**  Obviously, each case must be looked at individually. No plaintiff's circumstances are the same as another plaintiff's. In all the circumstances, an appropriate award of non-pecuniary damages is $90,000.

**Loss of Income**

**69**  Ms. Bannerman testified she was unable to work in 2009 and most of 2010. By late 2010 she wanted to get back working. This is consistent with Dr. Greidanus' report. He said that after revision surgery, it usually takes 18 to 24 months to achieve complete functional recovery. I find she was totally disabled for 20 months, until September 2010.

**70**  However, at September 2010, the plaintiff lacked the capacity to work at her previous level. As well, her lack of availability for Neil Rogic, in particular, has lead to losses that go beyond September 2010 and extend to the present.

**71**  The period of disability from the date of the accident until September 1, 2010, will first be considered, the period from September 1, 2010, until the date of the trial will then be considered.

**72**  What was the plaintiff's loss during the period of total disability? Cory Heming is a chartered accountant. He provided an opinion concerning Ms. Bannerman's loss. In the five years preceding the accident (2004 - 2008), her average revenue was $31,520. After expenses her average net income was $19,411.24. Taxes at the rate of 22 percent would be payable.

**73**  I assess her loss until September 1, 2010 to be $35,000.

**74**  In the period from September 2010 to the present, Ms. Bannerman has earned $9,757. During that time she has received almost no work from Mr. Rogic. He testified that after the accident, there was work for her to do but she was not capable of it.

**75**  Mr. Rogic had employed his daughter before Ms. Bannerman. His daughter moved to Calgary but returned to the Lower Mainland in 2009. When Ms. Bannerman's accident happened, Mr. Rogic began employing his daughter again. This arrangement continues today. No doubt part of this is family loyalty. However, he also took into account that Ms. Bannerman's capacity had diminished. When he assigns work to her, he delivers the work and picks it up. He no longer relies on her to deliver or pick up things.

**76**  For the period between June 2011 and August 2012 he paid her $800 a month. She previously received $1,800 a month from him.

**77**  I conclude that the accident caused a loss of income to the time of trial and beyond. Mr. Rogic values her work. If the accident had not occurred, the evidence establishes that the plaintiff would be receiving more work today. While it is impossible to quantify with specificity, I assess the loss for the period of September 1, 2010, to the date of trial at $20,000.

**78**  I award compensation for lost income at $55,000.

**Loss of Earning Capacity**

**79**  It is seldom that a 76-year-old plaintiff makes a claim for loss of earning capacity. But Ms. Bannerman is an unusual person. She testified that she wishes to work and indeed needs to work to meet her mortgage commitment. I accept her evidence that she is not retired.

**80**  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, Mr. Justice Savage summarized the test for diminished earning capacity from *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.

**81**  Here the evidence establishes the first requirement in *Perren v. Lalari* is met. There is a real and substantial possibility of events leading to an income loss.

**82**  Ms. Bannerman has a reduced ability to work full time because of pain and her worsened physical state.

**83**  In these circumstances the impairment of earning capacity should be assessed on a loss of capital asset basis. I assess the loss of future earning capacity at $20,000.

**Mitigation**

**84**  Both the plaintiff and the defendant made submissions regarding mitigation. The plaintiff argued that I should consider that she "over-mitigated" or "pre-mitigated" her loss. The plaintiff gave several examples. Ms. Bannerman had built a house with an elevator, a walk-in shower and other amenities which suit a person with mobility problems. She was thereby able to come home from the hospital without engaging in extensive modifications to her home. Second, she was able to pay Ms. Broughton $25 per day to care for her, far below market rates for home care. Third, she went out and sought work when others her age and in her circumstances would have retired. She exceeds what the occupational therapist, Sarah Ismael, thinks she is capable of.

**85**  I agree that Ms. Bannerman took steps when designing her home that are helpful to her now. The expense for Ms. Broughton's care is below market rates. Ms. Bannerman has a spirited desire to continue working when many at her age and in her circumstances would retire.

**86**  But I do not accept that some principle of pre-mitigation or over-mitigation comes into play. This is analogous to the thin skull rule: a tortfeasor takes the victim as he or she finds him or her. The defendants were in a collision with a woman who had undergone a hip replacement. Her damage claim exceeds that of a plaintiff who did not have this condition. Similarly, this plaintiff is resourceful and determined to make the best of her situation, more so than an average plaintiff.

**87**  The defendants argue that the plaintiff failed to mitigate her claim for past and future income loss. They point to the fact that Ms. Bannerman was offered work for nine months, at $7,000 per month, on a First Nations reserve. The reserve is some 50 miles from Pemberton and is only accessible by logging road.

**88**  Ms. Bannerman testified that she turned down the offer because of the job's remote location, the length of the assignment, its interference with the scheduled trial, and its interference with her personal life.

**89**  A plaintiff has a positive duty to take reasonable steps to mitigate her losses. The defendant bears the onus of proving a failure to mitigate: *Red Deer College v. Michaels,* [*[1976] 2 S.C.R. 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24MJ-00000-00&context=) at 331; *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation* [*[1979] 1 S.C.R. 633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-254W-00000-00&context=).

**90**  I am not persuaded that the plaintiff acted unreasonably in refusing this job offer. If it is 50 miles from Pemberton, that means it is 250 - 300 km from her home. She testified that the road conditions past Pemberton were poor.

**91**  A plaintiff in Ms. Bannerman's position, living in a home designed to accommodate her disability, is not acting unreasonably when she decides not to relocate for nine months to an isolated community far from home in order to take employment. She has not failed to mitigate her losses.

**Cost of Future Care**

**92**  The approach of a trial judge to determining damages for future care was described in *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.); aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (CA):

The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

**93**  Mr. Justice Masuhara in *Izony v. Weidlich,* [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=), explained a sensible limitation on the principle. He said at para. 74 that future care costs must be reasonable in the sense that the plaintiff will be likely to incur them:

I therefore do not think it appropriate to make a provision for items or services that the plaintiff has not used in the past (see *Courdin*, [*[2005] B.C.J. No. 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=), at para. 35) ... The evidence at trial and the clinical records clearly indicated that Mr. Izony has expressed resistance to using items or availing himself of services that were medically recommended.

**94**  Sarah Ismail is an occupational therapist who has received training in preparing cost of future care reports. Ms. Ismail reviewed the medical and clinical documentation, interviewed the plaintiff, conducted a physical/functional assessment of her within her home and made physical observations of her house. She concluded that the plaintiff had the following limitations:

1. Reduced ability to participate in homemaking activities (including grocery shopping and cleaning), related to decreased functional tolerances and pain.
2. Reduced ability to participate in yard maintenance/gardening tasks, related to decreased functional tolerances and pain.
3. Reduced ability to participate in previously enjoyed leisure activities, related to decreased functional tolerances and pain.
4. Reduced ability to participate in full-time work, related to decreased functional tolerances and pain.
5. Reduced ability to care for her pet, related to decreased functional tolerances and pain.
6. Reduced ability to participate in maintaining her home, related to functional tolerances and pain.

**95**  It is difficult to ascertain future care costs in this case. Ms. Bannerman will require assistance with some house and garden items sooner than she would have in the absence of the accident. The defendant is only liable for the increase in her needs that was caused by the accident.

**96**  I am not including any allowance for physiotherapy expenses. Ms. Bannerman has not availed herself of physiotherapy in 2012 or 2013 and does not have any appointments to do so in the future. Similarly, I find it unlikely that she would engage the assistance of a occupational therapist.

**97**  The plaintiff will need assistance with pet care. She has an increased need for Tylenol 3 medication as a result of the accident. She has an increased need for assistance with household cleaning and yard maintenance.

**98**  I assess the cost of future care at $20,000.

**Summary**

**99**  In summary, I make the following award:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $90,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $8,891.77 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Income: | $55,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Earning Capacity: | $20,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care: | $20,000.00 |  |

**100**  The sum of these amounts is $193,891.77. There is a deduction of 20 percent based on the contingency of surgery to her knee and/or hip in any event.

**101**  I award Ms. Bannerman $155,113.42.

S.F. KELLEHER J.

**End of Document**

[***Vander Maeden v. Condon, [2013] B.C.J. No. 1688***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B26D-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Powell River, British Columbia

G.R.J. Gaul J.

Heard: April 10-13 and 16-18, 2012.

Judgment: August 1, 2013.

Dockets: M2131, M2380

Registry: Powell River

**[2013] B.C.J. No. 1688** | 2013 BCSC 1389 | 50 M.V.R. (6th) 205 | 2013 CarswellBC 2331

Between Rudolphus Johannes Franciscus Vander Maeden, Plaintiff, and Michael Francis Condon and Donald Scott Hart, Defendants And between Rudolphus Johannes Franciscus Vander Maeden, a.k.a. Rudy Vander Maeden, Plaintiff, and Catherine Anne Mander, a.k.a. Anne Mander, Defendant

(116 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Head injuries — Ears — Hearing — Concussion — Headaches — Arm injuries — Elbow — Leg injuries — Fibromyalgia or chronic pain — Psychological injuries — Cognitive impairment — Depression — Post-traumatic stress disorder (PTSD) — Arising subsequent to incident — Considerations impacting on award — Pre-existing injury --- Credibility — Future treatment required — Miscellaneous — Actions by the plaintiff for damages from Accident 1 allowed and for damages from Accident 2 dismissed — Liability admitted in Accident 1 — Parties equally liable in Accident 2 but injuries de minimis so no damages — Injuries caused by Accident 1 included exacerbation of chronic pain, depression, and mood disorder; PTSD; mild soft tissue injuries; elbow pain; mild headaches; moderate hearing loss; tinnitus; minor cognitive impairment — Physical and social activities curtailed — No income loss or loss of earning capacity — Plaintiff awarded non-pecuniary damages of $110,000, future care costs of $10,000, and special damages of $1,600.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Affecting recreational activities — Actions by the plaintiff for damages from Accident 1 allowed and for damages from Accident 2 dismissed — Liability admitted in Accident 1 — Parties equally liable in Accident 2 but injuries de minimis so no damages — Injuries caused by Accident 1 included exacerbation of chronic pain, depression, and mood disorder; PTSD; mild soft tissue injuries; elbow pain; mild headaches; moderate hearing loss; tinnitus; minor cognitive impairment — Physical and social activities curtailed — No income loss or loss of earning capacity — Plaintiff awarded non-pecuniary damages of $110,000, future care costs of $10,000, and special damages of $1,600.**

**Damages — Assessment of damages — Limiting factors — Pre-existing conditions — Thin or crumbling skull rule — Actions by the plaintiff for damages from Accident 1 allowed and for damages from Accident 2 dismissed — Liability admitted in Accident 1 — Parties equally liable in Accident 2 but injuries de minimis so no damages — Injuries caused by Accident 1 included exacerbation of chronic pain, depression, and mood disorder; PTSD; mild soft tissue injuries; elbow pain; mild headaches; moderate hearing loss; tinnitus; minor cognitive impairment — Physical and social activities curtailed — No income loss or loss of earning capacity — Plaintiff awarded non-pecuniary damages of $110,000, future care costs of $10,000, and special damages of $1,600.**

**Tort law — Contributory *negligence* — Apportionment of liability — Equal apportionment — Motor vehicles — Pedestrians — Actions by the plaintiff for damages from Accident 1 allowed and for damages from Accident 2 dismissed — Liability admitted in Accident 1 — Parties equally liable in Accident 2 but injuries de minimis so no damages — Injuries caused by Accident 1 included exacerbation of chronic pain, depression, and mood disorder; PTSD; mild soft tissue injuries; elbow pain; mild headaches; moderate hearing loss; tinnitus; minor cognitive impairment — Physical and social activities curtailed — No income loss or loss of earning capacity — Plaintiff awarded non-pecuniary damages of $110,000, future care costs of $10,000, and special damages of $1,600.**

|  |
| --- |
| Actions by plaintiff for damages arising from being a passenger in a vehicle that was struck by another (Accident 1 in 2009) and for damages arising from being struck by a vehicle when he was walking on the street (Accident 2 in 2011). Liability was admitted in Accident 1 but not Accident 2. The issues were liability for Accident 2, the nature and extent of the plaintiff's injuries, the legal causation of the plaintiff's injuries, and the quantum of damages. The plaintiff was 60-years-old at the time of Accident 1, and had been involved in a catastrophic traffic accident in 1979. The plaintiff's physical and psychological condition just prior to Accident 1 was as follows: chronic pain in his back as a result of a crushed disk; chronic pain in both legs, with osteoarthritis in his knees; chronic pain in his shoulders; chronic arthritic pain in his hands; and, depression and sleep loss. Due to a serious visual impairment, he received a government disability pension and was not working for several years prior to both Accidents. He was nevertheless an avid swimmer, attended the local gym, rode a mountain bike, and used a recreational power boat. His exercise routines and social activities were always subject to and governed by his chronic pain. He had the assistance of a housekeeper. In Accident 1, the plaintiff was in the passenger seat and the vehicle was struck on that side. The plaintiff was propelled sideways by the impact, and his head struck the passenger door window and front windshield. In Accident 2, the plaintiff was walking and stepped onto a driveway as a truck approached. The defendant Mander was backing out of the driveway at the time. His cane struck her vehicle and he did not fall.  HELD: Actions allowed in part.  The plaintiff was awarded $121,600 in damages as a result of Accident 1. The plaintiff suffered no compensable damages or losses as a result of Accident 2. Mander and the plaintiff were each found 50 per cent liable for Accident 2. Although Mander was proceeding slowly and with caution, she should have seen the plaintiff. However, the plaintiff's decision to walk across the path of a car that was moving in reverse towards him was dangerous and unwise. The consequences of Accident 2 were of such a minor and trifling nature they constituted de minimis. The plaintiff was a credible witness, but his reliability in recounting his medical history to the various health care professionals who treated him was less than consistent. The medical evidence itself was at times inconsistent or contradictory. The plaintiff's pre-existing physical conditions made him unusually susceptible to injury and he was to a certain degree someone with a "thin skull". The plaintiff suffered an exacerbation of the chronic pain he had in his back, shoulders, and legs as a result of Accident 1. He also suffered an exacerbation of his depression and mood disorder, resulting in the diagnosis of PTSD. Accident 1 also caused new physical ailments including: mild soft tissue injuries to his upper body, right elbow, and right hip, all of which resolved, except for the elbow that continued to cause some occasional pain; mild headaches; moderate hearing loss and tinnitus; and, minor cognitive impairment (i.e. mild loss of ability to concentrate). The plaintiff continued to attend the gym but was more cautious. He no longer rode his bike and reduced his social activities. As the plaintiff was legally blind and thus much more reliant on his hearing that those with regular eyesight, $110,000 was awarded in non-pecuniary damages. There was no evidence that the plaintiff actually lost income or any real and substantial possibility that he would have earned income after Accident 1. He failed to show that his earning capacity was impaired as a result of Accident 1. For future pain relief treatments, psychological counselling and additional domestic assistance, the plaintiff was awarded $10,000. The plaintiff was awarded $1,600 in special damages. The in trust claim for the plaintiff's companion was not made out as she was an untrustworthy witness and had a clear financial interest in the case. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 12-6(12)

**Counsel**

Counsel for the Plaintiff: I. Fleming.

Counsel for the Defendants: D. Perry.

**Reasons for Judgment**

|  |
| --- |
| **G.R.J. GAUL J.** |

**Introduction**

**1**  On 20 March 2009, Rudolphus (Rudy) Vander Maeden was the passenger in a vehicle that was struck broadside by another vehicle as it was making a left-hand turn across Highway 101 in Powell River, British Columbia ("Accident #1"). Asserting that he has suffered significant injuries as a result of Accident #1, Mr. Vander Maeden has sued both the driver of the vehicle he was in, as well as the driver of the vehicle that struck them ("Action #1).

**2**  On 5 May 2011, Mr. Vander Maeden was walking on a quiet side street in Powell River when he was involved in an accident involving a motor vehicle that was backing out of a driveway ("Accident #2"). Mr. Vander Maeden has sued the driver of the motor vehicle in question, alleging her negligent driving caused him additional injuries and or exacerbated those associated with Accident #1 ("Action #2").

**3**  In both lawsuits, which by consent were tried together, Mr. Vander Maeden seeks damages under the following headings:

1. Non-Pecuniary damages for pain, injury, suffering and loss of enjoyment of life;
2. Loss of Past Income;
3. Loss of Future Earning Capacity;
4. Cost of Future Care; and
5. Special Damages.

**4**  Mr. Vander Maeden also seeks an "in trust" award for the domestic services his friend and roommate Ms. Geraldine Bergstrom has performed for him.

**5**  The trial of Mr. Vander Maeden's claims began before a jury. On account of improper comments made during Mr. Vander Maeden's counsel's final submissions, I acceded to the defendants' application pursuant to Rule 12-6(12) of the *Supreme Court Civil Rules*, discharged the jury and with the consent of the defendants ordered that the balance of the trial continue before me.

**Issues**

**6**  The defendants in Action #1 have admitted liability for Accident #1. The defendant in Action #2 has denied she is liable for Accident #2.

**7**  There are four principle issues that need to be resolved:

1. Liability for Accident #2;
2. The nature and extent of Mr. Vander Maeden's injuries;
3. The legal causation of Mr. Vander Maeden's injuries; and
4. The quantum of damages Mr. Vander Maeden is entitled to for the injuries and losses attributable to the accidents.

**Background Facts**

Pre-Accident Condition: Physical & Psychological Health

**8**  In the spring of 2009, Mr. Vander Maeden was 60 years old. Since he was aged 10, Mr. Vander Maeden has experienced significant and chronic vision problems. It was not until he was 24 that he was formally diagnosed with retinitis pigmentosa, a progressive degenerative eye disease that causes severe vision impairment and eventual blindness. By the time that diagnosis was made, Mr. Vander Maeden was already legally blind. Mr. Vander Maeden's vision has not improved and all that remains of his eyesight is some peripheral vision.

**9**  Mr. Vander Maeden had been previously married, however in 1979 his wife died in a catastrophic traffic accident (the "1979 Accident"). They had been walking together on a local roadway in Powell River when they were struck by a motor vehicle. Mr. Vander Maeden suffered multiple serious injuries, including to his neck, back and legs. He also suffered a concussion and spent close to a year in the hospital convalescing. Tragically, Mrs. Vander Maeden lost her life.

**10**  Since the 1979 Accident, Mr. Vander Maeden has had to deal with chronic pain and discomfort that has, at times, made walking and performing other ordinary tasks difficult. His condition deteriorated to such an extent that he needed to undergo back surgery in or around 1999. He also had four operations on his right knee in the early 2000s. It was around this time that Mr. Vander Maeden began taking morphine on a regular basis as a means of addressing and managing his pain.

**11**  In or around 2002, Mr. Vander Maeden crushed one of his fingers in a wood splitting device, requiring major surgery. It was also around this time that Mr. Vander Maeden's physician discovered Mr. Vander Maeden suffered from cardiac arrhythmia resulting in the need for him to have a pace maker implanted. Further heart problems for Mr. Vander Maeden necessitated a cardiac ablation procedure in 2010.

**12**  In April 2005, Mr. Vander Maeden sold his house and property on the outskirts of Powell River and relocated to a new home closer to town. In 2007 or 2008, he moved into the condominium in which he continues to reside.

**13**  In 2006 and 2007, Mr. Vander Maeden had a number of concussions as a result of him accidentally colliding with the walls in his home. On at least one of these occasions the impact was of such force that he lost consciousness. The transient post-concussion symptoms that Mr. Vander Maeden suffered included increased visual difficulties, nausea, dizziness, and diminished cognitive functioning.

**14**  In 2007, Mr. Vander Maeden sought counselling and psychiatric treatment for depression and a mood disorder. He was becoming more fearful of being on the street, given his diminishing eyesight and was disheartened by the thought that he soon might have to resort to using a seeing-eye dog. In 2008, Mr. Vander Maeden reported to his general physician that he was again feeling depressed.

**15**  Mr. Vander Maeden's physical and psychological condition in the spring of 2009 just prior to Accident #1 can be summarized as follows:

1. Chronic pain in his back as a result of a crushed disk;
2. Chronic pain in both legs, with osteoarthritis in his knees;
3. Chronic pain in his shoulders;
4. Chronis arthritic pain in his hands; and
5. Depression and sleep loss.

Pre-Accident Condition: Employment & Activities

**16**  In 1993, Mr. Vander Maeden's visual impairment had reached such a degree that he was formally recognized as a person with a disability and began receiving a government disability pension. He presently receives approximately $790 per month.

**17**  In the years prior to 1993, Mr. Vander Maeden had been employed in a variety of jobs, including working on tug boats and log booms for MacMillan Bloedel. He had set up a freight business and had been involved in the cutting and transporting of firewood. For a short while he was also involved in building houses.

**18**  Apparently the rules pertaining to his disability pension permit Mr. Vander Maeden to earn a small income of no more than $500 per month. Until 2005, Mr. Vander Maeden pursued this option and earned a small supplemental income, principally from the collection and sale of firewood. This source of income ceased when he abandoned this work in or around 2005.

**19**  Notwithstanding his chronic injuries from the 1979 Accident and his serious visual impairment, in the months leading up to Accident #1, Mr. Vander Maeden was an avid swimmer. He also attended the local gym where he would exercise using weights and a treadmill. Mr. Vander Maeden enjoyed riding his mountain bike and using his power boat for recreational purposes.

**20**  Mr. Vander Maeden's exercise routines and social activities were always subject to and governed by the chronic pain he continued to experience, especially in his back and legs. Mr. Vander Maeden had difficulty performing chores around his home and therefore he had the assistance of a housekeeper.

Accident #1

**21**  On the afternoon of 20 March 2009, Mr. Vander Maeden and his friend Michael Condon, the defendant in Action #1, were proceeding southbound on Highway 101 in Mr. Condon's 2003 Dodge Ram pickup truck. They were *en route* to their regular "Happy Hour" event at a mutual friend's home in Powell River. Mr. Condon was driving and Mr. Vander Maeden was a passenger in the vehicle. At around the same time, the defendant Donald Hart was driving his 1991 Ford Ranger truck northbound on Highway 101. As Mr. Condon attempted a left-hand turn across Highway 101, Mr. Hart's oncoming vehicle collided with the passenger side of Mr. Condon's truck. The force of the impact propelled Mr. Vander Maeden sideways causing his head to strike the passenger door window as well as the front windshield. He faded in and out of consciousness and he described feeling considerable pain in his right shoulder, some of his fingers as well as his right hip, knee and foot. He also described the sensation as "heating up" and "hurting like hell".

**22**  After rescue personnel from the fire department were able to extract Mr. Vander Maeden from Mr. Condon's vehicle, he was transported by ambulance to the local hospital where he was examined by the emergency room physician on duty. Mr. Vander Maeden was released from the hospital early the next morning and he returned home.

Accident #2

**23**  On 5 May 2011, Mr. Vander Maeden was walking along the side of Courtenay Street heading towards his home. Courtenay Street has no sidewalk. Just ahead of him was a friend who was walking her dog. As a truck approached, Mr. Vander Maeden stepped off of the roadway and onto the defendant Catherine Mander's driveway. As Mr. Vander Maeden did this, Ms. Mander was very slowly backing her vehicle out of her driveway. Mr. Vander Maeden moved out of the way of Ms. Mander's vehicle however, in doing so, his cane struck the bumper of her vehicle. Mr. Vander Maeden did not fall.

**Liability for Accident #2**

**24**  Mr. Vander Maeden asserts that he was within Ms. Mander's field of vision when she was backing her car out of her driveway and consequently she should be found 100% responsible for Accident #2.

**25**  Ms. Mander says she acted appropriately when she was moving her car and that Mr. Vander Maeden is entirely responsible for Accident #2 because he is the one who walked behind her moving vehicle. In the alternative, Ms. Mander submits that liability for Accident #2 should be divided between herself and Mr. Vander Maeden with a higher percentage of responsibility falling on Mr. Vander Maeden.

Evidence of Ms. Mander

**26**  The driveway of Ms. Mander's home was approximately 6 meters long. As she backed out of her driveway on the morning of 5 May 2011, she was travelling very slowly, at a speed of less than 10 km hour. She had seen Mr. Vander Maeden on Courtenay Street about 10 meters away from her home.

**27**  As she backed out, she looked over both shoulders and did not see anyone or anything in her path. Consequently, she continued to back out. It was then that she heard something strike her vehicle. She moved her car forward, stopped it and then got out. She then saw Mr. Vander Maeden walking towards her. The two spoke briefly before they carried on their respective ways. According to Ms. Mander, Mr. Vander Maeden said he was fine.

Evidence of Mr. Vander Maeden

**28**  According to Mr. Vander Maeden, he was walking on Courtenay Street a short distance behind a friend of his who was walking her dog. When he observed a truck approaching, he stepped off of Courtenay Street and onto Ms. Mander's driveway. He explained that as he traversed the driveway, his friend called out to him just as Ms. Mander's car was approaching. Mr. Vander Maeden quickly moved out of the way of Ms. Mander's car. He described his actions as "overcompensating" and "torquing" out of the way of the vehicle. Mr. Vander Maeden did not think Ms. Mander's vehicle struck him, though he did believe his cane struck the vehicle. In any event, Mr. Vander Maeden remained on his feet. According to Mr. Vander Maeden, this encounter with Ms. Mander's vehicle was a fairly minor event and simply involved him quickly getting out of the way of Ms. Mander's car.

**29**  Mr. Vander Maeden and Ms. Mander spoke afterwards. According to Mr. Vander Maeden, he apologized for striking Ms. Mander's car with his cane and she said she will take more care the next time she is backing out of her driveway. Following this brief conversation, both parties parted.

Evidence of Dana Carriere

**30**  Mr. Carriere lives across the street from Ms. Mander. On the morning of 5 May 2011, Mr. Carriere was sitting at his kitchen table looking out onto Courtenay Street. He saw Mr. Vander Maeden and a woman with a dog walking together on Courtenay Street. He also saw Ms. Mander backing her vehicle down her driveway towards Courtenay Street. Mr. Carriere could not remember if the vehicle was in motion before Mr. Vander Maeden and woman with the dog crossed Ms. Mander's driveway.

**31**  Mr. Carriere saw Mr. Vander Maeden's arms go up in the air and his cane strike the bumper of Ms. Mander's vehicle.

Conclusion

**32**  In my opinion, Ms. Mander should have seen Mr. Vander Maeden as she was backing her vehicle out of her driveway. I accept that she was proceeding very slowly and with caution. However Mr. Vander Maeden was there to be seen and he should have been seen. In my view Ms. Mander is partially responsible for what happened with Mr. Vander Maeden.

**33**  I am also of the view that Mr. Vander Maeden knew or should have known that Ms. Mander's vehicle was proceeding down her driveway towards him. In my opinion, his decision to walk across the path of a car that was moving in reverse towards him was a dangerous and unwise one. In my opinion, Mr. Vander Maeden is equally responsible for the incident that resulted in his cane striking Ms. Mander's vehicle.

**34**  In the result, I find Ms. Mander and Mr. Vander Maeden are each 50% responsible for Accident #2.

**The Nature and Extent the Plaintiff's Injuries**

**35**  Mr. Vander Maeden only experienced very minor stiffness following Accident #2. This discomfort dissipated quickly and within a day or two it was completely gone and he was back to his pre-incident condition.

**36**  Mr. Vander Maeden testified that he did not think Accident #2 caused him any injuries. He also agreed in cross-examination that at his first appointment with his family doctor following Accident #2 on 11 May 2011 he told his doctor that he felt "perfectly well" and that he had only felt "a bit sore for a few days" after the accident.

**37**  In my opinion, the consequences to Mr. Vander Maeden of his encounter with Ms. Mander's vehicle were of such a minor and trifling nature that they constitute *de minimis*. As such, I find Mr. Vander Maeden suffered no compensable damages or losses as a result of Accident #2.

Plaintiff's Physical and Psychological Health Post-Accident #1

**38**  Mr. Vander Maeden says that in the days following Accident #1, he experienced headaches, dizziness, nausea and the occasional bout of vomiting. He explained that he felt as if he had had too many martinis and the room was swaying. He felt tired and confused, his vision was blurrier than normal and he had difficulty committing things to memory. His back, ribs, right arm and right leg were sore and he had a tingling sensation in the fingers of his right hand.

**39**  Mr. Vander Maeden also described how within a couple of days of Accident #1, he noticed how his neck was becoming increasingly painful and how his hearing had diminished. He compared the feeling to having just come out of the swimming pool; he could hear sounds, but not make out all of the words. He also noticed that he had a ringing in his ears, described as a dull roar, which was worse at night and caused him to lose sleep.

**40**  Mr. Vander Maeden says his hearing loss was a significant problem for the first few months after Accident #1, but that this condition improved considerably over the course of the year. Mr. Vander Maeden's tinnitus continues to be troublesome for him and it continues to impact his sleep.

**41**  Mr. Vander Maeden also noticed that after Accident #1 his self-confidence began diminishing and he started experience anxiety and fear of being on a roadway or in a public place. He also felt a growing sense of frustration, anger and depression.

**42**  Mr. Keith Miller has known and been friends with Mr. Vander Maeden since 1990. Mr. Miller described how in late 2010 or early 2011, Mr. Vander Maeden was able to attend at his residence and cut some wood that was on the property. Mr. Vander Maeden and Mr. Miller worked the entire day, taking the occasional rest. Mr. Miller did not notice any significant change in Mr. Vander Maeden's physical abilities since Accident #1, though he did observe that Mr. Vander Maeden was moving more slowly than he had in the past.

**43**  Ms. Sharon Nash, Mr. Miller's wife, has been a friend of Mr. Vander Maeden for approximately 20 years. Ms. Nash testified that before Accident #1 Mr. Vander Maeden was an outgoing and energetic person, notwithstanding his physical disability. She explained that after Accident #1, Mr. Vander Maeden appeared less confident and more withdrawn in public and was prone to being less socially active.

Expert Evidence

**44**  Mr. Vander Maeden presented the evidence of a number of expert witnesses to explain the nature and extent of the injuries he says are attributable to Accident #1. The defendants presented the evidence of one medical expert.

Dr. Gordon Robinson

**45**  Dr. Robinson is a neurologist with an expertise in headache disorders who testified on behalf of Mr. Vander Maeden. Dr. Robinson prepared a medical-legal report dated 4 January 2012 and his testimony at trial was presented by means of video deposition.

**46**  Dr. Robinson examined Mr. Vander Maeden on one occasion on 7 December 2011. In his report under the heading "opinion", Dr. Robinson concluded:

This man was involved in a motor vehicle accident on March 20, 2009. As a result of the accident he sustained soft tissue injury to his head, neck and low back. He may have had brief loss of awareness, however I doubt he sustained a traumatic brain injury.

Ever since the accident he has had constant headache usually felt at the back of his head. The headaches were improved following injection of local anesthetic and corticosteroid into the upper neck well over a year ago. Headaches are now mild to moderate in intensity and do not affect his ability to function.

I believe that his history and examination are consistent with a diagnosis of chronic posttraumatic headache related to head and neck injury.

Before the accident he was disabled due to profound visual loss related to retinitis pigmentosa as well as chronic back pain. The latter came on following an injury in 1979 and was possibly worsened after back surgery 20 years later. He was unable to work full-time but does describe an active lifestyle despite his limitations.

He has had an increasing disability over the last few years. Although this may be partly due to accident related physical symptoms it appears that he has had further worsening of vision related to his retinisis pigmentosa. In addition he has developed signs and symptoms of neuropathy and ataxia which may occur in association with this disorder.

I believe it is probable that the symptoms of pain and numbness in his hands and feet, as well as his unsteadiness walking, are related to neuropathy-ataxia-retinitis pigmentosa (NARP), an inherited mitochodrial disorder. This disorder may have associated cardiac conduction defects.

**47**  In cross-examination, Dr. Robinson confirmed that even if Mr. Vander Maeden did suffer a mild or brief concussion in Accident #1, in his opinion, the symptoms that Mr. Vander Maeden continues to exhibit would likely still be unrelated to that concussion.

Dr. Neil Longridge

**48**  On 15 February 2011, Mr. Vander Maeden was examined by Dr. Neil Longridge. Dr. Longridge is a medical doctor with a specialty in otololanryngology, and a particular interest in tinnitus, hearing loss and dizziness. Dr. Longridge conducted a number of tests and experiments on Mr. Vander Maeden during the course of the examination. In his medical-legal report dated 20 April 2011, Dr. Longridge noted:

Studies have attempted to determine how loud a sound is when a patient is complaining about tinnitus but studies have been unable to measure the sound reliably. Unfortunately, it is purely dependent on the patient's statement about how much incapacity there is.... My experience with tinnitus is that it is usually at its worst when it first comes on, it can be expected to improve for a period of approximately a year and at the end of that time whatever is present is likely to be present on a long-term, permanent basis. Whether the tinnitus improves or the patient just becomes inured to it over that period I do not know.

Beltone hearing test on May 25, 2009... showed a conductive hearing deficit and this appears to largely have remitted with a remaining high tone deficit compatible with a history of previous noise exposure.

**49**  With respect to Mr. Vander Maeden's hearing loss, Dr. Longridge concluded:

It is unclear what the cause of this temporary hearing loss was. Pure tone testing shows normal hearing up to 2 K, dropping at 4 and 8 K to a mild to moderate sensorineural hearing loss. His difficulties with hearing could be related partly to this accident and part of this could be related to noise exposure in his earlier activities and life.

**50**  Dr. Longridge reported on Mr. Vander Maeden's balance problems as follows:

In the first two weeks following the accident [Mr. Vander Maeden] was significantly incapacitated with severe vertigo, nausea, vomiting, requiring wall support to get to the bathroom and at first he would even need to crawl to do so. These complaints are characteristic of an acute labyrinthine dysfunction and coming on following trauma probably represent labyrinthine concussion, a well recognized form of post-traumatic malfunction of the inner ear.

**51**  Although he could have articulated his opinion in a clearer fashion, I take it Dr. Longridge is of the opinion that Mr. Vander Maeden's balance system has been compromised as a result of Accident #1.

Dr. John le Nobel

**52**  Dr. le Nobel is a medical doctor with an expertise in physical medicine and rehabilitation who examined Mr. Vander Maeden on 9 March 2011.

**53**  Dr. le Noble diagnosed Mr. Vander Maeden as suffering from chronic post traumatic headache. In his medical-legal report dated 11 March 2011, Dr. le Noble concluded:

I diagnose Rudolphus Vander Maeden's pain as chronic... He reports a period of discontinuous memory of the motor vehicle collision [Accident #1] consistent with a brief period of altered cognitive function.

At the time of this assessment, Rudolphus Vander Maeden's cognitive difficulties are multi-factorial, and contributed to by chronic pain and sleep interference, use of medications and substances, depression, as well as any contribution from brain trauma including with the March 20, 2009 motor vehicle collision...

I diagnose Rudolphus Vander Maeden's headaches as chronic post traumatic headache. There are likely contributions from cervical spine (cervicogenic headache) as well as from trauma directly to the head (post concussion headache). He has chronic neck pain post-accident due to symptomatic cervical spondylosis. Post Accident x-rays showed degenerative changes in the cervical spine. Rudolphus Vander Maeden had episodes of neck pain before the motor vehicle collision (June 5, 2006). He did not however have such severe neck pain before the motor vehicle collision. Absent the motor vehicle collision I would not have anticipated him developing chronic neck pain such as he has subsequent to the motor vehicle collision.

Rudolphus Vander Maeden indicates problems with depression. Based on depression earlier in his life, Rudolphus Vander Maeden was at increased risk for development of depression with exposure to trauma and injuries from the March 20, 2009 motor vehicle collision.

Rudolphus Vander Maeden has tingling in his hands, consistent with irritation of the nerves supplying his hands. Rudolphus Vander Maeden did not have sustained sensory symptoms in his hands before the motor vehicle collision. Absent the motor vehicle collision March 20, 2009, he would not have been anticipated to develop the bilateral hand symptoms such as has been the case since the motor vehicle collision.

Dr. Desmond Coen

**54**  Dr. Coen is a registered psychologist who specializes in neuropsychology. Dr. Coen examined Mr. Vander Maeden on 27 June 2011. During the course of this examination, Mr. Vander Maeden performed a number of tests, the results of which are recorded in Dr. Coen's report dated 28 September 2011. In his report, under the heading "Impression, Summary & Recommendation", Dr. Coen concluded:

Based on the results of review background documentation, clinical interview, behavioral observation, and psychological and neuropsychological testing, there are converging lines of clinical findings to support two primary diagnoses. First is a Cognitive Disorder (not otherwise specified), to describe the transient auditory confusion that is seen on a measure of auditory discrimination, and impaired (initial) verbal list learning. This may represent the fleeting disruption of attention in Mr. Vander Maeden caused by his emotional upsets, which will be diagnosed separately. However given the history of loss of consciousness, and the diagnosis of concussion on file, plus his specific concentration complaints since the accident in question, I cannot rule out concussion residue as the cause, or as an additional causal factor. This difficulty is compounded by the smaller than average test battery used (due to his limited vision). In addition by his self-report he is sleeping rather poorly most evenings, so some transient cognitive impairment could also result from that cause also. Finally he also appears to have a prior history of at least one or two prior head injuries, so pre-existing cognitive impairments cannot be ruled out. In short the causation appears multi-factorial at this time, but the nature of the cognitive lapses appears on a clinical judgment basis to exceed that normally expected due to anxiety or mood disorders alone, so is diagnosed separately here.

Second Mr. Vander Maeden meets diagnostic criteria for Post-Traumatic Stress Disorder (PTSD), chronic type. He remains hyper-vigilant and distrusting in a variety of driving situations, has disturbed sleep and intrusive recollections of his accident, and is prone to angry and irritable outbursts. Earlier in his recovery he reported more PTSD symptoms, including more frequent bad dreams-to the point he awoke with soaked night wear. Despite these limited improvements in some select symptoms, he continues to meet sufficient diagnostic criteria to quality for a PTSD diagnosis. Given the severity of his prior MVA, and the tragic loss of his first wife, his threshold to PTSD may have been lowered prior to the accident in question [Accident #1], but he was functioning well psychologically in terms of mood, sleep and productivity, so it appears there was no residual PTSD from the first accident.

Dr. Brad Schweitzer

**55**  Dr. Schweitzer is a medical practitioner who has been Mr. Vader Maeden's family doctor for 13 years. Dr. Schweitzer prepared reports relating to Mr. Vander Maeden. In his report dated 16 July 2009, Dr. Schweitzer observed:

After the motor vehicle accident of March 20, 2009, and for some months afterwards Rudy had ongoing symptoms, including:

1. Congestion and ringing in his ears with decreased hearing
2. Severe sprain of the 5th digit of his right hand and of the thumb of his left hand
3. Neck pain and stiffness
4. Headaches
5. Contusions of his right elbow, right hip and right knee
6. Shoulder pain and stiffness on the right side
7. Stiffness of his right leg.

At this time Rudy is almost fully recovered from the above injuries, although does unfortunately continue to have ringing in his right ear (tinnitus) with occasional forgetfulness and slower thought processes, particularly mathematics which he has always been very quick at, but notes that he is much slower at it now.

**56**  Dr. Schweitzer's follow-up report of 22 September 2010, confirmed that Mr. Vander Maeden continued to complain of tinnitus, pain and stiffness in his neck, lower back, right hip, right shoulder, right elbow and right hand. Mr. Vander Maeden also continued to report suffering from daily headaches, though they had decreased in intensity.

**57**  In his report dated 24 January 2012, Dr. Schweitzer described the following:

Rudy continues to be bothered by numerous physical symptoms:

1. The ringing in his ears (tinnitus) has continued unabated with no signs of improvement. He continues to have hearing deficit in both ears.
2. The sprain and injuries to his right hand and thumb have improved, although he continues to have paresthesia.
3. The neck pain and stiffness continues and does cause him much disability.
4. The headaches also continue to bother him, although these have improved somewhat.
5. Rudy continues to be bothered by significant low back pain for which he takes analgesic medication.

The contusions and bruising of his right elbow, hip and knee of course have all resolved.

**58**  In his final report, dated 2 February 2013, Dr. Schweitzer provided the following opinions regarding Mr. Vander Maeden's condition:

My opinion is based on my personal experience with Mr. Vandermaeden (sic) as his family physician upon medical records in my chart and also I have relied upon the opinions of several specialist that Mr. Vandermaeden has attended, which include: Dr. Desmond J. Coen (Registered Psychologist), Dr. Gordon Robinson (Neurology), Dr. John Le Nobel (Physical & Rehab Medicine) and Dr. Neil S. Longridge (Otolaryngology).

**59**  Although he offers no new opinion in his final report, Dr. Schweitzer does agree with the views expressed by Dr. le Nobel, Dr. Robinson, Dr. Longridge and Dr. Coen. Worthy of note is the fact that in cross-examination, Dr. Schweitzer confirmed that he agreed with Dr. Robinson's opinion that Mr. Vander Maeden's reduction in vision was more likely attributable to his retinitis pigmentosa than Accident #1 and that the numbness and tingling sensation in Mr. Vander Maeden's hands and feet and his balance problems were probably unrelated to Accident #1 and more likely caused by his NARP.

**60**  Dr. Schweitzer confirmed that in the fall of 2009 he referred Mr. Vander Maeden to Dr. J.P. Claasen, and ophthalmic surgeon for a assessment of Mr. Vander Maeden's vision issues. Dr. Classen provided Dr. Schweitzer with a consultation report dated 24 August 2009 setting out his examination of Mr. Vander Maeden. That report was not admitted into evidence during the trial. However, during his cross-examination, Dr. Schweitzer agreed with and in essence adopted the following observations contained in Dr. Claasen's report:

Mr. Vandermaeden has what appears to be end stage Retinitis Pigmentosa accounting for his near total vision loss in both eyes. He also has signs of meibomian seborrhoea of posterior blepharitis which can account for his symptoms of sore eyes...I don't feel his symptoms are related to his blunt head injury...

Dr. A. Sidki

**61**  Dr. Sidki is a medical practitioner who specializes in orthopaedics. At the request of the defendants, Dr. Sidki reviewed all of the plaintiff's expert medical reports, including the supporting materials that were used to prepare those reports. In his expert report dated 22 February 2012, Dr. Sidki opined:

Mr. Vander Maeden had a variety of principally musculoskeletal issues and complaints prior to the motor vehicle accident [Accident #1]. Since the accident Mr. Vander Maeden has had increased pain in his previously painful shoulder, knee and back and also has new complaints of ringing in his ears (tinnitus), numbness of his right hand and thumb, neck pain and stiffness, dizziness, hearing loss and headaches. In the period after the accident, Mr. Vander Maeden had complained of other musculoskeletal complaints such as hip and knee pain as well as right elbow pain although these do not seem to be consistent long-term complaints and they appear to have essentially resolved.

Based on the records available for review Mr. Vander Maeden is almost three years from the motor vehicle accident. He continues to describe significant ongoing issues. Although some of these issues have improved it does appear that Mr. Vander Maeden continues to complain of ongoing tinnitus, hearing deficit, hand parastheisa, neck pain and stiffness, headaches, low back pain and dizziness.

Overall Mr. Vander Maeden's complaints are likely multifactorial and are partially related to pre existing conditions and partially related to the motor vehicle accident [Accident #1].

Conclusion

**62**  I have approached the medical evidence presented by Mr. Vander Maeden with a certain degree of caution. Although I found Mr. Vander Maeden to be a credible witness, his reliability in recounting his medical history to the various health care professionals who have treated him has been less than consistent. Mr. Vander Maeden clearly does not have a strong memory for details and he confirmed during his testimony that the medications that he has been taking for years, particularly the morphine, have affected his ability to recall matters in a consistent manner. Moreover, the medical evidence itself is, at times, inconsistent or contradictory. For example, the opinions of Dr. Robinson and Dr. Coen, two witnesses presented by Mr. Vander Maeden conflict on the question of whether Mr. Vander Maeden suffered a traumatic brain injury in Accident #1. In my respectful view, Dr. Robinson as a medical doctor with an expertise in neurology is better suited and able to opine on the issue of traumatic brain injuries in this case than Dr. Coen.

**Causation**

**63**  In order to prove causation, Mr. Vander Maeden must satisfy the court that the negligent acts of the defendants caused or materially contributed to his injuries (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=)).

**64**  In *Ng v. Sarkaria*, [*2011 BCSC 1643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22N6-00000-00&context=), Butler J. helpfully summarized the relevant principles of causation as follows:

[8] 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 proven: *Resurfice Corp. v. Hanke*, [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), at paras. 21-23.

[9] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated 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:

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

[10] 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. The tortfeasor must take his or her victim 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*, at paras. 32-35.

The Plaintiff's Position

**65**  Mr. Vander Maeden acknowledges that he had pre-existing physical ailments, such as limited vision and chronic pain in his back. However, he maintains that his pain and discomfort have been exacerbated to a large degree by Accident #1 and that the accident has left him with additional new injuries. Mr. Vander Maeden points to the fact that he did not suffer from headaches, dizziness and hearing loss before Accident #1. He maintains that his degenerative eye disease had stabilized prior to Accident #1 and that the force of that collision caused head injuries that have prompted a further diminishment of his vision. He also maintains that his emotional state has deteriorated since Accident #1 and in particular he now claims to suffers from Post-Traumatic Stress Disorder. In essence, Mr. Vander Maeden claims he is someone who fits within the "thin skull" rule of causation.

The Defendants' Position

**66**  The defendants accept that Mr. Vander Maeden suffered some soft injuries as a result of Accident #1. Specifically, the defendants acknowledge that Mr. Vander Maeden suffered transient pain and discomfort as well as temporary hearing loss following the accident. The defendants deny the balance of Mr. Vander Maeden's complaints arguing his evidence regarding them was inconsistent and therefore unreliable. The defendants also point to Mr. Vander Maeden's long-standing serious disabilities, including his retinitis pigmentosa, his NARP, and the pre-existing chronic pains associated with the 1979 Accident to support their argument that Mr. Vander Maeden would have suffered many of the ailments he is attributing to Accident #1, irrespective of the accident. In other words, the defendants argue many of the physical ailments Mr. Vander Maeden attributes to Accident #1 are more properly because of his latent condition (i.e., crumbling skull) and not the accident.

Conclusion - Causation

**67**  In *Athey*, Mr. Justice Major explained the concepts of "thin skull" and "crumbling skull" as follows:

**33** In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.

1. The Thin Skull and "Crumbling Skull" Doctrines

34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, supra, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death (9th ed. 1993), at pp. 39-40. 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: Graham v. Rourke, [*[1990] O.J. No. 2314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JCJ5-22YM-00000-00&context=), supra; Malec v. J. C. Hutton Proprietary Ltd., 169 C.L.R. 638, supra; Cooper-Stephenson, supra, at pp. 851-852. 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.

**68**  I accept that Mr. Vander Maeden's pre-existing physical conditions made him unusually susceptible to injury and was to a certain degree someone with a "thin skull". In this regard, I find Mr. Vander Maeden suffered an exacerbation of the chronic pain he had in his back, shoulders and legs as a result of Accident #1. He also suffered an exacerbation of his depression and mood disorder, resulting in the diagnosis of PTSD. Accident #1 also caused new physical ailments for Mr. Vander Meaden:

1. mild soft tissue injuries to his upper body, right elbow, and right hip. All of these injuries have resolved themselves, except for the elbow that continues to cause Mr. Vander Maeden some occasional pain;
2. mild headaches;
3. moderate hearing loss and tinnitus;
4. minor cognitive impairment (i.e., mild loss of ability to concentrate).

**69**  With respect to Mr. Vander Maeden's assertion that the onset of dizziness, vertigo, tingling in his arms, hands and feet as well as his further reduction in vision are attributable to Accident #1, I find myself unconvinced that these symptoms would not have occurred but for the accident. In other words, I am of the opinion that the pre-existence of retinitis pigmentosa, NARP and the chronic ailments associated with the 1979 Accident, made it very likely that Mr. Vander Maeden would have suffered from these symptoms at some point in the future irrespective of whether Accident #1 had occurred or not.

Plaintiff's Post Accident Condition: Employment & Activities

**70**  Mr. Vander Maeden has not earned any type of income to speak of since 2005 when he wound-down his firewood business. Although Keith Miller did give Mr. Vander Maeden $150 in 2010 for the assistance he provided in cutting some wood on Mr. Miller's property, that payment was more of a gratuity than a wage. According to Mr. Miller, the work was difficult but Mr. Vander Maeden was able to complete it as he was "still a bear for work". Mr. Miller had confidence in Mr. Vander Maeden's physical ability to handle the work and expressed his view that he never felt any danger being around Mr. Vander Maeden.

**71**  Since Accident #1, Mr. Vander Maeden has continued to regularly attend at the gym; however his routine has changed in that he is now more cautious, uses lower weights and has to hold onto items to steady himself. Mr. Vander Maeden no longer rides his bicycle and he has reduced his social activities and in particular he no longer attends the Happy Hour at his friend's home, nor does he participate in the breakfast group that he had been a part of.

**Damages**

**72**  Mr. Vander Maeden argues that as a result of Accident #1 he has suffered significant and permanent injuries warranting a substantial award of damages. I will address each of the head of damages under which Mr. Vander Maeden is making a claim.

Non Pecuniary Damages

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

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=), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**74**  For his non-pecuniary damages, Mr. Vander Maeden seeks an award of between $125,000 and $185,000. In support of this position, Mr. Vander Maeden relies upon the following case authorities*: 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=); *Millar v. Waring*, [*[2009] O.J. No. 1865*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S403-00000-00&context=) (S.C.J.), supplemental reasons [*[2009] O.J. No. 1866*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S404-00000-00&context=) (S.C.J.); *Place v. Ali*, [*[2007] O.J. No. 2526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-JS0R-2055-00000-00&context=) (S.C.J.); and *Chancey v. Chancey*, [*[1999] B.C.J. No. 551*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-224X-00000-00&context=) (S.C.).

**75**  In *Dionne*, the 54-year old claimant was a pedestrian who was struck by a motor vehicle while she was crossing a marked pedestrian crosswalk. The accident caused a traumatic brain injury for Ms. Dionne and left her with headaches, pain in her neck and back and impairment of her hearing and sense of smell. The court found Ms. Dionne suffered many losses from the accident, including having to leave an employment that she enjoyed and was an important part of her identity. In the result, Ms. Dionne was awarded $185,000 for non-pecuniary damages.

**76**  In *Millar*, the 42-year old claimant was intentionally struck in the face with a sledgehammer. The resulting injuries to Mr. Millar included a fractured skull and resulting brain injury that required surgical intervention. Mr. Millar also lost the sight in one of his eyes. The court accepted the parties' joint submission of $185,000 for non-pecuniary damages.

**77**  In *Place*, the claimant's vehicle was struck from behind by the defendant's vehicle. The collision left Ms. Place with damage to her inner ear that caused a moderate loss of hearing as well as a loss of balance. The court found this injury to her inner ear would this have a permanent and serious effect on her future life including preventing her from pursuing her intended career as a correctional officer. The claimant also suffered chronic and permanent soft tissue injuries to her neck, shoulder, back, and hip. She also developed a major depression / adjustment disorder. The court awarded Ms. Place $125,000 in non-pecuniary damages.

**78**  In *Chancey*, the claimant was a 48-year old realtor who was a passenger in a motor vehicle accident. Miraculously, neither the driver nor Mr. Chancey were physically injured. The court found that Mr. Chancey's pre-existing psychiatric condition made him a "classic 'thin skull' personality" and consequently awarded him $100,000 in non-pecuniary damages for what were described as severe psychological injuries.

**79**  The defendants submit that a just award for Mr. Vander Maeden's non-pecuniary damages would fall within the range of $60,000 to $90,000. In support of this position, the defendants cite the following cases: *Zen v. Readhead*, [*2011 BCSC 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33X-00000-00&context=); *Trevitt v. Tobin*, [*2009 BCSC 1249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62DJ-00000-00&context=); *Haile v. Johns, Plasman and I.C.B.C.*, [*2005 BCCA 517*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B27J-00000-00&context=); and *White v. Nuraney*, [*2000 BCCA 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B19S-00000-00&context=).

**80**  In *Zen*, a 45-year old claimant suffered multiple injuries in a motor vehicle accident. Madam Justice Fenlon described Mr. Zen's condition post-accident at para. 54:

[54] ...Mr. Zen is now 45-years-old. He used to be an outgoing, charismatic athlete who weekly ran 40 km, did the Grouse Grind, and took an active role in the lives of his daughters, all while working long days in the family business including most Saturdays. Today he is a different man. He is sleep-deprived and in chronic pain, which makes him irritable and prone to frustration and anger. He can no longer push himself athletically, which was a central part of his life and the way he managed stress. He is a diminished role in the lives of his daughters, and in particular his youngest daughter, Olivia. Mr. Zen's relationship with his wife has been significantly affected and he has, in his words, "missed out on the best years of [his] life".

**81**  Mr. Zen was awarded $110,000 for his non-pecuniary damages.

**82**  In *Trevitt*, the claimant had been riding his motorcycle when it collided with a car that was making a left-hand turn across the traffic. Mr. Trevitt suffered chronic soft tissue injuries to his shoulders, left elbow, left knee and left ankle. He also suffered damage to his inner ear that caused dizziness and balance problems. The court awarded Mr. Trevitt $60,000 for his non-pecuniary damages.

**83**  In *Haile*, the 24-year old complainant suffered soft tissue "aches and pains" as a result of a motor vehicle accident. Those injuries resolved themselves reasonably quickly. The accident also left Mr. Haile with mild non-intrusive tinnitus and dizziness. The trial judge awarded Mr. Haile $30,000 for his non-pecuniary damages and that award was upheld on appeal.

**84**  In *White*, the 55-years old complaint suffered dizziness, tinnitus, and benign positional vertigo as a result of a motor vehicle accident. The jury that tried Ms. White's case awarded her $55,000 for her non-pecuniary damages. In upholding that award, Braidwood J.A. observed at para. 51:

[51] It is somewhat difficult to pinpoint an exact "range" for tinnitus awards, since plaintiffs always suffer the injury in conjunction with other (often more serious) injuries. However, the range for non-pecuniary damages seems to extend from $20,000 to $90,000 depending on whether there are other injuries present. Perhaps the bottom end of this range, when adjusted for inflation, is now in the neighbourhood of $35,000. At any rate, the jury award in this case of $55,000 is not "inordinately low" and, following the traditional test, this Court cannot interfere with it.

**85**  I accept that as a result of Accident #1, Mr. Vander Maeden suffered soft tissue injuries to his upper body, right elbow and right hip. He has been left with mild headaches, moderate hearing loss and tinnitus and minor cognitive impairment. He has suffered exacerbation to the existing chronic injuries he had to his neck, back, shoulders and legs, as well as his pre-existing mood disorder. The temporary dizziness and vertigo Mr. Vander Maeden experienced essentially resolved themselves within a year of Accident #1 and, in any event, they were more likely unrelated to this accident. Finally, I accept that that Accident #1 exacerbated Mr. Vander Maeden's pre-existing depression causing him to reduce his social activities.

**86**  Considering all of the circumstances of this case, especially the fact that Mr. Vander Maeden is legally blind and thus much more reliant on his hearing that those with regular eyesight, I find an award of $110,000 would be fair compensation for his non-pecuniary damages.

Loss of Past Income

**87**  Mr. Vander Maeden was unemployed when Accident #1 occurred. Notwithstanding that fact, he claims that in the Spring of 2009 he was thinking of starting a business collecting wood off of the local Powell River beaches and then transporting and selling it to local residents. While nothing was definitive and no concrete plans had been made, Mr. Vander Maeden argues that he could have started this business and therefore he is entitled to some compensation for the loss of this opportunity.

**88**  In my opinion, there is no convincing evidence that supports Mr. Vander Maeden's claim under this heading. The law is quite clear that an award for past loss of earning capacity is based on what the plaintiff would have earned, but for the injuries sustained. A claim that the plaintiff could have earned an income will not suffice (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=)).

**89**  There is no evidence that Mr. Vander Maeden actually lost income as a result of the injuries he suffered in Accident #1, nor in my opinion is there any convincing evidence that there was a real and substantial possibility that he would have earned income after Accident #1. As Mr. Vander Maeden has not made out this portion of his claim, it is denied.

Loss of Future Earning Capacity

**90**  Mr. Vander Maeden seeks modest compensation for the loss of a capital asset, namely, his ability to earn income in the future. While he acknowledges that he has been on a disability pension for many years, Mr. Vander Maeden asserts that he could have worked cutting firewood or doing other manual labour but for the injuries he suffered in Accident #1. In essence, Mr. Vander Maeden seeks compensation for income that he says he would have or could have earned in the future, but that he will be unable to earn because of the injuries he has suffered as a result of the accidents.

**91**  Much like their position with respect to Mr. Vander Maeden's claim for loss of past income, the defendants argue there is no real possibility this loss of future income will occur, given his non-existent employment history in the four years prior to Accident #1 and the serious and progressive pre-existing health issues he had.

**92**  In order to obtain an award under this head of damages, Mr. Vander Maeden must prove a real and substantial possibility that his earning capacity has been impaired (see: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=)). If he can do so, then the assessment of his loss will require the consideration of the following four factors articulated by Finch J. (as he then was) in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.) whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**93**  In my opinion, Mr. Vander Maeden has failed to show that there is a real and substantial possibility that his earning capacity has been impaired on account of Accident #1. While Mr. Vander Maeden did suffer injuries as a result of Accident #1 the fact of the matter is, in the Spring of 2009 he had been on a disability pension for 16 years, had earned no supplementary income for close to four years and he was suffering from chronic pain and a degenerative condition that required him to take potent analgesics regularly. With all due respect to Mr. Vander Maeden, in my view, he had no realistic earning capacity prior to Accident #1. For the same reasons, were I to consider and apply the four questions posed in *Brown* to Mr. Vander Maeden's circumstances I would be compelled to answer each in the negative.

**94**  Mr. Vander Maeden's claim under this heading is denied.

Cost of Future Care

**95**  An award under this heading will be justified if there is medical justification for the claim and the claim is a reasonable one (see: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (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.)).

**96**  The expert medical evidence, as well as the evidence of Dr. Coen satisfies me that there is a real and substantial possibility that Mr. Vander Maeden will incur expenses in the future as a result of the injuries he sustained in Accident #1.

**97**  Dr. le Nobel recommended that Mr. Vander Maeden continue with acupuncture and pain block injections as necessary. He did not recommend any other type of therapy (e.g., physiotherapy or massage therapy), nor did he recommend any chiropractic treatment. Dr. le Nobel did recommend counselling and possibly medication for Mr. Vander Maeden's depression. I accept Dr. le Nobel's evidence in this regard.

**98**  In Dr. Coen's opinion, Mr. Vander Maeden requires additional counselling to address his psychological problems, particularly the Post Traumatic Stress Disorder. Dr. Coen suggested 10 to 25 counselling sessions at an approximate costs of between $1,600 and $4250. He also recommended that Mr. Vander Maeden be referred to a sleep clinic and pain clinic to address the sleep difficulties he is having and the continuing problems he is having managing his pain. No cost estimate was provided for this additional assistance.

**99**  On the issue of Mr. Vander Maeden's need for future care and assistance, Dr. Robinson observed in his report:

He will probably continue to have headaches indefinitely. His ability to function will remain compromised related to back pain and symptoms related to NARP. It is unlikely that he will ever be gainfully employed. He will continue to require assistance for activities of daily living, particularly maintaining his home.

**100**  Dr. Schweitzer concluded that Mr. Vander Maeden is going to require domestic assistance at home. I accept Dr. Schweitzer's opinion as well as that of Dr. Robinson, however in my view the claim for the cost of future domestic assistance should be discounted because Mr. Vander Maeden already had an established need for homecare assistance prior to Accident #1 and given his pre-existing chronic pain and his degenerative condition, it was practically certain that his need for this assistance would have continued and likely grown even if the accident had not occurred.

**101**  Although the evidence on the point conflicts, I accept that Mr. Vander Maeden needed the assistance of a housekeeper and had such assistance prior to Accident #1. When that assistance began is somewhat of a controversial and convoluted issue. Initially in his evidence-in-chief, Mr. Vander Maeden could not remember when Ms. Cheryl Yungen began helping him at home. He guessed that it was sometime after he moved into his Powell River condominium and shortly before Accident #1. He indicated that she worked one day per week for between 2 to 4 hours, cleaning his home and doing other tasks around his home. He paid her $15 per hour for her services. At his examination for discovery on 25 October 2010, Mr. Vander Maeden said Ms. Yungen began working for him after Accident #1. He then changed that evidence and indicated that that she began assisting him a few months before Accident #1, and that it could have possibly been up to a year before the accident. At his examination for discovery on 14 February 2012, Mr. Vander Maeden said Ms. Yungen had worked for him for "a couple of years". In cross-examination, Mr. Vander Maeden indicated again that Ms. Yungen had begun providing him with homecare assistance a few months prior to Accident #1, most likely in January of 2009. He also indicated that she stopped working for him in April of 2009, a few months after Accident #1, around the time Ms. Geraldine Bergstrom moved into his condominium complex and began assisting him. Mr. Vander Maeden testified that Ms. Yungen worked for him from January 2009 until April 2009, for a total of three or four months. He also asserted that after April 2009, Ms. Yungen did not provide him with any homecare assistance after that date.

**102**  Mr. Vander Maeden testified that when Ms. Bergstrom moved into his condominium complex, she "kind of slid in" and replaced Ms. Yungen. This, according to Mr. Vander Maeden occurred about six weeks after Accident #1. Ms. Bergstrom began working 10 -15 hours per week helping Mr. Vander Maeden in his home. At some point Ms. Bergstrom moved into Mr. Vander Maeden's home and became his roommate. Mr. Vander Maeden explained that they are not romantically involved and are simply friends. According to Mr. Vander Maeden, Ms. Bergstrom has been instrumental in getting him prepared and ready for the trial of his legal actions. She has also assisted him greatly with an ongoing dispute he has with a government ministry. As Mr. Vander Maeden described it, "she has done yeoman's work" for him.

**103**  In her examination-in-chief, Ms. Yungen said she could not remember the specific length of her employment with Mr. Vander Maeden. She initially testified that she began working for Mr. Vander Maeden in late 2008 and continued to do so until April or May of 2010. That would have meant she had worked for Mr. Vander Maeden for approximately a year and a half. Ms. Yungen corrected herself and said the finished working for Mr. Vander Maeden in April or May of 2009 and therefore she had only worked for him for 5 or 6 months. In cross-examination, Ms. Yungen admitted telling an investigator from the Insurance Corporation of British Columbia that she had worked for Mr. Vander Maeden for approximately one year after Accident #1. Ms. Yungen explained that was what she thought at the time but, since telling the investigator that, she had had the opportunity of speaking with Ms. Bergstrom and Mr. Vander Maeden's counsel about her term of employment. Having done so, she now insists she only worked for Mr. Vander Maeden for three or four months.

**104**  While counsel for the defendants is correct in saying the evidence of Mr. Vander Maeden and Ms. Yungen is not particularly reliable on the question of how long she worked for him and the evidence in general regarding Mr. Vander Maeden's housekeeping needs was less than satisfactory, I find there is a realistic possibility that the nature of the injuries caused by Accident #1, as well as those existing injuries that were aggravated by the accident will call for additional housekeeping services, beyond those provided prior to the accident and therefore a modest award for the future cost of these additional housekeeping services should be granted.

**105**  Aside from the costs for psychological counselling and the hourly rate Mr. Vander Maeden paid Ms. Yungen for her housekeeping services, there very little evidence regarding Mr. Vander Maeden's potential or projected costs of future care. While such evidence would have been of assistance, the calculation of future care costs is based upon what is reasonable and does not require a precise accounting (see: *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=)).

**106**  In my view, a reasonable award for the costs of Mr. Vander Maeden's future pain relief treatments, his psychological counselling and the additional domestic assistance he will need is $10,000.

Special Damages

**107**  Mr. Vander Maeden says he has paid approximately $2,100 for various "out-of-pocket expenses" he claims are directly attributable to the injuries he suffered in the accidents. The defendants have accepted that Mr. Vander Maeden has paid these expenses and all but one of them are justifiable. The one item the defendants take issue with is the approximate $500 spent on physiotherapy in February 2012. The evidence relating to this particular therapy suggests it was required not because of any injury suffered in Accident #1 but as a result of another incident. I agree with the defendants and will consequently award Mr. Vander Maeden $1,600 in Special Damages.

In Trust Claim

**108**  Mr. Vander Maeden and Ms. Bergstrom testified that since she moved into his condominium in 2009, she has provided him with unpaid housekeeping assistance. They both also confirmed that she has assisted Mr. Vander Maeden with his mail and paper work and has been especially instrumental in getting Mr. Vander Maeden prepared for this trial. She has also been a significant help to Mr. Vander Maeden in his dealings with the Ministry of Social Services. Mr. Vander Maeden explained that in his discussions with Ms. Bergstrom, he told her he would reimburse her for her work once these legal proceedings have been resolved. It is unclear to me whether that reimbursement would be for the work she has done providing homecare or whether it is for all of the administrative assistance she has provided him in his on-going dispute with the ministry and preparing for trial, or both.

**109**  Ms. Bergstrom confirmed in her evidence that she and Mr. Vander Maeden have discussed the topic of her being reimbursed from the proceeds of any award from this litigation for all of her work, although she claimed there was no amount discussed or agreed upon.

**110**  I am not convinced that Mr. Vander Maeden's in trust claim is meritorious. I am of that view for two principal reasons. First, I found Ms. Bergstrom to be a less than reliable witness. She also suffered from serious credibility lapses. On more than one occasion she was inexplicably evasive and unresponsive to the simple questions being posed of her. For example, when she was asked in cross-examination whether she knew Mr. Vander Maeden suffered from vision problems before Accident #1, her puzzlingly non-responsive answer was to the effect that she too wore glasses. Secondly, and of significant importance, I found Ms. Bergstrom was deliberately untruthful with the court when she was asked whether she had ever spoken with Ms. Yungen about Ms. Yungen's evidence. When in cross-examination Ms. Bergstrom was first asked that question, she replied that she had not. That answer was surprising because Ms. Yungen had testified that she had spoken about her evidence with Ms. Bergstrom prior to the trial and had done so again very recently when they were both sitting outside of the courtroom waiting to testify at this trial. Ms. Yungen explained that it was on account of her discussions with Ms. Bergstrom that she was able to determine the dates when she had worked for Mr. Vander Maeden. Given the startling response of Ms. Bergstrom, counsel for the defendants asked the question a second time, carefully wording it so that there would be no misunderstanding of what was being asked. Ms. Bergstrom again said she had not spoken with Ms. Yungen about Ms. Yungen's evidence and more particularly about the dates when Ms. Yungen worked for Mr. Vander Maeden. Between the two, I accept the evidence of Ms. Yungen, for her evidence is logical and credible. Moreover, she had no reason for fabricate her evidence in this regard. The same cannot be said of Ms. Bergstrom and consequently I find she was not being truthful when she testified that she had not spoken with Ms. Yungen about her evidence.

**111**  In addition to her being an untrustworthy witness, counsel for the defendants also underscored the fact that Ms. Bergstrom had a clear financial interest in this case and consequently had a good reason to colour or exaggerate her evidence in order to advance Mr. Vander Maeden's claim.

**112**  I am not satisfied Mr. Vander Maeden has made out this aspect of his claim. Moreover, I would be leery about making such an award in light of what I have found to be the misleading nature of Ms. Bergstrom's evidence.

**113**  Mr. Vander Maeden's in trust claim is denied.

**Order**

**114**  Although I found Ms. Mander 50% liable for Accident #2, as there were no damages that resulted from the accident, Mr. Vander Maeden is entitled to no award of damages in Action #2.

**115**  With respect to Action #1, the defendants are liable for Mr. Vander Maeden's damages and expenses associated with Accident #1 and consequently I make the following awards:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non Pecuniary Damages | $110,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Past Income | $0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future Capacity to |  |  |
|  | Earn Income | $0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Costs of Future Care | $10,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $1,600.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | In Trust Claim for |  |  |
|  | Geraldine Bergstrom | $0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL:** | $121,600.00 |  |

**116**  If the parties are unable to agree on costs, they may speak to the issue upon obtaining a date from the trial manager's office.

G.R.J. GAUL J.

**End of Document**

[***Shannahan v. Johnson, [2010] B.C.J. No. 938***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-21YB-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J.

Heard: March 15-19, 22-26, 29-31 and April 1, 2010.

Judgment: May 19, 2010.

Docket: S070321

Registry: Vancouver

**[2010] B.C.J. No. 938** | 2010 BCSC 700 | 189 A.C.W.S. (3d) 533 | 2010 CarswellBC 1274

Between James Grant Shannahan, Plaintiff, and Dr. Andrew A. Johnson, Dr. Edward V. Auersperg, Dr. Francis L.C. Ervin, and Dr. Conrad G. Keebler, Defendants

(114 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Action by Shannahan against four physicians for medical *negligence* dismissed — Shanahan arrived at Mission Memorial Hospital complaining of various symptoms and explained that he had been previously diagnosed with Still's Disease — Shanahan was seen by the defendant physicians over several weeks and was ultimately diagnosed with Still's Disease — Shanahan submitted that the physicians failed to diagnose and treat him in a timely way — The physicians made note of Shannahan's previous diagnosis while still considering other possible causes — There was no evidence that the physicians failed to meet the required standard of knowledge, skill and ability.**

**Professional responsibility — Liability — Professions — Health care — Doctors — Action by Shannahan against four physicians for medical *negligence* dismissed — Shanahan arrived at Mission Memorial Hospital complaining of various symptoms and explained that he had been previously diagnosed with Still's Disease — Shanahan was seen by the defendant physicians over several weeks and was ultimately diagnosed with Still's Disease — Shanahan submitted that the physicians failed to diagnose and treat him in a timely way — The physicians made note of Shannahan's previous diagnosis while still considering other possible causes — There was no evidence that the physicians failed to meet the required standard of knowledge, skill and ability.**

|  |
| --- |
| Action by Shannahan against four physicians for medical ***negligence***. On January 20, 2005, Shanahan arrived at the emergency department of Mission Memorial Hospital complaining of various symptoms. Shanahan explained that he had been previously diagnosed with Still's Disease and that his current symptoms could represent a recurrence. Between January 21, 2005 and February 14, 2005 Shanahan was seen by the various defendant physicians. Ultimately, Shanahan was diagnosed with Still's Disease. According to Shannahan, his recovery was very slow and he was forced to discontinue his business and was unable to continue making payments for his home. Shanahan took the position that the physicians were negligent in failing to diagnose and treat him in a timely way. The defendant physicians denied that they were negligent. The physicians further submitted that Shannahan had an unusual presentation of a rare disorder.  HELD: Action dismissed.  The various physicians made note of Shannahan's self-diagnosis of Still's Disease while still considering other possible causes for his condition. The diagnosis of Still's Disease was by exclusion, it was an extremely rare disease and Shanahan's presentation of the disease was unusual. Consequently, the Court was unable to find that the physicians' consideration of Shannahan's medical history was negligent. Furthermore, there was no evidence of the physicians failing to meet the required standard of knowledge, skill and ability. As a result, Shanahan failed to establish that the defendant physicians were negligent. |

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 18A

**Counsel**

Counsel for the Plaintiff: Appearing on his own behalf.

Counsel for the Defendants: D.W. Pilley, K.J. Yee.

**Reasons for Judgment**

|  |
| --- |
| **J.E.D. SAVAGE J.** |

**I. Introduction**

**1**  The plaintiff, James Grant Shannahan ("Mr. Shannahan"), brings this action against four physicians for medical ***negligence*** and defamation. Mr. Shannahan is impecunious and at trial was self-represented. He is an intelligent man, an autodidact, with obvious abilities.

**2**  The defendants include his family physician, Dr. Andrew A. Johnson ("Dr. Johnson"), the general internal medicine specialist at the Ridge Meadows Hospital ("RMH") , Dr. Edward V. Auersperg ("Dr. Auersperg"), and two consulting physicians at RMH, Dr. Francis L.C. Ervin ("Dr. Ervin"), and Dr. Conrad G. Keebler ("Dr. Keebler").

**3**  Dr. Garry Henderson, the emergency room physician at Mission Memorial Hospital ("MMH"), and Dr. Shavinder S. Gill, an internal medicine specialist, and the Fraser Health Authority, the operator of the MMH, MSA General Hospital, and RMH, were formerly defendants in the action.

**4**  On January 20, 2005 Mr. Shannahan arrived at the MMH Emergency Department in a wheelchair. He complained of various symptoms. He explained that he had been diagnosed with adult onset Still's Disease about 20 years earlier and thought his current symptoms might represent a recurrence. He saw Dr. Garry Henderson in emergency.

**5**  On January 21, 2005 his regular family doctor, Dr. Johnson, assumed his care at MMH. Mr. Shannahan was transferred to MSA Hospital briefly on January 25, 2005, then returned to MMH. Because his condition worsened Mr. Shannahan was transferred on an emergency basis to RMH on February 1, 2005. Between January 21, 2005 and February 14, 2005 Mr. Shannahan was seen by the various defendant physicians. He was subsequently transferred to Vancouver General Hospital ("VGH") on February 14, 2005. Within a couple of days after he received treatment, his condition improved and he was discharged from VGH on February 25, 2005.

**6**  Mr. Shannahan says that his recovery was slow and he was forced to discontinue his business, Phoenix Arts. He was unable to continue payments for his home, which included his studio, and it was sold in the summer of 2005. He is now categorized by the Canadian Revenue Agency as a person with a disability, and receives disability benefit payments.

**7**  During the course of his treatment he was tested for HIV which tests proved negative. There is reference to the HIV testing in the physicians' records including hospital records. Mr. Shannahan denies that he consented to the HIV tests that were actually administered.

**8**  Mr. Shannahan claims damages for ***negligence*** for delayed diagnosis and damages for defamation. The physicians deny that they were negligent. They deny that their actions caused or contributed to the plaintiff's current condition.

**9**  In a related matter in *Shannahan v. Fraser Health Authority*, [*2010 BCSC 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0S8-00000-00&context=), Smith J. dismissed the action against Fraser Health Authority. In another related matter, *Shannahan v. Fraser Health Authority* (01 January 2010), Vancouver S070321 (S.C.), Silverman J. dismissed the actions against Dr. Garry Henderson and Dr. Shavinder S. Gill. Those actions were concluded by proceedings for summary judgment under Rule 18A of the *Rules of Court*.

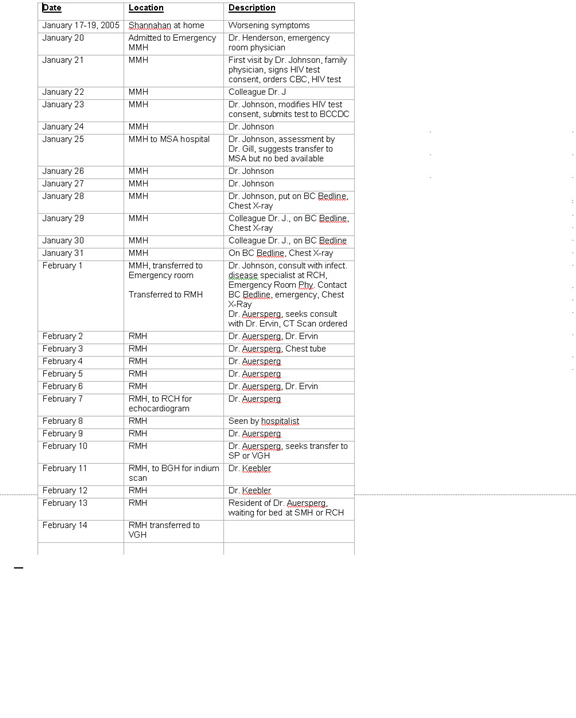
**II. Issues**

**10**  The issues for consideration by this court are:

1. Were any of the physicians negligent in their treatment of Mr. Shannahan?
2. Were any of the remarks made by the physicians about Mr. Shannahan defamatory? If the remarks were defamatory were they privileged?
3. Did the physicians' ***negligence***, if any, cause or contribute to Mr. Shannahan's condition?
4. If the physicians' ***negligence*** caused or contributed to Mr. Shannahan's condition, what are Mr. Shannahan's losses attributable to such ***negligence***?
5. Did Mr. Shannahan consent to the HIV testing?

**III. Location and Assessment Chronology**

**11**  The following is a brief chronology of some of the events that occurred up to Mr. Shannahan's admission to VGH:



**A. 1985 Episode and Diagnosis**

**12**  As I have mentioned, Mr. Shannahan became Dr. Johnson's patient in 1991. At that time he gave Dr. Johnson a history that included the diagnosis and treatment for Still's Disease in 1985 by Dr. Angela Howe.

**13**  Dr. Johnson had Mr. Shannahan sign a requisition authorizing the release of his medical records. The requisition was sent by Dr. Johnson although there is some controversy over whether he received anything in reply. Dr. Johnson's evidence was that not receiving anything was not uncommon but a review of his records indicates, he believes, that he received some documents.

**14**  Dr. Johnson also gave evidence that it was his practise to vet such records, discard illegible or unintelligible material, and retain only what he thought useful. There are some records in his file, although Mr. Shannahan argues that the earlier material came from his own records, concerning which he enlisted Dr. Johnson's assistance in making WCB claims. In my opinion nothing turns on this difference in the evidence.

**15**  Introduced in evidence are some records from 1985 including a Consultation Report dated May 13, 1985 and a Discharge Summary dated May 26, 1985 from Burnaby Hospital. Although Mr. Shannahan insists that he was diagnosed with Still's Disease, the documents suggest a less certain conclusion. Dr. Johnson did not see this record.

**16**  The records indicate that Mr. Shannahan was admitted to Burnaby Hospital on May 13, 1985 after having been unwell for 12 days, and after having visited the emergency room on four or five occasions. On each occasion he was told he had an infection and sent home on Erythromycin. The symptoms included fever, myalgia, productive cough, malaise, anorexia, sore throat, difficulty swallowing and recent knee pain and swelling.

**17**  Mr. Shannahan was assessed by Dr. Angela Howe. Her initial impression was that he had an underlying infectious process resulting in his symptoms but sought to first rule out bacterial causes. A number of laboratory investigations were conducted and drugs administered over the first six days in hospital with no improvement. He was started on prednisone and showed improvement. Within seven days he was discharged. The records say that "[h]e was discharged on May 26th with the diagnosis not clear but may either be due to a post viral infection syndrome, to gonococcal arthritis, or to adult Still's".

**18**  There is no indication in the records that Dr. Voth, from whom Dr. Johnson sought records, had received this document.

**B. Dr. Johnson Pre-Hospital Admission 1991-2005**

**19**  Dr. Johnson has a family practice. He was educated at the University of Manchester, finishing his schooling in 1976, whereupon he commenced three years of rotating internships. He practiced family medicine in Manchester, England until coming to Canada in 1983. He commenced his family practice in Mission, B.C., in 1990. He had an open practice at that time and took Mr. Shannahan as a patient in 1991.

**20**  In 1991, when first meeting Mr. Shannahan, Dr. Johnson noted in his records that Mr. Shannahan reported an episode of Still's Disease. From 1991 until January 2005, the concerns were relatively mundane, including flu shots, back pain, and some male health issues. Mr. Shannahan was also tested for human immunodeficiency virus on two occasions. The results of the test were negative.

**C. Mission Memorial Hospital Admission and Care January 20-February 1, 2005**

**21**  On January 20, 2005 Mr. Shannahan attended the emergency room at MMH. He was seen by Dr. Gary Henderson, the emergency room physician, who is a general practitioner. Dr. Henderson took a history and admitted Mr. Shannahan to hospital.

**22**  On admission Mr. Shannahan explained that he had three days of worsening conditions prior to his admission. Dr. Henderson examined Mr. Shannahan and found his lungs clear to oculation, and his heart sounded normal. He ordered lab work including CBC, SED rate, C-reactive protein, uric acid, ANA, and blood cultures. He ordered that urine and sputum be collected. A chest X-ray was taken and interpreted as normal. Hematology and Chemistry were checked. Dr. Henderson did not see Mr. Shannahan again. Although the action originally included Dr. Henderson, the action against Dr. Henderson was dismissed.

**23**  On January 21, 2005 Dr. Johnson attended on Mr. Shannahan at MMH. Dr. Johnson ordered CBC and HIV testing. Mr. Shannahan signed a consent for HIV testing but the form was misdated by a staff member. January 21st was a Friday and the form was not processed. HIV testing takes from 5 to 7 days. Mr. Shannahan's urinalysis was reported and his temperature fluctuated.

**24**  On January 22, 2005 Mr. Shannahan was seen by one of Dr. Johnson's colleagues at MMH. His hematology was checked, chemistry was checked, and temperature recorded.

**25**  On January 23, 2005 Dr. Johnson saw Mr. Shannahan at MMH. He found bilateral bibasilar crackles. He prescribed Clarithromycin. A chest X-ray was interpreted as showing possible signs of pneumonia. A sputum culture showed normal respiratory flora. His temperature was checked. The HIV test form was properly dated and sent off to the B.C. Centre for Disease Control ("BCCDC").

**26**  On January 24, 2005 Dr. Johnson saw Mr. Shannahan at MMH. His urinalysis was checked and temperature recorded.

**27**  On January 25, 2005 Dr. Johnson saw Mr. Shannahan. Later that day his condition worsened. He was taken to MSA Hospital from MMH by ambulance and seen by Dr. Shavinder Gill. Dr. Gill who is a general internal medicine specialist reviewed Mr. Shannahan's history and made eleven orders. He sought to have Mr. Shannahan admitted to MSA hospital but there were no beds.

**28**  Mr. Shannahan returned to MMH and continued under the care of Dr. Johnson.

**D. Ridge Meadows Hospital Admission and Care February 1-February 13, 2005**

**29**  Late in the day February 1, 2005 Mr. Shannahan was transported to RMH. Dr. Auersperg was the physician in attendance. He is a fellow of the Royal College of Physicians and Surgeons with a specialty in internal medicine. He graduated from medical school at the University of British Columbia in 1983, completing residencies in VGH and St. Paul's Hospital in 1989. He also has a Masters in tropical medicine from London, England.

**30**  Dr. Auersperg first encountered Mr. Shannahan shortly after 10:00 p.m. on February 1, 2005. He spoke to him just before midnight that evening. He reviewed the medical records, took a history, spoke with the attending nurse, and made various orders. Dr. Auersperg acknowledged that he was the responsible physician during Mr. Shannahan's stay at RMH. Within a day he had Mr. Shannahan's HIV test results which were negative. Although the test results were negative, the test results did not definitively rule out HIV. His diagnostic impression was that Mr. Shannahan had a typical case of very severe pneumonia.

**31**  Mr. Shannahan mentioned to Dr. Auersperg his earlier diagnosis of Still's Disease. Dr. Auersperg's view was that he must first deal with the symptoms of infection. His view was that Mr. Shannahan's condition should be stabilized. To do that he prescribed adrenalin, antibiotics and expected to see his condition improve. He was aware of Still's Disease, which he described as a disease where the immune systems "go berserk". The symptoms of Still's Disease may include similar features to the symptoms of infectious diseases.

**32**  The treatment of Still's Disease requires the application of steroids. However, if there is sepsis, arising from infection, the application of steroids is contraindicated. The negative test result for HIV does not rule out HIV. HIV gradually erodes immunity. Symptoms like fever and joint pain can sometimes signal the immune system waking up to the presence of an invader.

**33**  During the period February 1 to 9, 2005, Dr. Auersperg's observations were that in some respects Mr. Shannahan got better, but in other respects he got worse. He seemed generally better for 1 or 2 days after his admission to RMH, but on February 3 he looked worse. Over this period the antibiotics were changed, a tube was inserted into Mr. Shannahan's chest cavity and fluid extracted, he was also started on hydrocortisone.

**34**  The antibiotics were changed because the previous antibiotics did not create improvement. Antibiotics are intended to kill specific infectious organisms. A change in antibiotics would target different infectious organisms. It was also hoped to culture the infectious organism from the fluid extracted from Mr. Shannahan's lung. That way a specific antibiotic could be selected to attack the invading organism, instead of using less effective broad spectrum antibiotics.

**35**  On February 2 to 3, 2005 Dr. Auersperg consulted with Dr. Ervin. Dr. Ervin is a specialist in internal medicine. He has a subspecialty in respiratory medicine. He graduated from Dalhousie University in 1979, spent three years in emergency medicine, three years in internal medicine, and two years in respirology. After two years in P.E.I. he moved to Maple Ridge in 1990.

**36**  Dr. Ervin examined Mr. Shannahan on three occasions, February 2, 6 and 14, 2005. Although Dr. Ervin saw Mr. Shannahan more frequently than that, the other occasions were brief, as he was not the physician primarily responsible for Mr. Shannahan at Ridge Meadows Hospital. Nothing is recorded in the hospital records regarding those events. Dr. Ervin's consultation report of February 2, 2005 is part of the hospital records before the court.

**37**  Dr. Ervin formed the view that Mr. Shannahan had left lower lobe pneumonia. He noted the source of the pneumonia, i.e., the particular organism causing the pneumonia, was not identified. He also observed that Mr. Shannahan was not responding well to antibiotics and his ongoing sepsis syndrome was bordering on septic shock. Dr. Ervin was concerned about a lung abscess or complicated pneumonic effusion. He recommended a CT scan of the chest, and if no abscess was found, consideration be given to anaerobic bacterial coverage.

**38**  Dr. Ervin's evidence was that the ongoing sepsis syndrome required treatment. Septic shock was potentially fatal. He was aware of a previous history of arthritis thought to be Still's Disease. Still's Disease is rarely fatal.

**39**  Hydrocortisone was started February 3 and administered until February 6, 2005. Over this period there was no impression that he was getting better so this was discontinued.

**40**  On February 9, 2005 Dr. Auersperg made a lengthy note in the hospital chart which reveals his thought processes. The note started "Very mysterious! Not getting better, in some respects worse". Dr. Auersperg then went on to itemize some thirteen aspects of Mr. Shannahan's presentation. He then noted in the record that "Unifying [diagnosis] eludes me" and queried various options including "CTD" or connective tissue disease.

**41**  On February 11, 2005 Dr. Auersperg asked Dr. Conrad Keebler, the locum Internal Medicine Specialist, to see Mr. Shannahan in consultation. Dr. Auersperg asked Dr. Keebler for his opinion on possible diagnosis and for a proposed plan of action. Mr. Shannahan was placed on Bedline for transfer to a regional referral hospital. At the time Royal Columbian Hospital in Burnaby was considered. As it turned out, Mr. Shannahan was transferred to VGH on February 14, 2005.

**42**  Dr. Keebler performed his locum duties once a month over a 48-hour period encompassing Friday and Saturday. Dr. Keebler's consultation report of February 12, 2005 is part of the hospital records before the court. Dr. Keebler saw Mr. Shannahan on February 11, briefly on February 12 and the morning of February 13, 2005.

**43**  When Dr. Keebler saw Mr. Shannahan he was complaining of right-sided pleuritic pain and shortness of breath. He was still getting fever, chills and aches and pains in his joints and generally felt miserable.

**44**  Dr. Keebler concluded that Mr. Shannahan was probably septic, and that it started with left lower lobe pneumonia. He felt that Mr. Shannahan probably had an opportunistic infection and queried fungal disease. He ordered cultures for fungi and histoplasma serology.

**45**  Dr. Keebler did not think Mr. Shannahan was suffering from a collagen vascular disease, but conceded that he could be wrong. He thought that steroids should be stopped but then realized that they had already been stopped. He knew that Mr. Shannahan tested HIV negative but also knew because of the timing of the tests that it was possible that he had not yet seroconverted.

**E. Vancouver General Hospital February 14 et. seq.**

**46**  As noted earlier, Mr. Shannahan was on Bedline for transfer to a more specialized hospital. On February 14, 2005 he was transferred to VGH. In reasonably short order he was diagnosed and treated for Still's Disease.

**47**  Mr. Shannahan introduced in evidence the response of the BC College of Physicians and Surgeons to his complaint. He is not critical of the treatment he received at VGH. Dr. Wilson responded to queries from the College about his treatment at VGH in this way:

'... By the time he was transferred to VGH, he had had a thorough, thoughtful, and careful septic workup and treatment with appropriate broad spectrum antibiotics. Diagnostic thoracenteses were performed. HIV was appropriately considered, and tested. Toxic ingestions were considered, and lead poisoning ruled out. While it seems that the VGH physicians were able to make an astute diagnosis quickly, the reality is that all of the important workup had already been done by the physicians at Mission and Maple Ridge Hospital. If Mr. Shannahan had presented to VGH initially, I suspect his workup and time to diagnosis would have been similar, as Still's is a rare disease. To have treated Mr. Shannahan empirically with steroids for Still's disease before ruling out an infectious etiology for his symptoms might have had catastrophic results. The only test which may have helped make the diagnosis sooner was a serum Ferritin, which is typically markedly elevated in Still's disease. I am not sure if a level was drawn prior to the level drawn at VGH.'

**IV. Allegations of *Negligence***

**48**  Mr. Shannahan alleges that the named physicians were negligent. Broadly speaking, the allegation is that they were negligent in failing to diagnose and treat him in a timely way for the disease for which he was ultimately diagnosed, adult onset Still's Disease. Mr. Shannahan finds this especially troubling since when he presented at hospital for the first time he mentioned Still's Disease to his care providers and continued to do so throughout most of his treatment.

**49**  The main points raised by Mr. Shannahan, which I paraphrase, include: (1) the apparent failure of the physicians to consider his own statements, or self-diagnosis, regarding the likelihood of Still's Disease, (2) the failure of his physicians to obtain his earlier medical records, (3) the delay in obtaining and considering his HIV testing results, and (4) the failure of his physicians to obtain a referral to a specialist such as a rheumatologist and/or infectious diseases specialist.

**50**  The physicians' general response is that Mr. Shannahan had an unusual presentation of a very rare disorder. The disease can be mild or severe and can mimic a mild infection or a more serious systemic infection. There are no specific tests to confirm Still's Disease. The diagnosis of Still's Disease is therefore one of exclusion since none of the clinical features are specific or diagnostic, and there are no laboratory tests that are diagnostic. Since the diagnosis of Still's Disease is one of exclusion, it would be exceptional for any specialist to come up with a definitive diagnosis without the benefit of a battery of negative tests. That is ultimately what occurred here.

**V. Facts Regarding Allegations of *Negligence***

**A. Failure to Consider Self-Diagnosis**

**51**  When Mr. Shannahan first presented at MMH on January 20, 2005 he told the attending emergency room physician, Dr. Henderson, about an earlier episode regarding Still's Disease.

**52**  Dr. Henderson recorded the following note;

PAST MEDICAL HISTORY

Relevant for an acute inflammatory arthritis when he was about 35 years old He was treated by Dr. Angela Howe and was admitted to hospital. The entire episode lasted around six weeks. He recalls being treated with steroids. Following this, he made a full recovery and has not been troubled by his joints since then.

**53**  Dr. Henderson then gave a differential diagnosis of "... an acute polyarthritis versus a septic arthritis".

**54**  Dr. Johnson first saw Mr. Shannahan on January 21, 2005. He referred Mr. Shannahan to Dr. Gill, who provided a consultation report dictated January 25, 2005. In that consultation report Dr. Gill said:

... He says he was found to have similar symptoms in 1984 and 1985, and was having pain in the knees, loss of appetite, high fever, and then knee swelling. He did not have a rash. He was told that he has Still's disease. He was having possibly a gonococcal infection too.

**55**  Dr. Auersperg first saw Mr. Shannahan on February 1, 2005. His consultation report of February 2, 2005, noted in point 2 of his past history "Still's disease as a child which resolved".

**56**  Dr. Ervin saw Mr. Shannahan on February 2, 2005. His consultation report said, "He has had a history of arthritis thought to be Still's Disease".

**57**  Dr. Keebler saw Mr. Shannahan on February 11, 2005 and prepared a consultation report on February 12, 2005. Although he did not mention Still's Disease he did consider the issue. He wrote:

I do not think we are dealing with a collagen vascular disease here Ed. I would like to think so but I really do not feel that that is a possibility but I could be proven wrong.

**58**  Thus, it is apparent that all of the physicians, with the exception of Dr. Keebler, were aware of or at least considered Mr. Shannahan's self-diagnosis.

**59**  While Dr. Keebler did not mention Still's Disease by name, he did refer to "a collagen vascular disease". Under the heading "Physical examination" Dr. Keebler noted that, "He has no peripheral evidence to suggest a collagen vascular disease for that matter".

**B. Failure to Obtain Earlier Medical Records**

**60**  When Mr. Shannahan first engaged Dr. Johnson as his family physician Dr. Johnson had Mr. Shannahan sign an authorization to obtain his former physician's records. Apparently the authorization was sent, but it is unclear whether any records were received by Dr. Johnson. Dr. Johnson noted that it was not unusual for such requests to not receive a response.

**61**  Dr. Howe's consultation report is in evidence. I have referred to the facts in connection with that report above.

**C. Delay in Ordering and Receiving HIV Test Results**

**62**  It is acknowledged that Dr. Johnson ordered an HIV test on January 21, 2005 when he first saw Mr. Shannahan, but that the form was misdated and ultimately resigned and sent to the BCCDC on January 23, 2005. The results did not come back as would have been expected on January 28, 2005. As it turned out, the results were sent to another hospital.

**63**  By February 1, 2005 Mr. Shannahan had been transferred to RMH. While at RMH the physician primarily responsible for his care was Dr. Auersperg. Dr. Auersperg was aware of the negative results of the HIV testing.

**D. Failure to Refer to Rheumatologist/Infection Diseases Specialist**

**64**  During the course of his treatment at MMH and RMH while under the care of Dr. Johnson and then Dr. Auersperg, Mr. Shannahan was not referred to either a rheumatologist or an infectious diseases specialist. Mr. Shannahan was seen, however, by Dr. Auersperg, Dr. Gill, Dr. Ervin and Dr. Keebler. All of these physicians are specialists in internal medicine. Dr. Auersperg himself has training in tropical medicine, which specialization is largely related to infectious diseases.

**VI. *Negligence***

**65**  In order to succeed in a claim of ***negligence*** against the defendants the plaintiff must prove all of the elements of ***negligence***, but most importantly, that the defendants failed to meet the appropriate standard of care. The standard of care is not considered in the abstract.

**66**  A physician is required to possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar circumstances. Liability in ***negligence*** is founded by failing to meet the appropriate standard, which in a professional ***negligence*** claim is the average knowledge and skill of a physician's practitioner peers: *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=).

**67**  Sopinka J., speaking for the Supreme Court of Canada on this point in *ter Neuzen v. Korn* [*(1995), 11 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) [*(1995), 11 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) said:

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 817, *Lapointe c. Hôpital Le Gardeur*, *[1992] 1 S.C.R. 351* at 361, and *McCormick v. Marcotte* (1971), [*[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*; *Woolley v. Ministry of Health*, [1954] 2 All E.R. 131 (C.A.), at p. 137, "we 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.

**68**  The general principle with regard to assessing a physician's diagnostic skill, is that a doctor is expected to exercise reasonable care, skill and judgment in coming to a diagnosis. This is a matter of professional judgment based on training and experience: *Scrimgeour v. Singer*, [*[1988] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60XY-00000-00&context=) (S.C.), at p. 3-4. A mere error in judgment is insufficient to found liability, and no physician, or any other professional, is expected to be infallible.

**69**  In the ordinary case it is expected that evidence of professional practice will be presented to the court. In *ter Neuzen* the court said:

38 It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent. As L'Heureux-Dubé J. stated in *Lapointe*, in the context of the Quebec Civil Code (at pp. 363-64):

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, *a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories*. As expressed more eloquently by André Nadeau in "La responsabilité médicale" (1946), 6 R. du B. 153, at p. 155:

The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. *They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference.* (Emphasis added by Sopinka J.)

39 In The Law of Torts (7th ed., 1987), Professor Fleming observed the following with respect to the role of standard practice, at p. 109:

Conformity with general practice, on the other hand, usually dispels a charge of ***negligence***. It tends to show what others in the same "business" considered sufficient, that the defendant could not have learnt how to avoid the accident by the example of others, that most probably no other practical precautions could have been taken, and that the impact of an adverse judgment (especially in cases involving industry or a profession) will be industry-wide and thus assume the function of a "test case". *Finally, it underlines the need for caution against passing too cavalierly upon the conduct and decision of experts.*

All the same, even a common practice may itself be condemned as negligent *if fraught with obvious risks*. (Emphasis added by Sopinka J.)

40 With respect to the medical profession in particular, Professor Fleming noted, at p. 110:

Common practice plays its most conspicuous role in medical ***negligence*** actions. Conscious at once of the layman's ignorance of medical science and apprehensive of the impact of jury bias on a peculiarly vulnerable profession, courts have resorted to the safeguard of insisting that ***negligence*** in diagnosis and treatment (including disclosure of risks) cannot ordinarily be established without the aid of expert testimony or in the teeth of conformity with accepted medical practice. *However there is no categorical rule. Thus an accepted practice is open to censure by a jury (nor expert testimony required) at any rate in matters not involving diagnostic or clinical skills, on which an ordinary person may presume to pass judgment sensibly, like omission to inform the patient of risks, failure to remove a sponge, an explosion set off by an admixture of ether vapour and oxygen or injury to a patient's body outside the area of treatment.* (Footnotes omitted.) [Emphasis added by Sopinka J.]

**70**  In the course of argument Mr. Shannahan referred to the latin maxim *res ipsa loquitur* or "the thing speaks for itself".

**71**  In *Fontaine v. Insurance Corporation of British Columbia* [*(1998), 156 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), Major J., speaking for the Supreme Court of Canada, described the maxim thus:

17 *Res ipsa loquitur*, or "the thing speaks for itself", has been referred to in ***negligence*** cases for more than a century. In *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 159 E.R. 665, at p. 601 and p. 667, respectively, Erle C.J. defined what has since become known as *res ipsa loquitur* in the following terms:

There must be reasonable evidence of ***negligence***.

But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

18 These factual elements have since been recast (see Clerk and Lindsell on Torts, 13th ed. (London: Sweet & Maxwell, 1969), at para. 967, quoted with approval in *Jackson v. Millar*, [*[1976] 1 S.C.R. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0FK-00000-00&context=), at p. 235, and *Hellenius v. Lees*, [*[1972] S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B00T-00000-00&context=) at p. 172, [*20 D.L.R. (3d) 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B00T-00000-00&context=)):

The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without ***negligence***. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's ***negligence*** must be determined on that evidence.

**72**  The court considered the effect of the maxim on, for example, the application of the burden of proof, circumstantial evidence, and the procedural consequences, before concluding that the law would be better served by treating the maxim as having expired:

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.

**73**  In considering a professional ***negligence*** claim a court must almost always rely on expert evidence to establish a standard of care against which to measure the conduct of such professionals. This is especially so in cases where a court is asked to pass judgment on the application of diagnostic or clinical skills, as opposed to situations where ***negligence*** consists of an untoward act or event.

**VII. Analysis**

**A. Failure to Consider Self-Diagnosis**

**74**  In my opinion there is nothing in the evidence that suggests that the various physicians that treated Mr. Shannahan failed to appropriately consider his self-diagnosis, with the possible exception of Dr. Keebler. All of the other physicians made note of the self-diagnosis of Still's Disease, while pursuing other possible causes.

**75**  While at first blush this might seem odd, when all of the circumstances are considered, it is far less so.

**76**  Diagnosis of Still's Disease is by exclusion. That is, there is no diagnostic test for Still's Disease. The period of time taken to rule out other possible causes is consistent with the length of time taken for the ambiguous diagnosis he received in 1985.

**77**  Still's Disease is extremely rare. There are between one and two cases a year per million persons. Most of the physicians who treated Mr. Shannahan had many years of experience but had never encountered an instance of the disease.

**78**  Still's Disease is rarely fatal, but Mr. Shannahan presented as extremely ill. Infectious causes were consistent with Mr. Shannahan's symptoms. Sepsis caused by infection is common among hospitalized patients. It is also commonly fatal, being so in more than 30% of the 30,500 patients hospitalized with this condition in 2008-2009. Empirically, the absence of evidence of any particular infectious agent is not conclusive evidence of the absence of some agent.

**79**  Mr. Shannahan's presentation was unusual for Still's Disease. It was unusual in that (a) he did not have a salmon coloured bumpy rash, (b) his face was an unusual slate grey colour, (c) he had severe pneumonia which was an unusual manifestation, (d) he had low blood pressure and lack of appetite, (e) he was generally severely ill, (f) he did not have enlargement of the spleen, liver or lymph nodes, and (g) other tests were suggestive of infection. While it was established in cross-examination that most of these features can be associated with Still's Disease, it is uncontradicted that Mr. Shannahan's presentation was unusual for Still's Disease.

**80**  While Dr. Keebler seems not to have been aware of Mr. Shannahan's self-diagnosis, he considered "a collagen vascular disease". Dr. Keebler was of the view that there was no peripheral evidence to suggest that as a cause. He testified that had he known about Mr. Shannahan's previous bout with Still's Disease that would not have affected his consideration. Dr. Chan-Yan, a defence expert, testified that twenty years is an unusually long time to go without having a relapse.

**81**  In the circumstances I am unable to conclude that the physicians' consideration of Mr. Shannahan's reported medical history was negligent. While Dr. Keebler seemed unaware of that history, I am unable to conclude that with that history his conclusions would have been any different from those of Dr. Auersperg or Dr. Ervin.

**B. Failure to Obtain Earlier Medical Records**

**82**  It is argued by Mr. Shannahan that Dr. Johnson and perhaps the other physicians were negligent in failing to obtain the Burnaby hospital records relating to his admission in 1985. The trouble with that submission is that even if the record had been obtained by Dr. Johnson when he took on Mr. Shannahan as his patient, the discharge summary prepared by Dr. Howe was inconclusive about his diagnosis.

**83**  The discharge summary provides that "He was discharged on May 26th with the diagnosis not clear but may either be due to post viral infection syndrome, to gonococcal arthritis, or to Adult Still's". Interestingly enough, Dr. Gill's notes from Mr. Shannahan record "... possibly a gonococcal infection too".

**84**  Dr. Chan-Yan also testified regarding the uncertainty of earlier diagnoses of Still's Disease. Still's Disease has always been a rare disease. It was his view that there was less knowledge and fewer diagnostic tests for *other* diseases in the 70's and 80's, resulting in a diagnosis of Still's disease in many cases being probably erroneous.

**85**  It is clear from the record that the physicians who treated Mr. Shannahan, who were advised by him of his previous medical history, treated that history as fact. Dr. Howe's discharge summary rather than clarifying matters would have clouded that issue by creating uncertainty regarding the previous diagnosis.

**86**  In my view these circumstances do not establish ***negligence***.

**C. Delay in Ordering and Receiving HIV Test Results**

**87**  While there was an initial delay in ordering the tests, this ground rests primarily on Dr. Johnson failing to search out the test results when the results failed to arrive within five days of being ordered. The test results were sent to the wrong hospital through no fault of Dr. Johnson.

**88**  The tests were not conclusive in any event because of the period of time it takes for HIV to become detectable by using these tests. Thus, the physicians, even when aware of the negative test results continued to be alert to whether this was a potential cause.

**89**  There is no evidence before me to suggest that Mr. Shannahan's treatment would have been any different were those test results received earlier.

**90**  In my view these circumstances do not establish on a balance of probabilities that the physician defendants were negligent in this respect.

**D. Failure to Refer to Rheumatologist/Infection Diseases Specialist**

**91**  This ground of alleged ***negligence*** seems to suggest that only a specialist can positively diagnose Still's Disease or categorically rule out an infection. The only expert evidence before the court on this issue is that of Dr. Chan-Yan, and that of the physicians themselves. It was Dr. Chan-Yan's opinion that it is not necessary for either a rheumatologist to diagnose Still's Disease or for an infectious disease specialist to rule out an infection. Of course Dr. Johnson and the other treating physicians did seek out other consultations and specialists.

**92**  Dr. Johnson sought and obtained a consulting report from Dr. Gill who is an internal medicine specialist. Dr. Johnson consulted with an infectious disease specialist at the Royal Columbian Hospital. When Mr. Shannahan was transferred from MMH to RMH he was seen by Dr. Auersperg who is an internal medicine specialist.

**93**  Dr. Auersperg also has a special interest in tropical medicine which involves infectious diseases. Dr. Auersperg also consulted with Dr. Ervin and Dr. Keebler, both of whom are internal medicine specialists.

**94**  Dr. Auersperg also consulted with infectious disease specialists and rheumatologists by telephone while Mr. Shannahan was in his care, although no consultation report was generated.

**95**  It should also be noted that Dr. Auersperg sought to have Mr. Shannahan transferred to Surrey Memorial Hospital and ultimately had him transferred to VGH. This was done because of his view that the resources at RMH were no longer adequate.

**96**  I accept the evidence of Dr. Chan-Yan that an infectious disease specialist is not required to rule out an infection. I also accept his evidence that a rheumatologist is not the only type of physician that can diagnose Still's Disease.

**97**  While it is true that Mr. Shannahan was only diagnosed with Still's Disease at VGH, that was after the physicians at that hospital had the benefit of the investigative work done at MMH and RMH. In fact, at VGH he was given steroids for adrenal insufficiency. This resulted in improvement and the diagnosis followed.

**98**  There is also no evidence before me of any of the physicians failing to meet the standard of knowledge, skill and ability of professional persons with their training, knowledge and experience.

**99**  In my opinion Mr. Shannahan has failed to establish that his physicians were negligent in failing to have him referred to either an infectious disease specialist or a rheumatologist.

**VIII. Causation & Damages**

**100**  In order to establish a claim for ***negligence***, the plaintiff must not only establish a breach of the applicable standard of care, but also the existence of damage or injury that was caused by the breach.

**101**  As in my opinion the plaintiff has not established a breach of the applicable standard of care, it is unnecessary to consider whether damage or injury was caused by the breach. In deference to the vigour with which Mr. Shannahan has pursued this case, however, a few words are in order.

**102**  Of course, if there was a delay in diagnosis then Mr. Shannahan presumably would have experienced the symptoms of his disease for a longer period than necessary. There is no doubt that his experience was painful, traumatic and unsettling. As Mr. Shannahan put it, on a couple of occasions he came close to dying. That unfortunate experience would have been with him longer than necessary, had ***negligence*** been made out.

**103**  It is clear on the authorities that such is compensable: see *Wilson v. Vancouver Hockey Club*, [*(1983), 5 D.L.R. (4th) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-22D0-00000-00&context=) (B.C.S.C.), aff'd [*22 D.L.R. (4th) 516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-2122-00000-00&context=) (B.C.C.A.); *Wine v. Gould Estate,* [*[1978] O.J. No. 584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCF1-F900-G31D-00000-00&context=) (H.C.J.); *Bloudoff v. Dolezel,* [*[1992] O.J. No. 645*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCR1-F4W2-628B-00000-00&context=) (Ont. H.C.), aff'd [*[1996] O.J. No. 1447*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCX1-F57G-S4V5-00000-00&context=) (Ont. C.A.).

**104**  It is apparent that Mr. Shannahan also attributes other losses to these events. For example, he argues that as a result of the delayed diagnosis he was unable to work and earn income as a graphic artist. However, his business had for sometime been in the economic horse latitudes. In fact, it seems never to have turned a profit and was closed before these events as he undertook renovation of his home.

**105**  Another loss he attributes to the delayed diagnosis is the loss of his house. The sale of the house, however, had already been planned. He was behind on various bills, and was planning its sale, after some renovations. In the circumstances, I would not have attributed either of these alleged losses to the delayed diagnosis.

**106**  There was no expert evidence before me that Mr. Shannahan suffered any long term consequences of the delayed diagnosis as opposed to the ordinary sequelae of these and other medical problems he has had. While he blames the absence of a report on Dr. Johnson, in my view, once litigation was commenced or threatened, Dr. Johnson was under no obligation to provide a medical report which would be used against him.

**IX. Defamation**

**107**  Following the close of the plaintiff's case the defendants presented two no evidence motions. I allowed the motion and dismissed the plaintiff's case on the defamation matter for the reasons attached as Schedule A. I dismissed the motion as it related to the ***negligence*** claim. As a result, the defendants called evidence.

**X. Consent to HIV Testing**

**108**  As I understand this argument, it turns on whether Mr. Shannahan consented to the HIV testing after having initially signed a consent form on January 21, 2005. The form was misdated. It seems that a duplicate form may have been used in its place.

**109**  In my opinion nothing turns on this matter. Mr. Shannahan clearly consented to having the tests done by signing the form. There is no evidence to suggest he withdrew his consent.

**110**  It is acknowledged that the test did not definitively rule out whether he might be HIV positive. That is because the development of detectable specific antibodies to microorganisms in blood takes time. Because he might not yet have seroconverted, the test was not conclusive.

**111**  Of course, Mr. Shannahan proved not to be HIV positive. The fact that the test could not conclusively prove that, in my opinion, did not go to consent.

**XI. Conclusion**

**112**  Mr. Shannahan, through no fault of his own, has had the misfortune to have suffered a rare condition that had an unusual presentation. Still's Disease has no diagnostic test. As a result, diagnosis proceeds through exclusion. Moreover the condition he presented with appeared infectious in origin, or may have been coupled with an infection. As a result, the very medications that could help him were contraindicated.

**113**  I have great sympathy for Mr. Shannahan, who, despite his ordeal and his health issues has kept intact his charm and sense of humour. In the circumstances, however, for the reasons given, the evidence falls short of establishing ***negligence*** of any of the named defendants.

**114**  The action is dismissed.

J.E.D. SAVAGE J.

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**Schedule A**

[Editor's note: See [*[2010] B.C.J. No. 930*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-635V-00000-00&context=).]

**End of Document**

[***Telford v. Hogan, [2014] B.C.J. No. 2540***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4BM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: July 28 and 29, 2014.

Judgment: October 10, 2014.

Docket: M115026

Registry: Vancouver

**[2014] B.C.J. No. 2540** | 2014 BCSC 1925 | 246 A.C.W.S. (3d) 932 | 71 M.V.R. (6th) 69 | 2014 CarswellBC 3023

Between Tiffany Nichole Telford, Plaintiff, and Carol Mary Hogan, Defendant, and Insurance Corporation of British Columbia, Third Party

(109 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Plaintiff's knowledge of danger — Intoxication — Motor vehicles — Liability of driver — Passengers — Determination of liability and contributory *negligence* in relation to a motor vehicle accident — The defendant Hogan was the driver and the plaintiff Telford was a passenger — All the vehicle's occupants were consuming alcohol — The vehicle veered off the highway — Telford suffered substantial injuries and was suing Hogan for damages — Telford interfered with the steering wheel, causing Hogan to lose control — Hogan was impaired and was speeding — Telford knew that Hogan was drinking — Hogan was 75 per cent liable, Telford was 25 per cent liable, and Telford was 35 per cent contributorily negligent.**

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| Determination of liability and contributory ***negligence*** in relation to a motor vehicle accident. The accident occurred on the way home from a weekend camping trip which had involved significant consumption of alcohol. The defendant Hogan was the driver and the plaintiff Telford was one of three passengers. All of the passengers had containers of alcoholic beverages in the vehicle and Hogan sipped from those containers during the trip. The vehicle veered off the highway and flipped over. Telford, not restrained by a seatbelt, was thrown from the vehicle. She suffered substantial injuries, including broken bones, a collapsed lung, and a brain injury. She was suing Hogan for damages arising from her injuries. Hogan took the position that Telford jerked the steering wheel, causing her to lose control of the vehicle. ICBC, the third party, alleged that Telford was contributorily negligent by failing to take reasonable care for her own safety by riding as a passenger in the vehicle when she knew or ought to have known that Hogan had consumed alcohol and was impaired.  HELD: Hogan was 75 per cent liable, Telford was 25 per cent liable, and Telford was contributorily negligent to the extent of 35 per cent.  The Court found as a fact that Telford interfered with the steering wheel in some way, causing Hogan to lose control of the vehicle. Telford's actions materially contributed to the accident. However, Hogan's impairment and her excessive speed significantly contributed to the accident. With respect to Telford's contributory ***negligence***, she was well aware that Hogan was drinking over the course of the day and she voluntarily engaged in the hazardous enterprise. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46, s. 253*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5T7V-CCM1-JJ1H-X09K-00000-00&context=)(b), s. 255(2)

Evidence Act, [*RSBC 1996, CHAPTER 124, s. 71*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FCK4-G02K-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Douglas T.K. Chiu, Alan Truong.

Defendant Carol Mary Hogan appearing on her own behalf: Carol Mary Hogan.

Counsel for the Third Party Insurance Corporation of British Columbia, Clive Boulton.

**Reasons for Judgment**

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| **S.C. FITZPATRICK J.** |

**Introduction**

**1**  This case is yet another example of the terrible price paid by both drivers and passengers when the lethal combination of drinking and driving is involved. While no one died in this single vehicle accident, all occupants of the vehicle have paid that price, although in differing degrees.

**2**  This motor vehicle accident was a tragic end to what should have been a fun August long weekend camping trip to the Okanagan by four friends from the Lower Mainland. The four women included the defendant Carol Hogan, who was the driver, and the plaintiff Tiffany Telford, who was a passenger in the vehicle. The other two passengers, Carley Ettinger and Denise Dziedzic, were witnesses at the trial.

**3**  The accident spawned two actions.

**4**  Ms. Ettinger sued both Ms. Hogan and Ms. Telford for damages resulting from the substantial injuries she sustained in the accident. I understand that some or all of the issues in that litigation have been settled, particularly as they related to allegations of contributory ***negligence*** on the part of Ms. Ettinger.

**5**  In this action, Ms. Telford sues Ms. Hogan for damages arising from her injuries. By agreement of the parties, this trial involves only two issues, both relating to liability:

1. what was the cause of the accident?; and
2. was Ms. Telford contributorily negligent by reason of her voluntarily agreeing to ride in a vehicle driven by Ms. Hogan who was impaired?

It will be apparent from the facts below that there are also allegations that Ms. Telford was contributorily negligent arising from her failure to wear a seatbelt. That issue will be decided at a later time, failing agreement of the parties.

**Background Facts**

**6**  The connection between the four women was Ms. Telford. She had been friends with Ms. Ettinger since grade school and when Ms. Ettinger moved to Vancouver, she and Ms. Telford continued their friendship and saw each other often on a social basis. At the time of the accident, both were in their early 20s.

**7**  Ms. Telford saw Ms. Hogan socially. They had met in 2009 and Ms. Hogan had assisted Ms. Telford in finding a job. Ms. Hogan was somewhat older, being 36 years old at the time of the accident. Ms. Hogan owned a 2002 red Dodge Neon and she would always drive when she and Ms. Telford went to various places in her car. Ms. Telford did not have a driver's licence.

**8**  When Ms. Telford, Ms. Ettinger and Ms. Hogan socialized, alcohol would typically be consumed by all involved. Both Ms. Telford and Ms. Ettinger stated that when Ms. Hogan was drinking, she would not usually exhibit signs of intoxication. Ms. Ettinger said Ms. Hogan was not a heavy drinker. Ms. Telford agreed that Ms. Hogan was able to handle alcohol quite well and that she was in control most times. She was able to relate only one instance when Ms. Hogan had been openly intoxicated.

**9**  Ms. Hogan also socialized from time to time with her friend, Ms. Dziedzic, who was about 28 years old at the time of the accident. Ms. Dziedzic also related that she and Ms. Hogan consumed alcohol together at various times and that Ms. Hogan could consume quite a bit and still be in control. She could not recall any incident when Ms. Hogan was intoxicated to the point where it was noticeable.

**10**  Sometime prior to the August long weekend in 2011, a camping trip to Osoyoos, British Columbia was proposed and agreed upon by Ms. Telford and Ms. Hogan. Later, Ms. Hogan invited Ms. Dziedzic to come, who Ms. Telford had previously met. Similarly, Ms. Telford invited Ms. Ettinger. The plan was to leave Saturday, July 30 and return to Vancouver on Monday, August 1. Ms. Hogan had some camping experience and camping gear and she had a campsite in mind for the trip.

**11**  On Saturday morning, Ms. Telford, Ms. Ettinger and Ms. Dziedzic travelled to Pitt Meadows where Ms. Hogan was living at the time. Ms. Hogan picked them all up in her Dodge Neon. Ms. Hogan had brought her camping gear and the other three women had various backpacks, pillows, blankets and sleeping bags. The car was small and it was crammed full of their belongings such that the women, other than Ms. Hogan, had to sit on the bedding.

**12**  The vehicle was driven by Ms. Hogan. Ms. Telford was in the front passenger seat. The back seat was occupied by Ms. Dziedzic behind Ms. Telford on the passenger side. Ms. Ettinger was behind the driver, Ms. Hogan. This seating arrangement with Ms. Hogan assuming all driving duties would be constant throughout the weekend.

**13**  Not far into the trip to Osoyoos via the Hope-Princeton Highway, the women stopped at a liquor store to buy alcohol and at a convenience store to buy beverages to mix with their alcohol. All four of the women bought alcohol. Almost immediately, they started to consume the alcohol in various travel mugs or containers that they carried with them. Ms. Hogan believes that they each consumed one drink on the trip there.

**14**  Before arriving at the campsite, the women visited a beach where they consumed alcohol. After the group reached the campsite, the drinking on Saturday continued. In addition, the younger women, being Ms. Telford, Ms. Ettinger and Ms. Dziedzic, had brought some marihuana with them and that was consumed from time to time by them over the weekend. Ms. Hogan does not use drugs and did not partake.

**15**  All of the women recalled a party that they attended, although the younger women had unclear recollections as to when that occurred. Ms. Hogan, in my view, had the clearest recollection in stating that the party was on Saturday night after they had dinner and drinks at the campsite. Ms. Hogan had been invited to the party by a friend and the others agreed to go also. Ms. Hogan's plan was to stay the night there which would have allowed her to have a few drinks and not worry about driving back to the campsite. In hindsight, this decision on the part of Ms. Hogan would prove to be the most responsible decision of the weekend, although it was ultimately short-lived and was never to be resurrected over the remainder of the weekend.

**16**  After a few hours at the party, the younger women wanted to leave. Ms. Hogan stated that she was put in a tight spot and that she felt she had no option but to drive back then. She did not feel impaired but she was not comfortable driving after having consumed some drinks. She would have preferred to have spent more time sobering up before getting on the road but, in any event, she did drive back soon after the decision to leave was made.

**17**  None of the women passengers had any concerns about Ms. Hogan driving back to the campsite from the party despite her having consumed alcohol throughout the day and at the party.

**18**  Further events followed on Sunday, most involving the continuing consumption of alcohol. This included a visit to a winery, lunch at a pub and finally, a visit to an amusement park, all via the car driven by Ms. Hogan. At some point, the women visited the Osoyoos liquor store to buy more liquor, consistent with the fact that the consumption of alcohol was ongoing.

**19**  As with Saturday, Ms. Dziedzic noted that Ms. Hogan's behaviour was fine on Sunday.

**20**  The accident occurred on the trip back to Vancouver on the Monday morning of the long weekend.

**21**  On Monday morning, the women woke up. Ms. Hogan fairly quickly consumed a beer since they had no potable water at the time and she was thirsty. Afterwards, Ms. Hogan continued the day more responsibly, by drinking tea. The women cleaned up the campsite and got ready to leave. The drinking by the three younger women started early in the morning after they woke up.

**22**  The trip back involved a different route, travelling north toward Kelowna from Osoyoos and eventually taking the Okanagan Connector westward leading to the Coquihalla Highway and back to Vancouver. The weekend fun was not yet over in that the group had various stops and activities planned along the way.

**23**  The shared plan of the younger women was that the drive back would definitely involve the consumption of alcohol. The younger women mixed drinks in their travel mugs for the trip back. Ms. Telford's drink of choice was tequila with orange juice, Ms. Dziedzic's was beer or gin with juice and Ms. Ettinger was drinking rum with coke. The evidence from both Ms. Dziedzic and Ms. Hogan establishes that on the trip back, Ms. Hogan did not have her own container of an alcoholic beverage in the vehicle. Rather, she sipped from the containers of the others, including Ms. Telford and Ms. Ettinger, while at the various stops and on the road. Ms. Hogan states that most (70%) of what she would later consume came from the container of Ms. Telford. She states that she was not drinking to become impaired, but just to be sociable.

**24**  Again, the car was crammed full with their belongings and the camping equipment. They could not even get the trunk closed at one point. As with the trip to Osoyoos, it was necessary for some of the women to sit on the pillows and blankets. All four women were wearing their bikinis for the trip back since it was hot and some of the stops were to allow them to enjoy a dip in the water.

**25**  The first stop was at a local beach about a ten minute drive away from the campsite. They stayed a couple of hours. Ms. Hogan continued to drink from the containers of Ms. Telford and Ms. Ettinger. The three younger women smoked the final marihuana joint. They left around 1 p.m.

**26**  The second stop was at a hotel with a water slide and the third stop was at a fruit stand just before Oliver, BC. At the fourth stop, the women went into the Oliver liquor store where Ms. Telford bought more tequila, Ms. Ettinger bought more rum and Ms. Dziedzic bought some unknown type of alcohol.

**27**  The fifth stop was in Penticton where the women visited the river channel. They spent about an hour there where they continued to consume alcohol.

**28**  The sixth and final stop was at a pull out on the highway that had a dock or pier. The women wanted to have a final swim for the weekend. The drinking continued at this stop, with Ms. Hogan continuing to sip from the containers of the two other women. At some point, Ms. Hogan was anxious to return to Vancouver and wanted to leave. Ms. Dziedzic confirmed that Ms. Hogan was then in a rush to get home.

**29**  When they all entered the vehicle for the final time, they again all crammed in and the passengers sat on various pillows and blankets. Ms. Ettinger and Ms. Dziedzic sensibly put their seatbelts on and Ms. Ettinger reminded Ms. Telford to put hers on too. As she had many times earlier that weekend, Ms. Telford ignored the suggestion and did not put her seatbelt on.

**30**  Similar to their attitude toward Ms. Hogan's drinking and driving throughout the entire weekend, Ms. Telford, Ms. Dziedzic and Ms. Ettinger had no concerns about Ms. Hogan's ability to drive home. This lack of any concern would remain until the time that the vehicle veered off the highway, although closer to the time of the accident, the recollections particularly of Ms. Telford and Ms. Ettinger are understandably clouded by their copious consumption of alcohol.

**31**  As road and driving conditions go, the day was perfect with hot dry weather.

**32**  The evidence indicates that while travelling westbound on the Okanagan Connector highway near Merritt, BC, Ms. Hogan's vehicle was moving very fast. An independent witness, Miranda Berney, was travelling by car in the same direction at 100-110 km/hour with her friend Liam, who was driving. As Ms. Hogan's car sped by them on the left side, Liam commented on how fast the Dodge Neon was going. Ms. Berney stated that the Dodge Neon "flew by". It is undisputed and I find as a fact that Ms. Hogan was driving in excess of the speed limit.

**33**  Ms. Berney then observed that after the Dodge Neon passed them, it moved back into the right lane of the highway and then, within seconds or almost instantly, it suddenly veered sharply to the left toward the grassy median between the lanes of travel on the highway. Ms. Berney next observed a huge dust cloud as a result of the vehicle leaving the highway. When the dust had literally settled, both she and Liam observed that the Dodge Neon had travelled across the median, flipped over and ended upside down in the middle of the oncoming lane of travel. Thankfully, no vehicles travelling on the highway in the opposite direction were hit by the Dodge Neon.

**34**  The accident occurred at 5:35 p.m. and at some point a 911 call was placed to the police. As luck would have it, Cst. David Fahlman and his partner, Cst. Denning, of the Merritt RCMP were in the area and they responded to the scene. They arrived some 20 minutes later at 5:55 p.m.

**35**  Ms. Hogan recalls losing control of the vehicle and spinning out of control. She remembers being upside down and sliding along the highway. She appears to have gotten out of the vehicle without any difficulty and she had no apparent injuries.

**36**  Ms. Dziedzic blacked out and when she came to shortly thereafter, she unhooked herself from the seatbelt and escaped relatively unscathed through the window. Ms. Berney would spend some time comforting and caring for her at the scene.

**37**  Ms. Ettinger was not as lucky. She remained strapped in her seatbelt upside down after having suffered significant injuries to her head and face, apparently arising from contact with the road through the open window of the back seat after the car had flipped over and slid across the other side of the highway. She lost a significant amount of blood.

**38**  The unluckiest one of all was Ms. Telford. Not restrained by her seatbelt, she was thrown from the car and landed in the median area where she was found unconscious. She suffered substantial injuries, including broken bones, a collapsed lung and a brain injury. Despite these substantial injuries, Ms. Telford is now gainfully employed as a hairdresser and both counsel spoke highly of her spirit and determination in meeting the challenges she now faces as a result of those injuries.

**Discussion**

1. **What was the cause of the accident?**

**39**  The critical issue here is how did this accident happen? The central factual issue to be determined is whether Ms. Telford grabbed, yanked or came into contact with the steering wheel in some way so as to cause Ms. Hogan to lose control of the vehicle.

**40**  Ms. Telford's brain injury has understandably affected her memory from the time of the accident. It is quite apparent that she remembers little, if anything, of what occurred that weekend, including on Monday, the day of the accident and the accident itself. Other than perhaps a hazy recollection of a song playing on the CD player at the time of the accident called "Come on Eileen", she has no recollection of what happened in the vehicle. She only remembers waking up in the hospital some days later.

**41**  The blood testing of Ms. Telford also reveals that she was quite drunk at the time, which has no doubt affected her ability to recall the events in question. The blood sample taken from her at the hospital at 7:31 p.m. indicates that Ms. Telford had a blood alcohol concentration ("BAC") of 232 milligrams of alcohol per 100 millilitres of whole blood. The expert report of N.K. Shajani dated April 24, 2014 indicates that as of the time of the accident, around 5 p.m., Ms. Telford's BAC would have been between 257-282 mg/100 ml or over three times the legal limit. Mr. Shajani states that at the mid-range of 270 mg, Ms. Telford would have consumed a minimum of 13.5 ounces of hard liquor. Mr. Shajani confirms in his report that even at the lower BAC level of 232 mg, someone would be "grossly intoxicated".

**42**  Therefore, Ms. Telford's evidence that she has no recollection of yanking or grabbing the steering wheel of the car or having any physical contact with Ms. Hogan just before the accident is of little assistance in this case.

**43**  Ms. Hogan says that the music was playing very loud and contributed to the party atmosphere in the car where the younger women were singing and, in the case of Ms. Telford in the front seat of the vehicle, dancing. She says that Ms. Telford was drunk to such a degree that she had never seen before. Ms. Hogan described Ms. Telford as being very "animated" and "acting wild" and that she was waving her hands around her (Ms. Hogan's) head. Ms. Hogan says that Ms. Telford's hands and face were getting close to her head. Like everyone else in the vehicle, Ms. Hogan thought Ms. Telford was just being funny and she did not tell Ms. Telford to stop.

**44**  Ms. Hogan recalls that at some point, Ms. Telford jerked the wheel and she said something to the effect of "Tiffany, no". Ms. Hogan also says that Ms. Telford definitely touched the wheel with either her hand, arm or elbow to the point of moving it and that this movement caused her to lose control of the vehicle. She states that it was only this action by Ms. Telford that caused her to lose control and that otherwise she was having no difficulties in controlling the vehicle.

**45**  Ms. Hogan states in her evidence that she did not feel that she was going fast. I have rejected this evidence and have found that she was speeding. She also states that while she recognized that she had been drinking and felt the alcohol "a little bit" or felt "fuzzy", she did not feel impaired. She confirms that her vision was fine, but not her judgment. This is uncontroversial. She acknowledged in cross examination that the alcohol would have affected her motor skills, coordination and memory. During her discovery, Ms. Hogan stated that when she drank, her judgment was affected and also her memory was affected somewhat but "not that much".

**46**  Ms. Telford takes the position that Ms. Hogan is not a credible witness and that her testimony regarding Ms. Telford touching the wheel is false and unreliable. There are a number of reasons why I reject this submission.

**47**  Firstly, I found that Ms. Hogan gave her evidence in a straightforward and matter-of-fact manner. Despite the considerable responsibility she bears for the accident, she did not attempt to sugar-coat her actions and admits that, in retrospect, many of the decisions she made that day gave rise to this terrible situation. Indeed, of all the occupants of the vehicle, Ms. Hogan undoubtedly had the clearest recollection of them all. She had a clear recall of the many events over the weekend and the sequence of those events, contrary to the hazy recollection of the others.

**48**  I conclude that Ms. Hogan, as an experienced drinker, had a high tolerance level to alcohol. I also conclude that she could consume a considerable amount of alcohol and not exhibit signs of impairment easily or overtly. This was borne out by the evidence of the younger women in relation to previous drinking situations with Ms. Hogan and it was also borne out by the evidence of other witnesses at the scene of the accident.

**49**  Various independent and sober people made several observations of Ms. Hogan at the scene. Ms. Hogan's presence was very evident at the scene in that she spent some time going back and forth between Ms. Telford and Ms. Ettinger in an attempt to do what she could for them. Ms. Berney described Ms. Hogan as fine. In fact, Ms. Hogan was so composed immediately after the accident that Ms. Berney initially assumed that Ms. Hogan was from another vehicle stopped on the highway and not from the Dodge Neon.

**50**  Constable Fahlman had a similar reaction. Despite his extensive training in recognizing alcohol impairment and testing individuals for alcohol consumption, both roadside and in the detachment, he did not suspect at all that Ms. Hogan was intoxicated. He had some experience dealing with Ms. Hogan after having observed her walking and talking to various people and he also spoke directly to her at the scene. The issue of her intoxication only arose after Cst. Fahlman asked her what had happened to cause the accident, at which time Ms. Hogan volunteered to Cst. Fahlman that she had been drinking.

**51**  Secondly, the manner in which the accident occurred is also consistent with Ms. Hogan's explanation regarding Ms. Telford touching or jerking the wheel.

**52**  As evidenced by the events leading up to the accident, clearly Ms. Hogan was not just impaired, but significantly impaired. Ms. Telford refers to the expert report of another blood alcohol expert, Caroline Kirkwood, dated April 2, 2012. The readings of the later breath samples at the RCMP detachment indicated that Ms. Hogan had a BAC of 180 mg/100 ml at 7:55 p.m. and 170 mg/100 ml at 8:20 p.m.; in other words, more than twice the legal limit of 80 mg/100 ml. Consistent with his assessment of Ms. Hogan's demeanor at the scene, Cst. Fahlman was surprised by these results as he did not think she would fail the tests at all.

**53**  Ms. Kirkwood indicates that at the time of the accident, around 5 p.m., Ms. Hogan's BAC would have been 220 mg/100 ml or almost three times the legal limit. The report indicates that at this level, Ms. Hogan would have to have consumed, at a minimum, one beer and a minimum of 9.5 ounces of tequila between 9:00 a.m. and 5:00 p.m. Ms. Kirkwood confirms in her report that at this BAC level, most of the general population would exhibit gross symptoms of impairment although, as I have indicated, Ms. Hogan was not exhibiting any signs of impairment.

**54**  The Kirkwood report reveals that at Ms. Hogan's later tested blood alcohol level, an individual would be impaired, and would not possess the proper judgment, reaction time, balance, coordination, vision, speed judgment, comprehension or fine motor control to have the care and control of a motor vehicle. In particular, Ms. Kirkwood states that such a person would have problems tracking the vehicle or keeping the vehicle in the proper lane of travel. She states that, statistically, a person with that level of impairment is more than 50 times more likely to be involved in a motor vehicle accident.

**55**  The theory of the accident advanced by Ms. Telford is that Ms. Hogan, while admittedly driving at a high rate of speed, passed the Berney vehicle and then over steered while attempting to re-enter the right-hand lane, then overcorrected to the left, causing the vehicle to veer off the highway.

**56**  Yet, the description of the accident by the only truly independent witness does not support this theory. Ms. Berney did not observe anything that might have been happening inside the vehicle when Ms. Hogan passed her vehicle on the highway. She did, however, observe the vehicle as it passed them and then proceeded down the highway leading to the accident itself.

**57**  Again, Ms. Berney describes that the Dodge Neon passed her vehicle and then slowly moved back into the right hand lane. She does not state that the vehicle was veering or over steering into the right hand ditch or that anything untoward happened in the way in which this maneuver occurred. She says that within seconds or almost immediately *after entering* the right hand lane, the vehicle suddenly and sharply veered to the left. This evidence is entirely consistent with Ms. Telford having come into contact in some way with the steering wheel which caused Ms. Hogan to lose control such that the vehicle abruptly changed direction. It is consistent with Ms. Hogan having successfully completed the passing of the Berney vehicle and only losing control as a result of something else happening in the vehicle.

**58**  In addition, the wild gyrations of Ms. Telford in the front seat while very drunk are also consistent with this having occurred, whether deliberately on her part or not. As Mr. Shajani states, someone in Ms. Telford's position would have "gross muscular in-coordination resulting in staggering gate". At the time, Ms. Telford weighed 175 pounds and she and Ms. Hogan were in fairly tight quarters in the front seat of this small car with some of the bedding under Ms. Telford.

**59**  Again, the evidence supports that while certainly impaired, Ms. Hogan showed no outward signs that her consumption of alcohol affected her ability to move physically. This supports Ms. Hogan's evidence that but for Ms. Telford interfering with the steering wheel in some way, she was in control of the vehicle.

**60**  Thirdly, there is the matter of corroboration.

**61**  Similar to Ms. Telford, Ms. Ettinger's evidence is of little assistance as she has little recollection of the drive home, the accident and how it happened. She was very intoxicated. She recalls that Ms. Telford was dancing in the front seat and she also recalls them listening to the song "Come on Eileen". Ms. Ettinger states that Ms. Telford was looking back at her, being silly and "horsing around". At some point just before the accident, she closed her eyes happily relaxing in the back seat. Ms. Ettinger does not recall Ms. Hogan saying anything just before the accident to the effect of "Tiffany, no", nor does she recall that Ms. Telford grabbed the steering wheel or touched it or interfered with Ms. Hogan's driving at all. This is perfectly understandable given that she was drunk and napping in the back with her eyes closed at the time. Her next recollection was waking up in the hospital.

**62**  Ms. Telford places considerable reliance on the evidence of Ms. Dziedzic as the only "neutral" witness of all the occupants of the vehicle. I agree that Ms. Dziedzic was likely the most sober of the four. However, her evidence is not as helpful to Ms. Telford's case as she would like.

**63**  Like Ms. Ettinger, Ms. Dziedzic was also relaxing in the back seat. She was seated behind Ms. Telford. She relates that, consistent with the evidence of Ms. Hogan and Ms. Ettinger, Ms. Telford was hyperactive, dancing in her seat and swaying back and forth next to Ms. Hogan. Ms. Dziedzic had her head titled back and her eyes were closed from time to time. At some point while her eyes were closed, she felt the car swerving to the left (not right per the theory of Ms. Telford). After that point, she opened her eyes and saw that the vehicle was heading for the meridian. She saw Ms. Hogan trying to regain control of the vehicle by moving the steering wheel back and forth. She confirms that she did not observe Ms. Telford leave her seat, nor did she observe any physical contact between Ms. Telford and Ms. Hogan or interference by Ms. Telford with Ms. Hogan's driving. Ms. Dziedzic states that she did not hear Ms. Hogan say anything just before the accident, including words to the effect of "Tiffany, no". She blacked out shortly after she opened her eyes.

**64**  However, by the time that Ms. Dziedzic opened her eyes, the contact by Ms. Telford with the wheel had already occurred that had caused the vehicle to veer or swerve. Therefore, the evidence of Ms. Dziedzic does not contradict that of Ms. Hogan and, in fact, it is consistent with Ms. Hogan's explanation that prior to Ms. Dziedzic opening her eyes, some contact had occurred to cause Ms. Hogan to lose control. Ms. Dziedzic only saw the aftermath with Ms. Hogan trying, unsuccessfully, to regain control of the vehicle.

**65**  There is also the matter of statements made by Ms. Hogan to the police immediately after the accident. After she admitted to having been drinking, the RCMP gave Ms. Hogan a roadside screening test at 6:03 p.m. That registered a "fail". At that point, Cst. Fahlman demanded a breath sample at the detachment and, eventually, Ms. Hogan was transported back to the detachment for a breathalyzer test. During the ride in the police cruiser, Ms. Hogan states that she told Cst. Fahlman how the accident happened to the effect that Ms. Telford had interfered with the steering wheel. She does not recall her exact words. Cst. Fahlman confirms this evidence. He relates that during the ride to the detachment, Ms. Hogan stated at least twice that a passenger in the vehicle had grabbed and jerked the steering wheel from her.

**66**  Accordingly, Ms. Hogan's explanation for the accident is not a recent concoction on her part designed to avoid blame for the accident. Her explanation from just after the accident to the trial has been largely consistent as to how the accident happened, although admittedly, Ms. Hogan is not sure just what part of Ms. Telford interfered with the steering wheel.

**67**  Having considered all of the evidence and particularly the evidence of Ms. Hogan, which I accept, I find as a fact that Ms. Telford interfered with and touched the steering wheel in some way that caused Ms. Hogan to lose control of the vehicle. This distinguishes the case relied on by Ms. Telford, *Schoenhalz v. Reeves*, [*2013 BCSC 1196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M15D-00000-00&context=), where the court found that the passenger's bump to the driver's arm was not the cause of the accident (paras. 62-65, 151). In that regard, it was not, as is argued by Ms. Telford in the alternative, simply that she had "distracted" Ms. Hogan. In this case I find that Ms. Telford significantly touched the steering wheel in such a way that Ms. Hogan lost control of the vehicle.

**68**  That is not to say that Ms. Hogan bears no responsibility for the accident, in that speeding and drinking were major causes of this accident. Nor does she or the Insurance Corporation of British Columbia ("ICBC") suggest otherwise.

**69**  Ms. Hogan was charged with operating a vehicle while impaired and causing bodily harm to Ms. Telford and Ms. Ettinger, under s. 255(2) 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=). She eventually pled guilty to the charges in April 2013 and was sentenced, which involved community service as well as driving and drinking prohibitions, each of 3 years. At discovery, Ms. Hogan had little recollection about what her counsel submitted to the court or what she might have advised the court herself, particularly as to her explanation as to how the accident happened. At trial, she stated that, on the advice of her lawyer, she declined to point the blame at someone else, preferring to take responsibility for her own actions. This approach is perfectly understandable and, in my view, nothing turns on it to the point of challenging the credibility of Ms. Hogan's evidence on the point.

**70**  There is no dispute that Ms. Hogan's conviction is a relevant matter in this action. The *Evidence Act*, *R.S.B.C. 1996, c. 124* provides that the conviction is admissible to prove that she committed the offence and that the court must determine the weight to be given to the conviction:

1. In this section:

"conviction" means a conviction

1. that is not subject to appeal or further appeal, or
2. for which no appeal is taken;

"finding of guilt" means the plea of guilty made before a court by a defendant to an offence or, as the case may be, the finding by a court that a defendant is guilty of an offence, and the court makes an order directing that the defendant be discharged for the offence either absolutely or on the conditions specified in a probation order, and

1. the order directing the discharge is not subject to further appeal, or
2. no appeal is taken in respect of the order directing the discharge,

and 'found guilty' has a corresponding meaning.

1. Subject to subsection (3), if
2. a person has been convicted of or is found guilty of an offence anywhere in Canada, and
3. the commission of that offence is relevant to any issue in an action,

proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence to prove that the person committed the offence, whether or not that person is a party to the action.

...

1. ... [T]he weight to be given to the conviction or finding of guilt must be determined by the judge or jury, as the case may be.

**71**  In the face of her conviction and in the face of her evidence at this trial, Ms. Hogan very sensibly takes responsibility for her actions in consuming alcohol and driving. But she does not take responsibility for the actions of Ms. Telford in interfering with her ability to drive and control her vehicle.

**72**  Ms. Telford argues that the criminal conviction supports the contention that Ms. Hogan is solely to blame for the accident. I do not agree.

**73**  Ms. Hogan's guilty plea is such that she has acknowledged the essential elements of the offence. One element of the offence is that Ms. Hogan's ability to operate the vehicle was impaired. There are various kinds of impairment, including legally defined impairment such as under the *Criminal Code*, s. 253(b) where a person's BAC exceeds 80 mg of alcohol in 100 ml of blood and, of course, physiological impairment such as where the effects of alcohol are fully realized in matters of judgment or in the ability to perform the normal functions in the operation of a vehicle. Often, these two kinds of impairment will be co-extensive, where an inference may be drawn given the substantial body of expert medical evidence about the effects of certain BAC levels on the ability to operate a vehicle.

**74**  However, impairment must not be conflated with causation, a further element in the offence under s. 255(2) of the *Criminal Code*. Even though impairment might be proven, the question must still be asked about what effect the alcohol consumption had on the person's ability to function, such as driving a car. Can that person still make judgment calls about when to move into traffic, obey traffic signals, control the wheel and brakes, for example? Under s. 255(2) of the *Criminal Code*, the person's ability to operate the motor vehicle must be impaired by alcohol *and,* as a result, that impairment must have caused bodily harm to another person. The fact of impairment does not inexorably lead to the conclusion that impairment was the cause of the injury. What must be shown is that the impairment was a "significant contributing cause" of the bodily harm: *R. v. Nette*, [*2001 SCC 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49H-00000-00&context=) at paras. 71-72; *R. v. Pangowish*, [*2003 BCCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G540-00000-00&context=) at paras. 36-37.

**75**  There is little doubt here that Ms. Hogan's impairment was a "significant contributing cause" of the bodily harm suffered by Ms. Telford and Ms. Ettinger in the accident. As the older woman of the group, and therefore theoretically the more responsible and mature one, Ms. Hogan should have acted in a more responsible manner. Ms. Hogan has acknowledged that she was feeling the effects of the alcohol and I find as a fact that her inability to react effectively to Ms. Telford's interference with the steering wheel was a major factor in the accident. I also consider that her excessive speed contributed to the fact that she was unable to regain control of the vehicle. She was well aware of the risks of drinking and driving, as is most of the public these days. She had been alive to this issue just recently on Saturday night while at the party, and why she suddenly abandoned those concerns the following Monday is a mystery. This was a terrible lapse of judgment for which her friends paid dearly.

**76**  The blame to be laid at the feet of Ms. Hogan does not end there. After obviously now having substantial time to reflect on the situation, Ms. Hogan acknowledges that if she had recognized how drunk Ms. Telford was, and that Ms. Telford's actions in the car were creating a hazard, she should have stopped and tried to settle her down before continuing the drive home. At the very least, Ms. Hogan should have asked Ms. Telford to stop her "dancing" or waving her hands so as to lessen the hazards of her moving around in the front seat of the vehicle. In that regard, Ms. Hogan's judgment was seriously affected by the alcohol, a point acknowledged as a probable effect of such a large degree of impairment by both Ms. Kirkwood and Mr. Shajani.

**77**  However, the fact of Ms. Hogan's criminal conviction does not foreclose the possibility that there were other causes of Ms. Telford's injuries beyond Ms. Hogan's own impairment, her speeding and her lack of judgment in quelling the party atmosphere in the vehicle. I consider that it would not have been entirely foreseeable to Ms. Hogan that her intoxicated friend, Ms. Telford, would actually act to the point of interfering with the operation of the vehicle. In that regard, I have already found that Ms. Telford's actions also materially contributed to the accident. That Ms. Telford, a young adult but still an adult, put herself into such an inebriated state where she caused this interference is also a factor.

**(ii) How should liability for the accident be apportioned?**

**78**  ICBC has referred to a number of cases where passengers have grabbed the steering wheel and interfered with the operation of the vehicle. In those cases, the unruly passenger was found to be wholly at fault. In *McHardy v. Contois* (7 September 2007), New Westminster S79092 (B.C.S.C.), the driver was found not to be at fault where the action by the passenger pulling on the wheel was unexpected. There was no evidence that the driver's ability to drive had been affected by ecstasy (paras. 57-61). Similarly, in *McEvoy v. McEachnie*, [*2008 BCSC 1496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2P1-00000-00&context=), the driver had consumed alcohol but was not impaired. The court found that the unforeseeable actions of the drunk passenger in grabbing the steering wheel caused the accident and the driver was not found to be negligent (paras. 38-43).

**79**  ICBC does not suggest that Ms. Telford should be found solely responsible for the accident. ICBC's counsel has referred to *Sikora v. Brown*, [*2014 BCSC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1CM-00000-00&context=), which is the only case before me where liability as between the interfering passenger and the driver was apportioned. In that case, liability was apportioned equally because the court found that both individuals had contributed to the accident in equal measure: paras. 38-45. In that case, however, the evidence of both parties was not credible or reliable and there was no corroborative evidence: paras. 16, 37. In any event, ICBC submits that *Sikora* supports a 50/50 split of liability in these circumstances.

**80**  In this case, there is considerably more reliable evidence than was found in *Sikora*, as I have related above.

**81**  Overall, I consider that Ms. Hogan bears more responsibility or fault for the accident than does Ms. Telford. On Ms. Hogan's part, there is the appalling lack of judgment in imbibing alcohol during the drive home. In addition, whether from a lack of judgment (caused by the drinking) or simply a wish to get home quickly, she was speeding on the highway. Ms. Hogan was also, as the driver, responsible for the proper conduct of the passengers. She failed to calm Ms. Telford down or reposition her to the back seat when she saw that Ms. Telford was acting so erratically so as to begin to move her hands around Ms. Hogan's face. On Ms. Telford's part, there was also the action of substantially interfering with Ms. Hogan's control of the steering wheel, an action that I consider was not entirely foreseeable by Ms. Hogan. Ms. Telford had put herself into a severely intoxicated state that I conclude was the likely cause of the interference with the steering wheel. Whether she touched the steering wheel by accident or not, she bears some fault for having done so. This action set in motion the sudden veering off of the vehicle and, following that happening, Ms. Hogan's intoxicated state and excessive speed contributed to her not being in a position to recover as well as she should have.

**82**  I find that liability should be apportioned 75% to Ms. Hogan and 25% to Ms. Telford.

1. **Was Ms. Telford contributorily negligent?**

**83**  ICBC alleges that Ms. Telford was contributorily negligent by failing to take reasonable care for her own safety by riding as a passenger in the vehicle where she knew or ought to have known that Ms. Hogan had consumed alcohol and was impaired.

**84**  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=), the court was addressing a similar issue. Madam Justice Dickson summarized the task of the court in assessing whether the defendant has satisfied the onus of establishing contributory ***negligence*** on the part of the plaintiff in these circumstances:

[21] When a plaintiff contributes negligently to causing his or her own injury, pursuant to s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, the court must determine relative degrees of fault. The prerequisite to a liability apportionment is that damage or loss was caused by the fault of two or more persons. The fault of the plaintiff at issue is the failure to take reasonable care for his or her own safety: *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=), paras. 24-27.

[22] The onus is on the defendant to establish contributory ***negligence***. Once established, apportionment is based on the degree to which each person was at fault, not on the basis to which each person's fault caused the damage or loss. In assessing comparative fault, or blameworthiness, the court must consider the degree of risk created by each of the parties and apportion liability based on the nature and extent of each party's departure from the relevant standard of care. The levels of fault under consideration may vary from a reckless disregard for safety to a minor lapse of care: *Cempel v. Harrison Hot Springs*, [*[1997] B.C.J. No. 2853*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (B.C.C.A.), paras. 23-24; *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=), para. 46; *Bradley*, para. 24.

...

[26] A plaintiff may also be found to have failed to take reasonable care for his or her own safety by accepting a ride with an intoxicated driver when the plaintiff knew or should have known of the driver's intoxication when the ride was accepted. An objective assessment of all of the circumstances is required and, where the plaintiff joins the defendant in becoming intoxicated, liability may be imposed taking into account their joint participation in a hazardous enterprise. In such cases, the plaintiff is often held to be 25% to 40% contributorily negligent: *Pottage v. Patterson* [*(1980), 24 B.C.L.R. 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F8KH-X0TH-00000-00&context=) +(S.C.); *Walsh v. Gougeon*, [*[1989] B.C.J. No. 1446*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B061-00000-00&context=) (S.C.); *Neufeld v. Foster*, [*[1999] B.C.J. No. 764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1HJ-00000-00&context=); *Holton v. MacKinnon*, [*2005 BCSC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0WD-00000-00&context=).

**85**  Both Ms. Telford and ICBC have relied on a number of authorities. I will not discuss each case in any great detail as the factual circumstances of each must necessarily have dictated the result and are distinguishable from the unique facts here. Nevertheless, consistency is found in these cases in identifying certain relevant factors:

1. the plaintiff's knowledge of the defendant's consumption of alcohol and degree of impairment;
2. the plaintiff's ability to observe and appreciate the defendant's ability to drive at the relative times, being when she got into the vehicle and immediately prior to the accident; and
3. if, having appreciated the risk she was in, the plaintiff had an opportunity to remove herself from the vehicle.

**86**  On the first and second factors, Ms. Telford argues that she bears no responsibility in this respect. In the following cases cited by Ms. Telford, the court found that contributory ***negligence*** on the part of the passenger had not been proven:

1. *Reekie v. Messervey,* [*(1986) 4 B.C.L.R. (2d) 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1T8-00000-00&context=) at 200 (S.C.): the plaintiff was the passenger in the single vehicle accident after allowing the defendant to drive her vehicle. The defendant was impaired but his driving appeared normal at first. He lost control after he started playing with the steering wheel and hit black ice. The passenger, who herself was impaired, saw the defendant drinking some amount but she was not monitoring the defendant's alcohol consumption. In addition, the plaintiff did not observe any signs of obvious impairment. The court found that there was no reason for the plaintiff to believe she was taking a chance by being driven by the defendant. In addition, by the time the plaintiff realized that the defendant was not driving properly, she had no opportunity to leave the vehicle;
2. *Charlie v. Baker,* [*[1992] B.C.J. No. 1008*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0T9-00000-00&context=), [*1992 CanLII 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0T9-00000-00&context=) (S.C.): all occupants in the vehicle were drunk. The impaired driver was speeding. The vehicle left the road and went down the embankment. All of the occupants of the vehicle had been drinking the previous evening and earlier that morning. The court found that there was no evidence as to how much the driver had to drink or as to the condition of the driver. In addition, the court found that the intoxicated female passenger against whom contributory ***negligence*** was alleged did not have alternative means of transportation in the middle of the night;
3. *Gagnon v. Phillips,* [*[1993] B.C.J. No. 1283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3NT-00000-00&context=) at paras. 10-20, [*1993 CanLII 439*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3NT-00000-00&context=) (S.C.): the intoxicated plaintiff was injured when the motorcycle on which she was a passenger collided with a pick-up truck. The driver of the motorcycle was also impaired. Although the plaintiff knew that the driver had been drinking, since she had in fact served him, she did not know how much he had had to drink in total. In addition, the driver, a heavy drinker, showed little outward signs of impairment. The court concluded that there was insufficient evidence to show that the plaintiff knew or ought to have known that it was unsafe to ride with the defendant;
4. *Florence v. Shackelly,* [*[1999] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M35H-00000-00&context=) at paras. 45-49, [*1999 CanLII 6505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M35H-00000-00&context=) (S.C.): at the outset of the evening, the driver was consuming little alcohol. That would change later in the evening when he began to consume a lot of alcohol and quickly became intoxicated. By that time, however, the plaintiff was very intoxicated and he entered the defendant's vehicle as a passenger, after which the accident occurred. The court found that the plaintiff was not contributorily negligent because the plaintiff was very drunk at the outset and, in any event, there were little or no signs of impairment on the part of the defendant at the time;
5. *Dennis v. Gairdner,* [*2002 BCSC 1289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-206H-00000-00&context=) at paras. 42-60: the plaintiff was a passenger in a vehicle being driven by an impaired driver that collided with another vehicle. The plaintiff and the defendant had been drinking together just prior to the accident. The court found that there was no evidence that the plaintiff was monitoring the defendant's alcohol consumption or that there were any obvious signs of impairment on the part of the defendant; and
6. *Gilbert* at paras. 49-55: the plaintiff was a passenger in the back seat of a vehicle driven by the impaired defendant who lost control causing a single vehicle accident. The court found no evidence that the plaintiff knew of the driver's intoxication or that the driver was displaying obvious signs of impairment.

**87**  In my view, the above cases are clearly distinguishable from the circumstances here.

**88**  The evidence establishes that Ms. Hogan did not display any unusual or obvious signs of impairment. The testimony of all of the witnesses, to the extent of their recollection, corroborated that Ms. Hogan did not seem to be intoxicated. Clearly, however, the observational ability of the three passengers would have been affected by their own consumption of alcohol as the day went on, particularly in relation to Ms. Telford and Ms. Ettinger. Nevertheless, there is independent corroboration in that Cst. Fahlman similarly testified that there was nothing unusual about Ms. Hogan's speech, walking, demeanour or judgment that gave rise to any suspicion that Ms. Hogan was impaired. Nor did Ms. Berney notice any signs of impairment on the part of Ms. Hogan although she did not observe Ms. Hogan to any great degree.

**89**  Ms. Telford also submits that there is no evidence that she was monitoring Ms. Hogan's alcohol consumption. This submission can be rejected immediately. These four women were together in fairly close quarters all day Monday, just as they had been all weekend. But perhaps for Ms. Hogan's one beer in the early morning when she awoke, Ms. Telford would have had ample opportunity to observe Ms. Hogan's alcohol consumption all day long. More importantly, Ms. Telford was the one who bought the tequila which she mixed in her own container and it was this container that she extensively shared with Ms. Hogan throughout the day. In addition, Ms. Telford would have been able to observe that, to some lesser extent, Ms. Hogan was also sharing the drink container of Ms. Ettinger, which Ms. Telford would also have understood to contain an alcoholic beverage.

**90**  With Ms. Telford buying the quantity of alcohol she did (including at the pit stop in Oliver, BC while they were on the road driving home) and mixing her drink in her own container from time to time throughout the day, she would have been the *only* person to accurately gauge how much she drank and also how much Ms. Hogan drank. She would have known exactly how much they had both consumed from the tequila bottle (or perhaps bottles) as the bottle(s) were drained over the course of the day's activities.

**91**  Many of the above cases use phrases such as "this is not a case where the parties had been drinking together over an extended period of time prior to the accident" (*Dennis* at para. 56) or "this is not a case in which the plaintiff and defendant were drinking together for hours before the negligent driving in question" (*Gilbert* at para. 51). In this case, that is exactly what was going on. Ms. Telford was well aware of the need to drive home, that Ms. Hogan was the one driving the vehicle and she either knew or should have known that her voluntary sharing of her drink container with Ms. Hogan would result and did result in Ms. Hogan consuming a substantial amount of alcohol. Whether Ms. Hogan was exhibiting signs of impairment or not, it is undeniably the case that Ms. Telford voluntarily engaged in a drinking exercise that involved actively allowing Ms. Hogan, the driver, to consume alcohol during the drive home. It matters not whether Ms. Telford offered her drink to Ms. Hogan or whether Ms. Hogan simply helped herself. Even if the latter, the drink container was never far from Ms. Telford and she would have, at the very least, acquiesced in Ms. Hogan's sharing of her drink.

**92**  This knowledge and course of action on the part of Ms. Telford cannot be described as anything other than a careless or reckless disregard for her own safety while riding as a passenger in Ms. Hogan's vehicle. Frankly, the same can be said of Ms. Ettinger and Ms. Dziedzic, who would also have been aware that Ms. Hogan was consuming alcohol, although perhaps with less knowledge as to the exact amounts. To use the phrase from *Gilbert*, this was "joint participation" by all four women in a "hazardous enterprise": para. 26.

**93**  Ms. Telford also submits that she did not have an alternative means of transportation back to Vancouver from Osoyoos and she had no choice but to rely upon Ms. Hogan to get home. This is manifestly not the case and it is apparent that the circumstances in *Reekie* and in *Charlie* on this point were markedly different.

**94**  Here, Ms. Telford had many options. Firstly, and obviously, she could have stopped allowing Ms. Hogan to share her drink container. She could have also asked Ms. Hogan to stop sharing the drink container of Ms. Ettinger. There is no evidence that Ms. Hogan had or even wanted her own alcoholic drink and, in fact, she said she was sipping from her friend's containers just to be "sociable".

**95**  Even assuming that Ms. Hogan was continuing to drink over the objections or concerns of Ms. Telford, Ms. Telford could have bought a bus ticket home from any of the towns they visited in the Okanagan. There was no evidence that she did not have the funds to do so, although it is worth noting that she certainly had money to spend on alcohol. This is a very theoretical point here as, even from the sober outset of this homeward bound alcoholic frolic, Ms. Telford made a conscious decision to ride in a vehicle where the driver was actively consuming substantial amounts of alcohol with her express consent and encouragement.

**96**  As an overarching point, Ms. Telford's own substantial consumption of alcohol would no doubt have lessened her judgment to make the decision to continue the journey as the day progressed and she became more intoxicated herself. Nevertheless, Ms. Telford voluntarily engaged in this activity and it cannot be suggested that her own increasingly voluntarily induced incapacity reduced the level of responsibility she bears for the situation she found herself in. This is not a situation as was faced in *Florence* where the drinking on the part of the driver only started after the plaintiff was intoxicated.

**97**  In any event, I agree with the conclusions of the court in *Holton v. MacKinnon* [*2005 BCSC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0WD-00000-00&context=), which similarly distinguished *Florence* and adopted the comments of Taylor J. (as he then was) in *Shaw v. Storey*, [*[1989] B.C.J. No. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0BT-00000-00&context=), aff'd [*(1991) 53 B.C.L.R. (2d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X2CT-00000-00&context=) (C.A.). In *Shaw*, the parties went to a house party where they both became intoxicated. The Court of Appeal accepted the trial judge's findings that:

I find the plaintiff was contributorily negligent ... in riding on [the motorcycle] with the defendant when he knew the defendant had been drinking and ought to have known that the defendant's ability to drive it was probably impaired by alcohol.

...

I find the hazardous enterprise was one on which these young men embarked jointly and to whose consequences they contributed equally.

(*Shaw* at 261-262).

**98**  I find that Ms. Telford would have been sober enough early in the day to recognize the situation that she was in fact facilitating so as to allow her to make an informed decision to continue in the vehicle. To put it bluntly, the fact that Ms. Telford's own intoxication increased over the day to the point where she no doubt did not appreciate the risk she was facing does not relieve Ms. Telford of responsibility for her decisions. She voluntarily put herself in that position by engaging in this "hazardous enterprise". In *Holton*, Mr. Justice Hood stated:

[438] The point is that the plaintiff was drinking throughout the evening and early hours of the following morning with his companions. He had ample time, before becoming seriously intoxicated, to observe and appreciate that his driver, like him, was drinking continuously and was becoming, and became, intoxicated. In my opinion, he knew, or ought to have known, that if MacKinnon drove them home, he could be harmed, and he would have been able to assess the situation. It is no answer to say that MacKinnon had never done this before, which I would find difficult to accept, or that he somehow relied on MacKinnon. In continuing to drink until he was seriously intoxicated, the plaintiff did not, in his own interests, take reasonable care of himself and contributed by this lack of care to the injury he eventually suffered.

...

[440] In my view the driver who drinks himself into a state of intoxication and drives recklessly on a highway must bear a substantial portion of fault. A plaintiff who also drinks himself into a state of intoxication so that he is unable to care for himself, and who gets into a vehicle with his intoxicated drinking companion behind the wheel, must also bear a substantial portion, although less than the driver.

**99**  Similarly, the Court in *Glanville v. Moberg*, [*2014 BCSC 1336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B18B-00000-00&context=) found that a passenger who is voluntarily intoxicated to the point where he or she fails to appreciate the risks to his or her safety in riding in a vehicle driven by a drunk driver does not negate the duty to reasonably look after his or her safety to avoid injury: see paras. 108, 110-112, 114-116.

**100**  In the alternative, Ms. Telford submits that if she is found to have been contributorily negligent, then her contribution should be assessed at 5%. She relies on the court's *obiter* statement in *Gilbert*:

[55] If I am wrong and Ms. Gilbert failed to take reasonable care for her own safety either by failing to determine Mr. Bottle's state of sobriety or assuming a position in the vehicle unequipped with an available seatbelt I would have found her comparative degree of fault was minimal. Mr. Bottle drove in a criminally dangerous manner, while intoxicated, and thus departed dramatically from the relevant standard of care. Ms. Gilbert, on the other hand, failed to elicit information that would have protected her from the terrible risk created by Mr. Bottle's serious driving misconduct. In these circumstances, at most I would have assessed her contributory ***negligence*** at 5%.

**101**  In the further alternative, Ms. Telford submits that contributory ***negligence*** should be at the most 15%, citing *Burton v. Groening,* [*(1981) 30 B.C.L.R. 391*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2PG-00000-00&context=) at 394 (S.C.):

It was not wise, as events proved, for her to go driving with a group who had been consuming beer for some time. At three o'clock in the morning a group quest for cigarettes with a driver whose condition was suspect amounts to contributory ***negligence*** particularly when the plaintiff has expressed much concern about her own safety. The contributory ***negligence*** which can be attributed to the plaintiff for participating in this nocturnal quest I set at 15 per cent.

**102**  ICBC suggests that the following cases support a finding of contributory ***negligence*** on the part of Ms. Telford of between 30-35%:

1. *Ridsdale v. Taberner*, [*[1991] B.C.J. No. 893*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1C3-00000-00&context=), [*1991 CanLII 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1C3-00000-00&context=) (S.C.): the defendant driver and plaintiff passenger engaged in an afternoon of drinking, after which they left in the defendant's car and the accident occurred. The Court found that the plaintiff was aware that the defendant had a lot to drink prior to the departure and found the plaintiff contributorily liable to the extent of 30%;
2. *Grewal v. Simoncioni Estate*, [*(1993) 78 B.C.L.R. (2d) 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1HW-00000-00&context=) (C.A.): the plaintiff was with the defendant driver the entire evening in a nightclub. The plaintiff was sober and was found to have been well aware of the defendant's consumption of alcohol and his state of sobriety in terms of impairment. The Court upheld the trial judge's findings of 35% contributory ***negligence*** on the part of the plaintiff;
3. *Nielson v. Brunet Estate (Public Trustee of)*, [*(1994) 95 B.C.L.R. (2d) 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F57G-S121-00000-00&context=) (C.A.): both the plaintiff and defendant were drinking together for about ten hours. Both were intoxicated. The plaintiff was the owner of the vehicle driven by the defendant yet he encouraged the defendant to drive. Contributory ***negligence*** was assessed at 45%;
4. *Mushta v. Best*, [*[1998] B.C.J. No. 1346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22V5-00000-00&context=) (S.C.): three young men set out on a "high risk journey" -- an alcohol fuelled drive while travelling to and from Whistler, BC. The Court found the plaintiff, who was also impaired, was aware of the amount of beer consumed by the driver. The plaintiff was found contributory negligent assessed at 50%;
5. *Neufeld v. Foster,* [*[1999] B.C.J. No. 764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1HJ-00000-00&context=), [*1999 CanLII 6939*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1HJ-00000-00&context=) (S.C.): the parties and two friends engaged in an evening of drinking together to the point that they were all intoxicated. The plaintiff knew how much the defendant had been drinking and there was even a discussion at some point about taking a taxicab. Nevertheless, the plaintiff was found to have voluntarily become a passenger in the vehicle and was assessed to have been contributorily negligent to the extent of 30%;
6. *Holton*: the plaintiff, defendant driver and another friend were drinking one evening at a residence and at two bars by reason of which they became very intoxicated. The plaintiff was found to be contributorily negligent to the extent of 30%;
7. *Lumanlan v. Sadler*, [*2008 BCSC 1554*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2TW-00000-00&context=): the plaintiff passenger and the defendant driver met in a bar and both became intoxicated while drinking over an extended period of time. Both were exhibiting clear physical signs of intoxication and the plaintiff testified that she knew that the defendant was drunk when they left the bar. The plaintiff was found to be contributorily negligent to the extent of 25%; and
8. *Glanville*: the plaintiff and defendant engaged in an afternoon of drinking. The defendant exhibited obvious signs of intoxication before and immediately after the motor vehicle accident. The plaintiff was found to have known or should have known that the driver was intoxicated when they got into the vehicle. Contributory ***negligence*** was assessed at 30%.

**103**  Despite the efforts of Ms. Telford's counsel to distinguish the above cases, all of them bear some resemblance to this case in that the passenger and the driver embarked on a drinking exercise or "hazardous enterprise" where both knew or should have known that the intoxication of the driver was inevitable. I would repeat that Ms. Telford was well aware that Ms. Hogan was drinking over the course of the day and she had particular knowledge of the quantity of what Ms. Hogan consumed as the majority of it came from her own drink container. Although she may not have been aware of exactly what Ms. Hogan consumed from Ms. Ettinger's cup, she would also have been aware that Ms. Ettinger's beverage was alcoholic and that Ms. Hogan was sharing that too.

**104**  It does not follow that since Ms. Hogan was not exhibiting overt signs of impairment, one need not consider Ms. Telford's lack of judgment in both offering her drink to Ms. Hogan and then getting in the vehicle being driven by Ms. Hogan for the trip home. To the extent that later in the day, Ms. Telford drank alcohol to the point of being severely intoxicated herself confirms that she failed to take reasonable steps to ensure her ongoing ability to assess her safety over the course of the trip home.

**105**  The cases cited by ICBC support the suggested range of apportionment of 30-35% for such a passenger who voluntarily rides with a drunk driver. The higher end of this range is amply supported, particularly by the fact that Ms. Telford herself provided most of the alcohol consumed by Ms. Hogan that day.

**106**  I assess Ms. Telford's contributory ***negligence*** to be 35%.

**Conclusion**

**107**  I apportion Ms. Telford's responsibility for the accident at 25%, with the remainder (75%) attributable to Ms. Hogan.

**108**  In addition, I find that Ms. Telford was contributorily negligent to the extent of 35% for voluntarily engaging in a drinking exercise with Ms. Hogan while all the while knowing that Ms. Hogan was driving her home.

**109**  The parties may speak to the matter of costs, if they are unable to agree.

S.C. FITZPATRICK J.

**End of Document**

[***Boon v. Mann, [2015] B.C.J. No. 1217***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2D9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.D. Punnett J.

Heard: March 16-20, 2015, written submissions

of the Plaintiffs received

April 10, 2015; written submissions of

the Defendants received April 17,

2015; written reply submissions of the

Plaintiffs received April 24, 2015.

Judgment: June 10, 2015.

Docket: S128349

Registry: Vancouver

**[2015] B.C.J. No. 1217** | [*2015 BCSC 990*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61SF-00000-00&context=) | [*255 A.C.W.S. (3d) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61SF-00000-00&context=) | [*56 R.P.R. (5th) 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61SF-00000-00&context=) | [*2015 CarswellBC 1602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61SF-00000-00&context=)

Between Kenneth Boon, Leona Douglas, Plaintiffs, and Kashmir Mann, Manjit Saini, Gurjit Saini, Mandeep Sekhon, and Oceanic Plumbing & Heating Ltd., Defendants

(59 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Fire — Action by Boon and Douglas for damages for loss of property, personal injuries, wage loss and future care costs dismissed — Boon and Douglas resided as tenants in a residence owned by the defendant Mann — A fire significantly damaged their unit and killed one of their pet dogs — Boon and Douglas submitted that Mann acted negligently in failing to install smoke alarms — Mann was negligent in not installing and maintaining smoke alarms — However, Boon and Douglas failed on a balance of probabilities to establish that Mann's *negligence* caused the losses claimed.**

**Damages — Physical and psychological injuries — Physical injuries — Action by Boon and Douglas for damages for loss of property, personal injuries, wage loss and future care costs dismissed — Boon and Douglas resided as tenants in a residence owned by the defendant Mann — A fire significantly damaged their unit and killed one of their pet dogs — Boon and Douglas submitted that Mann acted negligently in failing to install smoke alarms — Mann was negligent in not installing and maintaining smoke alarms — However, Boon and Douglas failed on a balance of probabilities to establish that Mann's *negligence* caused the losses claimed.**

**Tort law — *Negligence* — Causation — Causal connection — Dangerous things and situations — Fire — Action by Boon and Douglas for damages for loss of property, personal injuries, wage loss and future care costs dismissed — Boon and Douglas resided as tenants in a residence owned by the defendant Mann — A fire significantly damaged their unit and killed one of their pet dogs — Boon and Douglas submitted that Mann acted negligently in failing to install smoke alarms — Mann was negligent in not installing and maintaining smoke alarms — However, Boon and Douglas failed on a balance of probabilities to establish that Mann's *negligence* caused the losses claimed.**

|  |
| --- |
| Action by Boon and Douglas for damages for loss of property, personal injuries, wage loss and future care costs. Boon and Douglas resided as tenants in a residence owned by the defendant Mann. On July 12, 2011, a fire significantly damaged their unit in the residence and killed one of their pet dogs. Boon and Douglas took the position that Mann acted negligently in failing to install smoke alarms. Mann took the position that the cause of the fire was unknown and that no fault or ***negligence*** could be ascribed to him. He further submitted that the plaintiffs failed to prove on a balance of probabilities that he was negligent and, even if he was, the plaintiffs failed to prove a causal link between his ***negligence*** and the losses claimed.  HELD: Action dismissed.  Mann was negligent in not installing and maintaining smoke alarms. However, Boon and Douglas failed on a balance of probabilities to establish that Mann's ***negligence*** caused the losses claimed. There was no basis upon which to find that had smoke alarms been present the fire would have been capable of extinguishment by the plaintiffs or the fire department in sufficient time to prevent any loss. |

**Statutes, Regulations and Rules Cited:**

British Columbia Fire Code, [*B.C. Reg. 175/2006*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC71-FD4T-B1H6-00000-00&context=),

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=), s. 6

Residential Tenancy Act, [*SBC 2002, CHAPTER 78, s. 7*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JK4W-M0B8-00000-00&context=), s. 32

**Counsel**

Counsel for the Plaintiffs: P.R. Bisbicis.

Counsel for the Defendants: J.R. Loeb, D. Paperny, Articled Student.

[Editor's note: A correction was released by the Court June 16, 2015; the change has been made to the text and the correction is appended to this document.]

**REASONS FOR JUDGMENT**

|  |
| --- |
| **R.D. PUNNETT J.** |

**1**   The plaintiffs, Mr. Kenneth Boon and Ms. Leona Douglas, resided as tenants in a residence owned by the defendant Mr. Kashmir Mann in Delta, British Columbia. On July 12, 2011 a fire significantly damaged their unit in the residence and killed one of their pet dogs. The plaintiffs' claim Mr. Mann acted negligently in failing to install smoke alarms and seek damages for loss of property and furnishings, personal injuries, wage loss, as well as future care costs. While they initially raised claims against certain other defendants, those have been discontinued.

**Background**

**2**  In early 2011 the plaintiffs leased a portion of the residence from Mr. Mann, taking possession on April 1, 2011. The parties never signed a tenancy agreement.

**3**  On their initial inspection of the property the plaintiffs noted that there were no smoke alarms. They allege the defendant Mr. Mann agreed to have them installed and say they reminded the defendant of the need to do so several times during their tenancy. The plaintiffs say they offered on one occasion to purchase the smoke alarms on Mr. Mann's behalf if the defendant would agree to deduct the cost from their rent. The plaintiffs contend that the defendant then repeated that he would attend to installing the alarms himself, which they allege he never did.

**4**  Ms. Douglas' son, Nick Douglas, testified that he had been in the home previously and observed the absence of smoke alarms. Mr. Mann testified that he did not know if the house had smoke detectors when he purchased it in 2007 or 2008 nor did he know if he had installed smoke alarms.

**5**  The plaintiffs installed three fire extinguishers in the home, which they testified were tested and functioning at the time of the fire.

**6**  In late spring 2011 the plaintiffs reported to the defendant that the dishwasher and refrigerator were not working. The refrigerator was repaired that same day but the plaintiffs were advised that the dishwasher had to be replaced.

**7**  On July 12, 2011 Ms. Douglas, her brother-in-law and her sister were at the residence for a barbecue. Mr. Boon joined them upon his arrival home from work in the late afternoon. During the course of the day Ms. Douglas' sister and her husband consumed approximately 12 beers. Ms. Douglas testified that she drank two or three beers and Mr. Boon said he may have had six beers.

**8**  At approximately 7:30 p.m. that evening a repairman arrived at the residence to install the new dishwasher. Mr. Boon, who planned to awaken at 2:30 a.m. the next morning for work, retired to bed around that same time. Someone in the household roused Mr. Boon at around 9:00 p.m. to assist the repairman in removing the old dishwasher. Mr. Boon returned to bed shortly thereafter. At 9:30 p.m. the repairman left the residence intending to return the following morning to complete the installation.

**9**  Ms. Douglas and the others went to bed later in the evening. There were four dogs in the house at the time, two belonging to the plaintiffs and two belonging to their guests.

**10**  At around 11:50 p.m. Ms. Douglas woke up to use the bathroom. She heard what she initially thought to be rain. When she entered the hallway she noticed fire reflected in glass doors leading to another room. She also observed smoke at waist level rolling down the hallway from the kitchen. She continued on to the kitchen, as that was where the dogs were kept, and noticed a hole in the ceiling with flames licking through it and across the ceiling. She screamed for her husband and ran to her sister and brother-in-law's room to wake them up. She had trouble rousing them, having to yank her brother-in-law from the bed by his leg to wake him. He then helped rouse Ms. Douglas' sister.

**11**  Ms. Douglas then attempted to call 911 but the phone cut out before she could complete the call. However, a neighbour called 911 at 11:51:01 p.m. and the fire department arrived 7 minutes and 29 seconds after the fire was reported.

**12**  All of the occupants escaped from the residence, although Mr. Boon re-entered the home in an attempt to rescue one of the dogs. He suffered some minor burns as a result; the dog perished in the fire.

**13**  The plaintiffs did not attempt to use the fire extinguishers as by the time they awakened the fire was too large. Flames destroyed the kitchen of their apartment and part of the building's roof, with smoke and water damage to other areas of the home. The cause and origin of the fire are unknown.

**Expert Reports**

**14**  The plaintiffs did not submit any expert evidence respecting the issue of causation as they agreed with the defendant's submission that the expert report prepared on the plaintiffs' behalf was inadmissible. I agree with that concession.

**15**  However, the defendant obtained a rebuttal report to the plaintiffs' report. That report was admitted as a stand-alone report for reasons consistent with those in *Kaigo v. Sawchuk Developments Co. Ltd. et al*, [*2014 BCSC 1858*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8T-89T1-JNCK-22VN-00000-00&context=).

**16**  The defendant's report is that of Sereca Consulting Inc. authored by Christopher J. Reed, MSc. Eng. (Fire), P.Eng. The plaintiffs took no position on the admissibility of the report or Mr. Reed's qualifications. Mr. Reed was qualified as an expert in fire investigation and analysis.

**17**  Mr. Reed confirmed that all residential buildings in BC require smoke alarms and commented as well on the purpose of such alarms as follows:

A smoke alarm combines smoke detection and alarm sounding together in one unit and is used in residential dwellings. The intent is to provide early warning to occupants to allow safe egress. A smoke alarm provides no fire suppression or other notification services. As the intent is for safe egress only and not protection of property, there is no difference in fire spread within an unoccupied dwelling with or without smoke alarms. ... [p. 8]

...

... Early detection increases the opportunity for suppression and therefore a properly operating smoke alarm can increase the opportunity to contain the fire. ... [p. 4]

**18**  He also opined that the effectiveness of a smoke alarm to alert occupants is dependent on the type of alarm, its working condition and the type of fire occurring, that is whether the fire was flaming as opposed to smouldering.

**19**  Mr. Reed commented on the issue of whether the spread of the fire could have been contained had smoke alarms been in place. In doing so he provided insight into how complex such a question is:

1. the exact effect of smoke alarms on property loss is difficult to assess;
2. no statistics are available on the frequency in which smoke alarms alerted occupants to a situation that would likely have turned into a fire without a smoke alarm's warning; and
3. despite having smoke alarms in place, 20 years of Surrey, BC fire data suggest that at least 20% if not more of household fires develop outside of the room of origin and cause significant damage.

**20**  In discussing whether the presence of smoke alarms would have had an impact on the damage caused by the fire, Mr. Reed opined that several factors contribute to the extent of damage caused by a fire, including:

1. the type of fuel burning;
2. available oxygen and fuel;
3. configuration of the building; and,
4. overall length of time that the fire is burning.

**21**  He also stated that in assessing whether or not a smoke alarm would have had an impact on the spread of a fire, it is important to know at what stage the fire was when discovered and its rate of growth. He noted that the rate a fire spread is dependent as well upon a number of factors including:

1. the initial heat source;
2. first fuel ignited;
3. nearby fuel characteristics; and
4. ventilation parameters.

**22**  He testified that the extent of fire damage, the absence of physical evidence of a specific fire cause and the lack of detailed witness observations precluded the opportunity to identify the specific cause of the fire. As a result a precise fire growth curve could not be determined. He concluded at p. 6:

...

... the absence of attempting to suppress the fire, the response time of the Fire Department, and the various rapid fire growth scenarios that are possible suggests that the overall spread of the fire could not have been contained had smoke alarms been in place.

...

**23**  Under cross examination Mr. Reed said this:

1. Okay. And your evidence as a whole, if I can summarize it, is there were no smoke alarms present potentially, you're not sure about that, but if there -- even if there had been smoke alarms installed, it wouldn't have made any difference in this case; that's been the crux of your evidence?
2. I agree that if or if not, the presence of smoke alarms would not have a bearing on this.
3. On this file?
4. No.
5. It wouldn't have changed anything?
6. No.

**24**  In his report he opined at pp. 6-7:

...

It is therefore my opinion that the absence of attempting to suppress the fire, the response time of the Fire Department, and the various rapid fire growth scenarios that are possible suggests that the overall spread of the fire could not have been contained had smoke alarms been in place.

...

In the situation that the fire was detected in the very early stages (detected by a smoke alarm or other notification), the 911 call and suppression activities would still have allowed at least 7-8 minutes of burning time. As discussed in **Section 4.2** of this report, the various fire growth scenarios possible in the kitchen could have all resulted in a fire transitioning to flashover generating extensive heat and smoke sufficient to cause the damage as observed at the subject building. Even if the kitchen did not reach flashover conditions, the open doorway to the hallway, opening to the attached side room, opening of the exterior door during egress, and observed fuel load within the kitchen would have resulted in smoke and heat exiting the kitchen and significant damage into the remainder of the building.

...

It is my opinion that in this instance, the damage to the Property would not have been lessened had appropriate detection equipment been in place.

**25**  It is clear from Mr. Reed's report that there would not have been a lengthy period of time from commencement of the fire to a point where the fire was not capable of being controlled by handheld fire extinguishers. Even if the occupants had been alerted earlier the growth and spread of the fire would still have resulted in full-room involvement.

**26**  I note as well that the opinion of Mr. Reed was not challenged in light of the absence of expert evidence to the contrary. As a result there is no expert evidence establishing that the presence of proper smoke alarms would have changed the outcome of the fire in any way, nor any evidence that the plaintiffs would have been alerted to the fire earlier had smoke alarms been present.

**Position of the Plaintiffs**

**27**  The plaintiffs submit that Mr. Mann owed them a duty of care to ensure the residence was reasonably safe for use and specifically that Mr. Mann should have done so by installing smoke alarms. They say that this duty arose both in ***negligence*** and pursuant to statute.

**Position of the Defendant**

**28**  The defendant submits that the cause of the fire is unknown and that no fault or ***negligence*** can be ascribed to him. Mr. Mann further submits that the plaintiffs have failed to prove on the balance of probabilities that he was negligent and, even if he was, the plaintiffs have not proved a causal link between his ***negligence*** and the losses claimed. With respect to the claim under statute he submits that breach of a statute does not automatically impose liability given the breach must relate to and be the probable cause of the damage claimed.

**Law and Analysis**

**29**  As noted the plaintiffs advance their claim in ***negligence*** and breach of statute. They rely on the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337*, the *Residential Tenancy Act*, *S.B.C. 2002, c. 78* and the *British Columbia Fire Code,* [*B.C. Reg. 175/2006*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC71-FD4T-B1H6-00000-00&context=).

**30**  The relevant portions of the *Occupiers Liability Act* are:

**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.

...

1. Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.

...

**6** (1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

...

1. For the purposes of this section
2. a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,
3. nothing relieves a landlord of a duty the landlord may have apart from this section, and
4. obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.
5. This section applies to all tenancies.

**31**  The salient *Residential Tenancy Act* provisions are:

**7** (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

1. A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

...

**32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that

1. complies with the health, safety and housing standards required by law, and
2. having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
3. A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
4. A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
5. A tenant is not required to make repairs for reasonable wear and tear.
6. A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

**32**  The plaintiffs allege that the defendant landlord owed them a duty of care under the *Occupiers Liability Act* and the *Residential Tenancy Act,* specifically that the defendant had a duty to ensure that the residence had smoke alarms pursuant to ss. 3 and 6 of the *Occupiers Liability Act* as well as s. 32 of the *Residential Tenancy Act*. Further, the plaintiffs say that the *Occupiers Liability Act* obliged the defendant to inspect the premises for defects.

**33**  The plaintiffs also argue that s. 7(1) of the *Residential Tenancy Act* means that the defendant must compensate the plaintiffs for all damages and loss resulting from his failure to comply with s. 32(1). They submit as well that under s. 6(1) of the *Occupiers Liability Act* the defendant owed the same duty of care to the plaintiffs and on the rented premises as would be owed by an occupier under the *Occupiers Liability Act*. As a result they say the defendant had a duty of care, but he took no such care. Regarding the *British Columbia Fire Code,* the plaintiffs point to B.C. Reg. 44/2010 which amended Article 2.1.3.3 of the *Fire* Code to stipulate that smoke alarms must be installed in all dwelling units in the province.

**34**  The defendant does not dispute that he had a duty of care under these statutes to ensure that the residence was reasonably safe and complied with safety and housing standards. He also concedes that the *Fire* Code requires smoke alarms in residential buildings. That, however, is not the end of the analysis. While the landlord breached certain statutory requirements, that in and of itself does not give rise to a right of action because the plaintiffs must also prove that Mr. Mann's ***negligence*** caused the damages complained of (*Bueckert v. Mattison* [*(1996), 149 Sask.R. 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F8KH-X1YM-00000-00&context=) (Q.B.), at paras. 54-56).

**35**  In *The Queen (Can.) 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 206, Dickson J. for the Court described this issue as follows:

...

This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his? ...

**36**  He then concluded at 227-228:

...

1. Civil consequences of breach of statute should be subsumed in the law of ***negligence***.
2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes ***negligence*** *per se* giving rise to absolute liability.
3. Proof of statutory breach, causative of damages, may be evidence of ***negligence***.
4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.
5. In the case at bar ***negligence*** is neither pleaded nor proven. The action must fail.

...

**37**  That said, the *Residential Tenancy Act* imposes a duty on the landlord to provide premises that comply with standards set by law. As held in *Tolea v. Ialungo*, [*2008 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1GX-00000-00&context=), a "breach of the building code may indicate that such standards have not been complied with, and thereby give rise to a civil action in tort," (para. 63), citing *Zavaglia v. MAQ Holdings Ltd.* [*(1986), 6 B.C.L.R. (2d) 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S0BC-00000-00&context=) (C.A.)).

**38**  The plaintiffs acknowledge that cases such as *Tolea*, *Zavaglia* and *O'Leary v. Rupert,* [*2010 BCSC 240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X10Y-00000-00&context=), state that the *Residential Tenancy Act* does not create a claim for breach of statutory duty or itself give rise to an action in tort. They also concede that the *Residential Tenancy Act* imposes no higher duty of care than that contemplated by the law of ***negligence***. However, they submit that those cases applied earlier versions of the *Residential Tenancy Act* that lacked a provision equivalent to what is now s. 7, and say that none of these decisions refer to such a provision as s. 7. They submit therefore that such authorities can no longer be relied upon as authority for the proposition that there can be no direct claim for damages under the *Residential Tenancy Act*.

**39**  The plaintiffs further submit that, by the plain wording of s. 7, in order to give rise to a right of compensation under s. 7 it is sufficient if the plaintiff's damage or loss "resulted" from the landlord's non-compliance with the *Residential Tenancy Act*. They argue it is not necessary for the plaintiff to show that the damage or loss resulted from the landlord's failure to take reasonable care for the plaintiff's safety. Nor, they say, under s. 3(4) of the *Occupiers Liability Act*, is the application of this higher standard to a landlord precluded by the fact that there may also be liability under the *Occupiers Liability Act*.

**40**  The plaintiffs' assertion that s. 7 of the *Residential Tenancy Act* has been amended and that therefore *Tolea*, *Zavaglia* and *O'Leary* cannot be relied upon is not supportable. The predecessor to the current *Residential Tenancy Act* was enacted in 1984 and amended in 1993, with a new version enacted in 1996. Each of these statutes contains a provision analogous or substantially similar to s. 7 of the present *Residential Tenancy Act,* which came into force on January 1, 2004. That version of the legislation was applied in *O'Leary* with the older statutes applicable in *Tolea* and *Zavaglia*.

**41**  The prior versions of what is now s. 7 of the *Residential Tenancy Act* are somewhat narrower than the provision in its present form, but not in a manner relevant to the disposition of the case at bar. The older versions apply only to a breach of the *Residential Tenancy Act* as opposed to a breach of the *Residential Tenancy Act*, the regulations or a tenancy agreement. The 1984 statute stated:

**48.** ...

1. A landlord or tenant who, being a party to a tenancy agreement, contravenes this Act is liable to compensate the other party to the tenancy agreement for loss suffered by him as a result of the contravention.
2. Where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his damages.

[Emphasis added]

...

**42**  And the similarly, from the 1996 legislation:

**80** ...

1. If a landlord or tenant who is a party to a tenancy agreement contravenes this Act, he or she is liable to compensate the other party to the tenancy agreement for loss suffered by the other party as a result of the contravention.
2. If a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his or her damages.

[Emphasis added]

...

**43**  I fail to see how s. 7 of the current *Residential Tenancy Act* somehow departs from the requirement that the damage or loss must result from the breach of the statute. Section 7(1) provides that the landlord "must compensate ... for damage or loss that results" [emphasis added]. It is incumbent on a plaintiff to prove causation on the balance of probabilities. There is nothing in s. 7 that relieves a plaintiff of that obligation. It does not state that merely breaching the *Residential Tenancy Act* gives rise to damages. The fact that the authorities referred to did not directly reference s. 7 or its predecessors does not affect the application of the law. As a result I conclude that the cases sought to be distinguished apply.

**44**  The plaintiffs further submit that a number of authorities have held that the failure to install smoke alarms in residential premises constitutes either ***negligence*** or a breach of the *Occupiers Liability Act* referring to *Bueckert*, as well as *Daniels v. McKelvery*, [*2010 MBQB 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JBT7-X134-00000-00&context=), at para. 21 and *Leslie v. S & B Apartment Holding Ltd.*, [*2011 NSSC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-JWBS-63DN-00000-00&context=), at paras. 34-38. While these cases do stand for that proposition, they also clearly state that a failure to install smoke alarms alone does not entitle a plaintiff to damages, without proof of causation.

**45**  In *Bueckert* the plaintiff fell asleep in the rental accommodation of an acquaintance. The apartment caught fire and she suffered severe burns to her arm and hand. She had no memory of the fire or how she was injured. There was a statutory requirement that smoke alarms be installed and the landlord was found negligent for failing to do so. However the Court was not persuaded on a balance of probabilities that there was "a causal connection between that ***negligence*** and the injury sustained" (para. 56). The Court found that the plaintiff had awakened before she incurred any injury, and as a smoke alarm would have achieved nothing more than that, its absence played no role in the injuries she suffered (paras. 58-59).

**46**  In *Daniels,* a 14-year-old boy died in a fire at the defendant's home. It was alleged that the defendants were negligent for failing to have working smoke alarms in the house. It was not disputed that under the applicable occupier's liability legislation the defendants owed a duty of care. The Court noted however that the plaintiffs had to establish firstly that the defendants' breached the duty of care, and secondly that the breach contributed to the death of the child. The Court accepted that the risk of fire was a reasonably foreseeable event. However, the evidence showed that the injuries incurred would have arisen regardless of the actions of the defendants, so that causation could not be proven (paras. 42-43).

**47**  In *Leslie* the plaintiffs awakened in their apartment to find it full of smoke, although no alarms were sounding. They suffered injury jumping from a window to escape. The landlord conceded he had a duty of care but denied breaching the standard of care and argued that the damages suffered were not due to any act or omission on his part. The Court found that the smoke detectors, when working, were sensitive to smoke and that failure of the alarms to sound allowed time for the smoke and fire to progress to the degree that it did before being detected by the plaintiffs. Thus, if the alarms had sounded the tenants would have been alerted earlier. That fact, in combination with evidence that the fire alarm was pulled by another tenant but did not work and evidence that the fire doors in the building were not functioning, was held to be sufficient to found causation in that case (paras. 45-46).

**48**  I consider as well the various cases referred to me by counsel for Mr. Mann. In Ratt (Litigation Guardian of) v. Wolfe [*(1994), 126 Sask.R. 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-JN14-G22N-00000-00&context=) (Q.B.), the infant plaintiffs claimed damages for smoke inhalation-related injuries they suffered during a fire in a home owned by the defendant landlord. The Court found that the defendant had failed to ensure that smoke alarms had been installed in the home. The plaintiffs in that case submitted that "if the defendants had installed the requisite smoke alarms, they would have awakened in time to escape uninjured," a position which the Court dismissed as "too simplistic" (para. 26). The Court held that while the infant plaintiffs had suffered extensive injury in the fire, and the defendant landlord had been negligent by failing to install proper smoke alarms in the house, the plaintiffs had not established that the absence of smoke alarms in the home had caused their injuries, at 227-228:

...

Causation must be proved on the balance of probabilities. It is not sufficient to show that the damage was possibly caused by the defendant's breach of the statutory duty in not having smoke alarms on the premises at the time of the fire. ...

On the facts I find that the absence of fire alarms at the time of the fire was not the cause of the plaintiffs' injuries or losses.

...

**49**  In AXA Insurance (Canada) v. Brunetti [*(1998), 80 A.C.W.S. (3d) 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-F2MB-S42C-00000-00&context=) (Ont. C.J. (G.D.)) ("*AXA*"), the defendant landlords were accused of ***negligence*** in causing fire damage to a neighboring home insured by the plaintiff. The plaintiff alleged that, among other acts of ***negligence***, the defendants had been negligent in failing to install smoke alarms in the home. The Court ruled that while the defendants had violated several city bylaws, this ***negligence*** was not causally linked to the damage caused by the fire. Thus no liability was found. Sutherland, J. outlined the test for determining liability in a case such as this:

**98** Given that there was a duty to provide and maintain a functioning smoke detector in the basement apartment, for the Gills to be liable to the plaintiff in respect of the smoke detector, it would be necessary for the plaintiff to establish

1. that the landlord was negligent with respect to the smoke detector (for example, by failing to supply it or by failing to inspect it on a regular basis);
2. that the smoke detector did not function properly on the night in question; and
3. the malfunction of the smoke detector allowed the fire to spread.

On the facts there was a properly placed smoke detector; the landlord failed to inspect it regularly; and, the detector functioned properly on the night in question. With respect to the last element, it is not clear that the functioning or non-functioning of the smoke detector would have made much difference in the matter of the spreading of the fire. The fire was one of violent "flash over" and it is unlikely that the functioning or non-functioning of the smoke detector would have had any impact in terms of the ability to prevent the spread of the fire. Its functioning was clearly more relevant in terms of getting the occupants out of the building.

**99** I conclude that the plaintiff has not proved that ***negligence*** of the defendant Gills caused or contributed to the fire loss at the adjoining premises and, accordingly, that the plaintiff's action against them is to be dismissed, with costs to the Gill defendants.

**50**  The Court cited AXA in Lippa v. Zarrello, [*[2004] O.J. No. 4254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JNCK-21DN-00000-00&context=) (S.C.J.), dismissing the plaintiff's claim in ***negligence*** on the basis of that authority:

**24** The view that a statutory breach gives rise to damages upon mere proof of a breach cannot be accepted. If proof is adduced that the statutory breach caused the damages then such breach may provide evidence of ***negligence***.

...

**29** As discussed in AXA Insurance (Canada) v Brunetti ... a malfunctioning smoke alarm can impose liability. In order to establish that the defendants' were negligent with respect to the smoke detector the plaintiff needs to prove that the defendants failed to inspect the smoke detectors on a regular basis; that the smoke detectors did not function properly on March 9, 2002; and that the malfunction of the smoke detectors allowed the fire to spread. ...

**30** ... There was no clear evidence before me with respect to when the fire started, and as to whether the triggering of the smoke detector would have made a difference. I conclude that the plaintiff has not established that ***negligence*** of the defendants caused or contributed to the fire loss in his apartment.

**51**  I also take guidance from the decision in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd*., [*2003 YKSC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3VX1-DYV0-G2GM-00000-00&context=), aff'd [*2004 YKCA 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3W11-JPP5-24WN-00000-00&context=). There, the Court had to determine whether the plaintiffs were contributorily negligent for damages caused by a fire that occurred in an airplane hangar owned by the plaintiffs. The plaintiffs alleged that employees of the defendant negligently caused the fire through improper use of an oxyacetylene torch. The defendant took the position that the plaintiffs' failure to install proper smoke alarms in the hangar contributed to the damages. In finding that the defendants had not proved causation with respect to their contributory ***negligence*** allegation, the Court held that there was no evidence establishing that the presence of a working smoke alarm would have limited the fire damage or changed the outcome of the fire.

**52**  Returning to the present facts, Mr. Mann gave evidence that he could not be sure whether or not any smoke detectors were installed. The expert report of Mr. Reed states no smoke alarms were noted by him during his examination of the premises, although the extent of the fire damage and collapsed debris may have caused these to escape his notice. I conclude however, that on the balance of probabilities, no smoke alarms were installed.

**53**  There is no evidence that the defendant did not conduct safety inspections of the residence nor was he asked if whether he had done so.

**54**  I am of the view that the applicable law is that articulated in AXA placing the onus on the plaintiffs to establish on the balance of probabilities that:

1. a) the defendant was negligent with respect to the installation, inspection, upkeep, or other matter relating to the smoke alarm;
2. b) the smoke alarm was not present or was not functioning properly at the time of the fire in question; and
3. c) the malfunction of the smoke alarm, or its non-existence, was causally linked to the spread of the fire and the damage caused by the fire.

**55**  It is insufficient for the plaintiffs to simply allege that firefighting crews or any other persons may have been alerted to the fire's presence earlier than they were had there been smoke alarms installed without providing evidence to establish this.

**56**  I am satisfied that the defendant was negligent in not installing and maintaining smoke alarms. However the plaintiffs have failed on the balance of probabilities to establish that ***negligence*** caused the losses claimed. The evidence of the plaintiffs failed to address the issue of when the smoke alarms, if present, would have alerted the inhabitants to the fire. There is no evidence of when the fire started, the length of time it had been burning before being discovered when Ms. Douglas awoke in relation to the fire's stage of growth and no evidence other than mere conjecture that the presence of smoke alarms would have awakened Ms. Douglas or the other occupants of the premises earlier.

**57**  There is simply no basis upon which to conclude that had smoke alarms been present the fire would have been capable of extinguishment by them or the fire department in sufficient time to prevent any loss. To reach that conclusion would be speculative at best. The plaintiffs have failed, on the balance of probabilities, to establish that the defendant's ***negligence*** was causally linked to the losses claimed.

**58**  As a result I need not address the issue of damages. I dismiss the plaintiffs' claim for want of proof of causation.

**Costs**

**59**  While defendant's counsel provided written submission on costs as part of their general submissions, plaintiffs' counsel seeks leave to address costs. As a result the parties are at liberty to file written submissions as to costs on a schedule to be arranged between them. That schedule is to be provided to the Court within 14 days of the release of these reasons.

R.D. PUNNETT J.

\* \* \* \* \*

**CORRECTION**

Released: June 16, 2015

Please be advised that the attached Reasons for Judgment of Mr. Justice

Punnett

dated June 10, 2015 have been amended as follows: On the front page

D. Paperny's name was misspelled. It has now been amended.

**End of Document**

[***Campbell v. Ragona, [2010] B.C.J. No. 1883***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2RP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.J. Pearlman J.

Heard: September 22-25, 29-30, October 1-3, 6-10, 14-17,

20-24, December 1-5, 11-12, 15-16, 2008; February 12-13, 2009;

written submissions, November 12 and December 15, 2009.

Judgment: September 23, 2010.

Docket: S065645

Registry: Vancouver

**[2010] B.C.J. No. 1883** | 2010 BCSC 1339 | 2010 CarswellBC 2535 | 193 A.C.W.S. (3d) 647

Between William Arthur Bedford Campbell, Plaintiff, and Michael P. Ragona, Q.C. and Joseph P. Cahan and Alexander Beaudin & Lang LLP (formerly known as Alexander Holburn Beaudin & Lang), Defendants

(619 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — *Negligence* — In conduct of action — Failure to pursue action with diligence — Settlements — Relationship with client — Conflict of interest — Action by plaintiff for professional *negligence* and breach of fiduciary duty allowed — Plaintiff injured in accident in Hong Kong — Defendant solicitors conducted Hong Kong personal injury proceedings — Plaintiff succeeded on issue of liability but action was dismissed for want of prosecution due to delay in assessing damages — Solicitors appealed and obtained settlement — Solicitors were negligent in conduct of action — Plaintiff entitled to damages representing difference between provisional damages award and settlement — Solicitors breached fiduciary duty due to awareness of potential *negligence* claim prior to negotiating settlement — Plaintiff entitled to disgorgement of fees.**

**Professional responsibility — Self-governing professions — Liability — Professions — Legal — Barristers and solicitors — Action by plaintiff for professional *negligence* and breach of fiduciary duty allowed — Plaintiff injured in accident in Hong Kong — Defendant solicitors conducted Hong Kong personal injury proceedings — Plaintiff succeeded on issue of liability but action was dismissed for want of prosecution due to delay in assessing damages — Solicitors appealed and obtained settlement — Solicitors were negligent in conduct of action — Plaintiff entitled to damages representing difference between provisional damages award and settlement — Solicitors breached fiduciary duty due to awareness of potential *negligence* claim prior to negotiating settlement — Plaintiff entitled to disgorgement of fees.**

|  |
| --- |
| Action by the plaintiff, Campbell, against the defendant solicitors, Ragona and Cahan, and their firm, Alexander Beaudin & Lang (ABL), for damages for professional ***negligence*** and breach of fiduciary duty. In 1993, the plaintiff retained the solicitors to conduct an action for damages he suffered in a 1992 motor vehicle accident in Hong Kong. The solicitors engaged an associated Hong Kong firm to conduct the action. The plaintiff, age 40, was a physically fit executive with a Hong Kong company. He was a rear-seat passenger in a taxi without seatbelts that was broadsided by another vehicle. The plaintiff suffered severe neck pain, a mild traumatic brain injury, severe headaches, impairment of cognitive functions and depression that ultimately disabled him from employment. Months after the accident, the plaintiff was dismissed following a dispute with his employer in which he sided with a colleague that was sexually harassed. The dismissal was the subject of legal proceedings that caused further stress. In 1998, the Hong Kong court found the other driver entirely at fault. Liability was severed from quantification of damages. In the subsequent five years, damages were never assessed and the plaintiff's action was dismissed for want of prosecution. The solicitors appealed and negotiated a settlement whereby the Hong Kong driver's insurer paid the plaintiff HK$1.1 million and the Hong Kong firm contributed an additional $HK400,000. The plaintiff signed a release of claims against the Hong Kong firm, but not ABL. After ABL deducted their fees, the plaintiff was paid a net amount of $63,478. The plaintiff submitted that the solicitors were negligent in failing to adequately investigate and prepare his case, and ensuring it was prosecuted in a timely manner. He submitted that following dismissal for want of prosecution, the solicitors were in a conflict of interest and dishonestly induced him to accept an improvident settlement in breach of their fiduciary duties. The plaintiff also sought damages for mental distress. The solicitors denied any ***negligence*** in the discharge of their duties. They submitted that the plaintiff's psychological complaints stemmed from his dispute with his employer, and his physical complaints were caused by a subsequent 1994 accident while swimming in a pool. The solicitors submitted that the plaintiff made an informed decision to voluntarily settle the Hong Kong claim. The plaintiff died in 2009 while the court's judgment was under reserve.  HELD: Action allowed.  The plaintiff suffered a mild traumatic brain injury in the Hong Kong motor vehicle accident. The accident and the stress from the employment dispute played a joint causative role in the development of the plaintiff's severe and disabling migraine headaches and the resulting loss of cognitive functions, depression and mood disorders. Therefore, 50 per cent of the plaintiff's losses were attributable to the accident. The medical evidence established that the plaintiff's brain injury symptoms were aggravated by psychiatric problems. Had damages been quantified at trial, and considering a reduction for his death, the plaintiff would have been entitled to a net damages award, converted to Canadian dollars, of $38,860 for pain and suffering, $160,180 for past income loss, and $259,250 for future income loss. The solicitors' failure to effectively oversee the conduct of the Hong Kong action and to familiarize themselves with the requirements of Hong Kong practice fell below the standard to be met by reasonably competent British Columbia lawyers representing a client engaged in a personal injury action in a foreign common law jurisdiction. The solicitors breached their retainer with the plaintiff and breached the duty of care to exercise reasonable skill and diligence on his behalf. There was no sound reason for severing liability and damages given the clear fault of the driver that struck the plaintiff. The failure to effectively manage the conduct of the action was a cause of the delay which ultimately resulted in the dismissal for want of prosecution. The solicitors were liable for the difference between the notional Hong Kong judgment and the settlement, approximately $300,000. Prior to the settlement, the solicitors were aware of the potential for a claim for professional ***negligence*** based on their correspondence with the plaintiff and their conflicting interests. The solicitors ought to have informed the plaintiff that they could no longer act, or insisted he take independent legal advice prior to settling his claim. The failure to do so was a breach of fiduciary duty. The plaintiff was entitled to disgorgement of fees paid to the solicitors in the amount of $84,391. The plaintiff was further entitled to $20,000 for damages for mental distress. |

**Statutes, Regulations and Rules Cited:**

Estate Administration Act, R.B.S.C. 1996, c. 8, s. 59, s. 59(3)

**Counsel**

Counsel for the Plaintiff: D.C. Creighton.

Counsel for the Defendants: P. Abrioux & H. Grewal.

[Editor's note: Corrigenda were released by the Court October 6, 2010 and February 11, 2011; the corrections have been made to the text and the corrigenda are appended to this document.]

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| **P.J. PEARLMAN J.** |

**A. INTRODUCTION**

**1**  The plaintiff claims damages from the defendants for professional ***negligence*** and breach of fiduciary duty. In July 1993, Mr. Campbell retained the defendants Michael P. Ragona, Q.C. and Alexander Holburn Beaudin & Lang LLP ("AHBL") to conduct an action for damages he suffered in a motor vehicle accident in Hong Kong on March 5, 1992. Although the Hong Kong High Court found the driver of the other vehicle entirely at fault, damages were never assessed. On the application of the Hong Kong defendant, the plaintiff's action was dismissed for want of prosecution in June, 2004.

**2**  At the time of the Hong Kong accident, Mr. Campbell was a 40-year-old businessman employed as a senior manager of a Hong Kong electronics company that was about to open a manufacturing plant in Richmond, British Columbia.

**3**  The defendant Michael P. Ragona, Q.C. was and is a senior litigation lawyer, and a partner in AHBL.

**4**  The defendant Joe Cahan was called to the bar in May 1995, assisted Mr. Ragona with Mr. Campbell's case from December, 1995 until its conclusion in 2004, and has been a partner in AHBL since 2002.

**5**  In addition to soft tissue injuries to his left foot, right knee, chest, and back which largely resolved within months of the accident, the plaintiff claimed that he sustained severe neck pain, a mild traumatic brain injury, and severe headaches and impairment of his cognitive functions that ultimately totally disabled him from employment. Mr. Campbell was the rear seat passenger in a taxi not equipped with seat belts when the vehicle in which he was travelling was struck broadside by another vehicle.

**6**  AHBL engaged Ong & Chung, a Hong Kong firm of solicitors with which it was associated, to conduct the action in Hong Kong. The action was commenced in May, 1994 against the driver of the other vehicle as first defendant, and the driver and owner of the taxi as second and third defendants respectively.

**7**  In November 1998, the Hong Kong High Court determined that the driver of the other vehicle was wholly liable for the accident, and dismissed the plaintiff's action against the second and third Hong Kong defendants. Because liability and quantum had been severed on the application of those defendants, there was no assessment of Mr. Campbell's damages in November 1998.

**8**  During the five years that followed the liability trial, the damages assessment was never set for hearing.

**9**  In January 2004, almost 12 years after the accident, the Hong Kong first defendant applied for dismissal of Mr. Campbell's action for want of prosecution. In June 2004, Master Wong of the Hong Kong High Court granted that application. Following the filing of an appeal from the Master's decision, Mr. Ragona negotiated a settlement by which the Hong Kong defendant's insurers paid to Mr. Campbell HK$1,100,000 and Ong & Chung contributed an additional HK$ 400,000. After AHBL deducted their fees and disbursements from the settlement funds they paid to Mr. Campbell, or to third parties on his direction, the net amount of CDN $105,665.95.

**B. POSITIONS OF THE PARTIES**

**10**  In this action, the plaintiff claimed that the defendants breached their retainer and were negligent in failing to adequately investigate and prepare his case, or to ensure that it was prosecuted in a timely manner. In addition, Mr. Campbell alleges that the defendants were in conflict of interest when they continued to act after the Hong Kong first defendant brought his motion to dismiss the action for want of prosecution. Mr. Campbell also maintains that the defendants, in breach of their fiduciary duties, dishonestly induced him to accept an improvident settlement.

**11**  The defendants deny any ***negligence*** in the discharge of their duties to Mr. Campbell. Alternatively, they submit that if there was any breach of their duty of care owed to Mr. Campbell, the plaintiff has not established that if his action had proceeded to trial in Hong Kong, he would have recovered more than the amount of the settlement. The defendants argue that the plaintiff has not shown that he suffered a brain injury in the Hong Kong motor vehicle accident. According to the defendants, the plaintiff's disabling headaches, any impairment of his cognitive abilities and his depression were caused by unrelated events subsequent to the Hong Kong motor vehicle accident. In July 1992, Mr. Campbell became involved in a bitter and stressful dispute with his employer which culminated in his dismissal in November 1992. In October 1994, Mr. Campbell struck his head on a metal ladder while swimming in a pool owned and operated by the City of Vancouver (the "pool accident"). The defendants submit that each of these events is a *novus actus interveniens*.

**12**  The defendants acknowledge that as solicitors acting for Mr. Campbell they owed to him a duty to avoid conflict interest. They submit that they did not breach that duty, that there was no dishonesty on their part, and that the plaintiff voluntarily made an informed decision to settle his claim on the terms negotiated by the defendants pursuant to his instructions.

**C. ISSUES**

**13**  This action involved both a trial within a trial to assess the damages Mr. Campbell would have recovered in Hong Kong if his action had not been struck for want of prosecution, and a trial of the plaintiff's claims of professional ***negligence*** and breach of fiduciary duty against the defendants.

**14**  The parties agree that the trial within the trial is governed by Hong Kong procedural and substantive law applicable to the assessment of damages for personal injuries.

**15**  The trial within the trial involves a determination of:

1. the notional trial date;
2. the application of Hong Kong law on successive torts and *novus actus interveniens*;
3. the assessment of Mr. Campbell's damages for injuries and loss sustained in the Hong Kong MVA;
4. credibility issues concerning both Mr. Campbell's inconsistent accounts of the pain, suffering, and loss of cognitive functioning he attributed to the Hong Kong MVA, the Wellfund dispute, and the pool incident, and the reliability of the plaintiff's collateral witnesses.

**16**  Issues arising in the trial of the plaintiff's allegations of professional ***negligence*** include:

1. the standard of practice and duty of care applicable to a British Columbia law firm acting for a client in litigation conducted in a foreign common law jurisdiction;
2. whether the defendants breached any duty of care they owed to Mr. Campbell and if so, whether the amount of the plaintiff's loss exceeded the value of the settlement of the Hong Kong action negotiated by the defendants;
3. whether the plaintiff is entitled to additional non-pecuniary damages to compensate him for mental distress allegedly caused by the defendants' delay in prosecution of the action following the notional trial date.

**17**  With respect to the plaintiff's claim for breach of fiduciary duty, the issues are:

1. whether the defendants breached their duty to avoid conflict of interest, their duty of commitment to the plaintiff's cause, or their duty of candour with the plaintiff;
2. whether the defendants dishonestly induced the plaintiff to accept any improvident settlement;
3. whether Mr. Campbell made an informed and voluntary decision to settle;
4. if the defendants are in breach of fiduciary duty, a determination of damages or other relief flowing from that breach.

**18**  Finally, the defendants request that the court determine a reasonable fee for the services they provided to Mr. Campbell.

**19**  I turn now to the background to this dispute.

**D. BACKGROUND FACTS**

**20**  Prior to the Hong Kong MVA, Mr. Campbell was a businessman, with a background in real estate sales and land development. He also had a keen interest in conservative politics and strategic military studies. The plaintiff graduated from university in 1977 with a Bachelor of Arts in economics. During and after university he was involved in politics, running for public office twice, first at the provincial level, and then for the federal Progressive Conservatives. After the downturn in the real estate market in the early 1980s, Mr. Campbell pursued his interests in conservative politics and strategic military studies full time. He worked for the Fraser Institute for a year. Together with his friend Richard Melchin, he founded of an organization called the Canadian Conservative Center, and published "Current Insight", a magazine devoted to public policy issues. Mr. Campbell wrote prodigiously, read extensively, and spoke at international conferences on foreign policy and strategic defense.

**21**  By his first marriage, which ended in divorce in 1986, Mr. Campbell had two daughters, Johanna and Jenny. In 1992, at the time of the Hong Kong MVA, Johanna was 14 and Jenny was 12 years old.

**22**  Before the Hong Kong MVA, Mr. Campbell was devoted to his daughters and played an active role in their upbringing and education. He kept a tidy and well-organized home, and took his daughters camping and skiing, and on trips to Washington D.C. and other cities where he had speaking engagements.

**23**  Mr. Campbell participated in sports including swimming, tae kwon do, volleyball and basketball. He was also actively involved with his church.

**24**  In 1991, Mr. Campbell obtained employment in a managerial position with Wellfund Audio-Visual Ltd., a Hong Kong company. His starting salary was $7,000 per month. Following his promotion to vice-president in late March 1992, his salary increased to $8,000 per month, plus stock options and other benefits. At the time of the Hong Kong MVA, Mr. Campbell was preparing for the opening of Wellfund's new factory in Richmond, British Columbia.

**The Hong Kong MVA**

**25**  On March 5, 1992, Mr. Campbell was riding as a back seat passenger in a taxi cab in Hong Kong. As his taxi crossed an intersection, another vehicle struck the front right side of the taxi. The taxi was not equipped with seat belts. The right side of Mr. Campbell's head struck the taxi's window and door frame. Mr. Campbell testified that after the impact with the other vehicle, the taxi hit a railing before coming to a stop, which caused him to be thrown forward over the steel divider separating the back seat from the front seat. He lost consciousness, probably for about one to two minutes. Mr. Campbell testified at the trial of this action that he had only a partial recollection of what happened immediately after the accident, or in the hours following. However, he was able to provide a statement describing the accident to the Hong Kong police several hours after the collision.

**26**  Mr. Campbell was taken by ambulance to the emergency department at Tang Shiu Kin Hospital. Later on March 5, 1992, he was transferred to Queen Mary Hospital. He left that hospital the following day against the attending physician's advice. Mr. Campbell then flew to Taiwan where his second wife, Angela, was residing and where he was to attend a trade show. He testified that he did not attend the trade show because of his condition. Two or three days later he returned to Vancouver.

**27**  Mr. Campbell suffered soft tissue injuries to his knee, neck, chest and head. He was in pain in all those areas, especially the neck and head. At the trial of this action, Mr. Campbell testified that after the accident, he experienced severe headaches accompanied by vomiting up to three times a week. He said that he had a different kind of sustained headache at the lower back of his skull that lasted through the month of April. At times he had difficulty focusing and was confused, making work much more difficult. The nature of Mr. Campbell's headaches, and their causation, are contentious issues in this case.

**28**  Mr. Campbell's first visit to his family doctor, Dr. Birnbaum, following the Hong Kong accident was on March 25, 1992. Dr. Birnbaum's clinical notes record that Mr. Campbell complained of neck, knee and chest pain. Although there is no reference in Dr. Birnbaum's clinical notes to Mr. Campbell having complained of headaches until June, the plaintiff testified that he was suffering from headaches at the time of his first visit to Dr. Birnbaum following his return from Hong Kong. By his medical letter dated March 29, 1993 and addressed to Hong Kong solicitors the plaintiff consulted before he retained AHBL, Dr. Birnbaum reported that Mr. Campbell had complained of headaches during his visit of March 25, 1992.

**29**  Shortly after the accident and his return to Vancouver in March 1992, Mr. Campbell began to experience delusions that Chinese agents were following and threatening him. He contacted a friend whose father worked for the Canadian Security and Intelligence Service ("CSIS") after an incident where he believed that a Chinese agent had entered the back of his car and threatened him with a firearm. On March 11, 1992, Mr. Campbell prepared a statement for CSIS concerning the incident. He was interviewed repeatedly by CSIS until the investigation was discontinued in August 1992. During April and May, the plaintiff continued to complain to his daughters that he was being followed by Chinese agents, and that someone was burning a Chinese death symbol into his lawn. He gave his daughter Jenny a $1,000 bill to keep in her sock so that she could support herself if anything happened to him.

**30**  At the time of the Hong Kong MVA, Johanna and Jenny Campbell lived with their father in Vancouver. According to the plaintiff and his daughters, in the months following the Hong Kong accident, the plaintiff's behavior toward his children changed dramatically. Mr. Campbell stopped participating in activities with his daughters. He became obsessed about their personal safety. He refused to allow them to attend the opening of the Wellfund factory because he feared someone would harm them. His daughters reported that he had severe mood swings, including episodes of uncontrollable anger that would last for hours, during which he would punch holes in the wall. He would shout at them when they did not meet his expectations. He destroyed some of their personal possessions, and threatened to kill their pet dog. Mr. Campbell testified that during that time his daughters had "an animal for a father".

**31**  Later, following the termination of his employment by Wellfund, Mr. Campbell, after taking exception to a perceived slight, physically ejected his friend Stewart Duncan from his home.

**The Wellfund Dispute and the Termination of the Plaintiff's Employment**

**32**  Sometime in late June or early July 1992, Mr. Campbell attended a business dinner where he observed a senior executive of one of Wellfund's subsidiary companies sexually assault a female Wellfund employee who Mr. Campbell had recruited. The assault involved the executive repeatedly touching the female employee in a sexual manner while they were dancing at a company dinner party. The female employee complained about the incident to her superiors, with Mr. Campbell's support. On July 21, 1992, Mr. Campbell received instructions to terminate the employment of the female employee. He initially refused to obey those instructions. After discussions with his superiors, Mr. Campbell relented and dismissed the female employee. However, on August 26, 1992 he wrote a letter to Wellfund's president in which he strenuously objected to the company's treatment of the female employee. He also indicated that he was prepared to act as a witness for the dismissed employee at her wrongful dismissal trial. Thereafter, Mr. Campbell's relationship with his employer deteriorated rapidly.

**33**  A number of incidents occurred in August and early September that made Mr. Campbell believe he was being harassed. The plaintiff found his position to be increasingly untenable. His health deteriorated to the point that he felt compelled to take sick leave from September 10 to November 2, 1992.

**34**  Mr. Campbell visited Dr. Birnbaum several times in September 1992 complaining of intense migraine headaches with and without visual auras accompanied by intense nausea and vomiting, continuing tension headaches, and depression. Dr. Birnbaum prescribed Tylenol 3 and Toradol for the headaches, and Luvox, an antidepressant.

**35**  Starting on September 10, 1992, and continuing for some 12 to 14 nights following that date, someone spread dog food on or next to Mr. Campbell's front lawn, which attracted a large number of crows. Mr. Campbell understood that crows are a symbol of bad luck and death in Chinese culture. He believed that agents of Wellfund were attempting to attract crows to his lawn to intimidate him. In fact, neighbours of Mr. Campbell told him that they had put out the dog food out to feed the crows. Mr. Campbell continued to believe that agents of Wellfund were responsible. He testified that he suffered nightmares about crows.

**36**  Soon after Mr. Campbell returned to work on November 2, 1992, Wellfund accused him of tax evasion and other acts of dishonesty, and then terminated his employment on November 6, 1992. Mr. Campbell responded by commencing an action for wrongful dismissal ("the Wellfund case").

**37**  Over the winter of 1992 and spring of 1993, Mr. Campbell's experienced significant financial hardship as a result of his loss of employment and the litigation against Wellfund. He was forced to give up his house and move into a trailer in Richmond. His daughters moved to their mother's home.

**The Plaintiff's continuing Medical Treatment**

**38**  Dr. Birnbaum referred Mr. Campbell to a neurologist, Dr. Kastrukoff, and ordered a CT scan because he was concerned about Mr. Campbell's migraines. Dr. Kastrukoff confirmed that Mr. Campbell was suffering from severe migraines with nausea, vomiting, and photophobia, as well as less severe tension headaches. The CT scan did not reveal anything unusual.

**39**  Dr. Birnbaum saw Mr. Campbell again on February 25, 1993, at which time the plaintiff complained of neck, knee and chest pains, and migraine headaches. In Dr. Birnbaum's view, Mr. Campbell's most severe injuries were post concussion migraine headaches. Next in severity were moderately severe back of the head and neck muscle tension headaches of whiplash variety. Dr. Birmbaum reported that contusions to the chest and knee were the least severe injuries suffered by Mr. Campbell in the Hong Kong accident. Dr. Birnbaum believed that the migraine headaches were precipitated by the Hong Kong MVA, and that the stress of the Wellfund case was an aggravating factor.

**The Plaintiff retains AHBL**

**40**  On July 2, 1993 Mr. Campbell retained Mr. Ragona and AHBL to act for him on the Hong Kong MVA case. The terms of the retainer were later set out in a contingency fee agreement made between the plaintiff and Mr. Ragona as a partner of AHBL in May, 2004. I will return to that agreement later in these reasons.

**41**  Mr. Campbell continued to see Drs. Birnbaum and Kastrukoff throughout 1993 and 1994 for his headaches, which proved intractable to the medical treatments they prescribed. The doctors reported that the Wellfund litigation was causing Mr. Campbell to experience high levels of stress, which was increasing the frequency and severity of his headaches. Mr. Campbell reported that he was experiencing extremely painful, debilitating migraine headaches with vomiting up to two days a week. He also reported claustrophobic attacks, compulsive and ruminatory thought processes, and insomnia. In September 1993, Mr. Campbell reported daily headaches to Dr. Kastrukoff, who recommended two weeks hospitalization, and that Mr. Campbell see a psychiatrist for his headaches and possible depression.

**42**  In November 1993, Mr. Campbell was referred to a psychiatrist, Dr. Claman. Mr. Campbell complained of a 12 to 18 month history of depressive symptoms, including despair, irritability, decreased appetite, increased appetite with carbohydrate cravings, sleep disturbance, impaired concentration and memory, and vague suicidal ideation. He also complained of migraines. Dr. Claman diagnosed Mr. Campbell with a major depressive disorder and classic migraines, and prescribed paroxetine. Within one month, Mr. Campbell reported improvement of all symptoms. By June 1994, Dr. Claman reported that Mr. Campbell's memory and cognitive abilities had improved substantially, and that the depressive disorder had gone into remission.

**43**  However, Mr. Campbell still suffered from migraines, and in March 1994 he was treated with narcotic analgesics for a debilitating headache.

**44**  Sometime before the Hong Kong MVA, Mr. Campbell began working on a novel called "China Terror". There is a controversy about the amount and quality of the work he did in connection with his novel after the Hong Kong MVA. Jenny Campbell testified that during 1993 and 1994 the book became an obsession for her father, who believed that he was predicting the future and that God was telling him what to write. She gave evidence that Mr. Campbell turned his living room into an office where he worked on the novel when he was not suffering from migraines. His office was disorganized and messy, with magazine articles and notes posted all over the room. On occasion, Mr. Campbell woke his young teenage daughters in the middle of the night to proofread his work.

**45**  Dr. Kastrukoff prescribed the antidepressant Zoloft to Mr. Campbell when he saw him on August 26, 1994. When Dr. Kastrukoff saw the plaintiff again in November he believed the Zoloft medication was causing Mr. Campbell's depressive symptoms to improve. The headaches, however, remained intractable.

**46**  On September 7, 1994 a second neurologist, Dr. Robinson, confirmed in a medical legal report that Mr. Campbell was suffering from migraine headaches with aura approximately 4 times per month. He also stated that Mr. Campbell was experiencing considerable stress due to his ongoing litigation.

**The Pool Accident**

**47**  In February 1994, Mr. Campbell moved from his Richmond trailer to a new residence in a BC Housing cooperative in the Jericho area. In July 1994, he began swimming in the Lord Byng Pool as part of his physiotherapy treatments. On October 28, 1994, Mr. Campbell hit his head on a metal ladder while swimming in the Lord Byng Pool. He reported nausea and dizziness immediately following the accident, and said that he suffered from intense vertigo in the months following, although the vertigo had first occurred shortly before the incident. The pool accident became the subject of a third action. In November 1994, Mr. Campbell commenced an action against the City of Vancouver, claiming that he had suffered a second brain injury in the pool accident. This action (the "pool case") ultimately went to trial, and was dismissed in March, 2001. Mr. Campbell was not represented by AHBL in that action.

**48**  Mr. Campbell continued to visit Dr. Kastrukoff throughout 1995 and 1996. He complained of vertigo, rage attacks, and increasing problems with his cognitive abilities and memory. It was Dr. Kastrukoff's opinion at this time that the pool incident had somewhat worsened Mr. Campbell's post concussion syndrome.

**The Wellfund Judgment**

**49**  The Wellfund case went to trial in January 1995 and continued until May of that year. In his reasons for judgment in *William A. Campbell v. Wellfund Audio-Visual Ltd. and others*, [*[1995] B.C.J. No. 2048*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1S1-00000-00&context=), (September 29, 1995), Vancouver C927075 (B.C.S.C.), Clancy J. found that Wellfund had wrongfully dismissed Mr. Campbell. Clancy J. also found that the Hong Kong MVA was the source of Mr. Campbell's migraines, but that the stresses that were imposed upon him by Wellfund during his term of employment and as a result of his dismissal exacerbated his medical difficulties.

**50**  At para. 79 of his reasons, Clancy J. accepted Dr. Kastrukoff's conclusion that Mr. Campbell had a genetic predisposition to migraine headaches. He found that the migraines were triggered by the Hong Kong motor vehicle accident, and that subsequent stress did not permit those headaches to subside and aggravated their severity. Clancy J. found that the combination of severe migraine headaches and the stresses experienced by Mr. Campbell led to the onset of his nightmares, panic attacks, claustrophobia, paranoia, mental depression and irrational thought processes.

**51**  The court awarded damages for wrongful dismissal in the amount of $48,000, representing six months' salary. In addition, Clancy J. found Wellfund liable for the tort of intentional infliction of mental distress. He apportioned causation for Mr. Campbell's injuries and loss to Wellfund and the Hong Kong MVA equally. Mr. Justice Clancy assessed Mr. Campbell's non pecuniary damages at $40,000. His Lordship found that Mr. Campbell's inability to work for the period of two and half years to the date of the Wellfund trial, and for an additional six months after that trial was attributable in part to the Wellfund defendants' conduct and in part to the Hong Kong accident. Clancy J. found that Mr. Campbell's annual income in the each of the three years following the termination of his employment would have been $45,000. He assessed Mr. Campbell's total wage loss of $135,000. Wellfund was responsible for one-half of that amount. After the deduction of $13,000 earned by Mr. Campbell in 1993 from some business consulting work, the award for lost wages was reduced to $54,500.

**52**  In assessing Mr. Campbell's credibility, Clancy J. found that Mr. Campbell had adopted false evidence on his discovery and that he was less than accurate, if not deliberately untruthful, in relating matters to Drs. Kastrukoff and Claman. His Lordship observed that Mr. Campbell was obsessed with the Wellfund action to the point where he persuaded himself of the truth of allegations he had made. The court found that the false information that Mr. Campbell had provided to the doctors could be explained by the fact that he was under extreme stress and not entirely rational when he consulted those physicians. At para. 63, the court found that Mr. Campbell was obsessed with the idea that the Wellfund defendants had conspired against him. At trial, he continued to believe that the defendants had spread dog food on his lawn to attract crows despite his counsel's concession that the defendants had no part in that incident. The court described Mr. Campbell's lack of objectivity as bordering on irrationality.

**1995 to 1998: the Plaintiff's Complaints, Behaviour, Treatment and Assessments**

**53**  In each of 1994, 1995 and 1996, Mr. Campbell attempted some part-time business consulting work. However, as a result of his headaches, lack of concentration, and depression, he was unable to function effectively. His total earnings from consulting work from 1993 through 1996 were $24,900. The plaintiff earned no income after 1996. After the termination of his employment with Wellfund, Mr. Campbell never returned to full-time employment.

**54**  In the fall of 1995 Johanna Campbell, now 17, moved back to her father's home. Mr. Campbell was then involved in a relationship with a 21-year-old woman, Emma. Mr. Campbell and Emma married in December 1995, and had a son, Joshua, in February 1996. The plaintiff and Emma separated in May 1996 and divorced in June 1998. Following a custody dispute in 1996, Mr. Campbell retained custody of his son.

**55**  Johanna Campbell testified that her father had volatile mood swings while she lived with him. She said that he gave her a car for her birthday but then took it back and gave it to Emma. On December 10, 1995, on Johanna's 18th birthday, Mr. Campbell woke up Johanna and held a pair of scissors against her throat while in a rage. Jenny Campbell witnessed the incident. She testified that her father threatened to kill her, her mother and her grandparents if she told anyone. Johanna moved back to her mother's home in late December 1995, after her father had assaulted her again during another outburst of rage. On that occasion, Mr. Campbell was arrested by police and spent a night in jail.

**56**  At some point in 1995, Mr. Campbell had stopped taking his antidepressant medications. He believed they were the source of his vertigo and cognitive difficulties. In January 1996, Mr. Campbell visited Dr. Kastrukoff complaining of emotional over reaction and rage attacks. He also told the doctor he had stopped taking his antidepressant medications to stop the vertigo and cognitive problems, but that it had not helped. Dr. Kastrukoff was sufficiently concerned to order an MRI which was conducted in January 1996. The doctor who performed the MRI, Dr. Flak, reported the results, as follows:

Fairly diffuse area of decreased signal intensity is seen within the deep white matter of the left frontal lobes on the gradient echo sequence. A more focal discrete area of low density change is seen in the globus pallidus on the left side. These finding would be compatible with previous haemorrhage in these areas with subsequent hemosiderin deposition presumably related to previous trauma. Not other significant focal lesions noted.

**57**  Dr. Kastrukoff reported that these findings were abnormal, and indicative of previous head trauma.

**58**  Mr. Campbell was referred to a neuropsychiatrist, Dr. Berzen, in April 1996. Between April 1996 and April 5, 2000, Dr. Berzen prepared numerous reports on Campbell's condition. Dr. Berzen found no distinct pattern of any focal organic pathology, but did find evidence of impaired memory and attention disturbance. In his progress report of September 12, 1996, Dr. Berzen opined that the January 1996 MRI results were highly equivocal. However, he did find there to be clear evidence that Mr. Campbell's mental functioning had dropped off. Based on the information provided to him by Mr. Campbell, Dr Berzen concluded that there had been a more significant decline in the plaintiff's functioning after the pool incident than following the Hong Kong MVA. While the extent to which each incident had contributed to the decline was difficult to ascertain, Dr. Berzen found evidence of impairment of Mr. Campbell's intellectual functioning, and of depressed mood, disinhibition, post traumatic headaches, post traumatic vertigo, and post traumatic labyrinthine concussion. In a further progress report dated September 27, 1996, Dr. Berzen noted that Mr. Campbell remained depressed, and continued to show signs of a brain injury.

**59**  Over time, Dr. Berzen noted an improvement in Mr. Campbell's mood. He found that the antidepressants that he and Dr. Claman had prescribed were effective in treating the plaintiff's depressive symptoms. The improvement in Mr. Campbell's mood coincided with his separation from his wife Emma in May 1996, and again with the start of a new relationship with another young woman in June 1997. His mood worsened during litigation over the custody of his son Joshua, which he was granted, in the fall of 1996. By April of 1997, Dr. Berzen was of the opinion that Mr. Campbell's depression had gone into remission.

**60**  The migraine headaches remained unresponsive to medical treatment and by June 1997 were occurring twice a week. Mr. Campbell's problems with disinhibition and temper, however, were improving, and his cognitive functions had stabilized as well.

**61**  In 1996, the plaintiff was approved for permanent disability benefits under the Canada Pension Plan. In 1997, Mr. Campbell was approved for handicap benefits by the British Columbia Ministry of Health, which paid for his prescription medications.

**62**  On April 28, 1998, Ong and Chung provided AHBL with their preliminary assessment of Mr. Campbell's damages claim. The Hong Kong solicitors advised that the plaintiff's non pecuniary damages fell within the range of substantial injury to gross disability, which would attract an award of between HK$540,000 and HK$1,000,000. They estimated Mr. Campbell's past wage loss at about CDN$900,000, and his post trial loss of earnings at CDN$1,870,000.

**The Hong Kong Liability Trial**

**63**  In November 1998, the Hong Kong High Court heard the liability portion of Mr. Campbell's case and found the first defendant to be 100 percent liable for Mr. Campbell's injuries. The plaintiff's claim against the second and third defendants was dismissed. The court ordered damages to be assessed before a Master at a date to be set.

**64**  In August of 1999, Ong & Chung and AHBL settled the costs of the liability trial with the first Hong Kong defendant's solicitors in the amount of HK$550,000 (approximately CDN$76,550). Ong & Chung applied those funds to the payment of their account. There is a dispute about whether AHBL told Mr. Campbell that these funds were used to pay Ong & Chung's legal fees and disbursements, and whether this amounted to a breach of the terms of the contingency agreement.

**Further Medical Assessments of the Plaintiff in 1999**

**65**  In January 1999, an orthopaedic surgeon, Dr. Piper, who conducted an independent medical examination of the plaintiff for the first Hong Kong defendant's solicitors, reported that a CT scan showed that Mr. Campbell had suffered a broken odontoid process in his neck, indicative of previous serious head trauma.

**66**  Dr. Paul Janke, a psychiatrist, also performed an independent medical examination of the plaintiff for the Hong Kong defendant. He concluded that the plaintiff's impaired functioning was attributable to stress related to Wellfund and the pool accident of October 28, 1994, rather than the Hong Kong MVA. Dr. Michael Jones, a neurologist who also examined Mr. Campbell for the first Hong Kong defendant, also attributed the plaintiff's migraine headaches to depression and the multiple stressors in Mr. Campbell's life, rather than the Hong Kong MVA.

**67**  In August or September 1999, approximately two months before the trial of the pool case commenced, Mr. Campbell was assessed by Dr. Berzen, and by another neuropsychiatrist, Dr. Hollander, for the City of Vancouver. Dr. Berzen reported that Mr. Campbell complained of early morning waking, increased appetite, decreased energy, decreased libido, severe fatigue, anxiety, claustrophobia, reading difficulties, balance problems, inability to play the guitar, memory problems, intellectual impairment, disinhibition, social withdrawal, anger management problems, inability to multi-task, and poor concentration and attention span. Mr. Campbell described his mood as a "7 out of 10" but said that it was labile, and characterized by frequent weeping spells. He also complained of panic attacks. His vertigo and depression were in remission. At that time Mr. Campbell was taking two types of antidepressants, a stimulant, a soporific, two narcotic analgesics, and a minor tranquilizer. His migraines remained intractable and unresponsive to treatment.

**68**  Dr. Hollander assessed Mr. Campbell, and diagnosed him with a Major Depressive Episode (in remission), an Opioid-Related Disorder, an Other Substance-Related Disorder, and Chronic Severe Migraine Headaches. Dr. Hollander noted that during the interview Mr. Campbell was "apparently very impaired while being observed, with subsequent sudden switch to a very different demeanor once the interview was over". Dr. Hollander stated that this behavior was consistent with someone "attempting to assertively demonstrate symptoms for the examiner".

**The Pool Case Trial and Judgment**

**69**  The pool case trial proceeded intermittently from November 1999 until May 2000. In March 2001, Mr. Justice Sigurdson released his judgment, indexed as *Campbell v. City of Vancouver et al*, [*2001 BCSC 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2PV-00000-00&context=). The court dismissed the plaintiff's claim for damages for the pool accident. Sigurdson J. found that Mr. Campbell was swimming too slowly to have suffered a head injury as a result of bumping into the metal ladder. The court also noted that two of the indicators of a brain injury were loss of conscious and amnesia, and that Mr. Campbell had suffered neither following the pool accident. At para. 246, Sigurdson J. found that the 1996 MRI result, if abnormal, more likely related to the Hong Kong accident than the pool accident. In the result, the City was found to be negligent for placing the ladder in the pool but was not liable for Mr. Campbell's injuries.

**70**  Sigurdson J. observed that the plaintiff's expert evidence, which included the reports and testimony of Dr. Kastrukoff, Dr. Gimbarzevsky, and Dr. Berzen, was dependent, in part, on Mr. Campbell's self-reporting. The court approached with care Mr. Campbell's evidence that his symptoms had changed following the pool accident. Sigurdson J. was not persuaded that, apart from Mr. Campbell's own interpretation of his symptoms, the evidence showed that Mr. Campbell's headaches, depression or ability to control his anger were any different after the pool accident than before. At para. 244, the court found that Mr. Campbell had allowed himself, probably unwittingly, to be influenced by an early conclusion that his condition was worse, by literature describing head injury symptoms, and by then placing the blame for his condition on the pool incident rather than on other causes such as depression or his intractable headaches. The court concluded that Mr. Campbell had looked for reasons to find the pool accident to be the explanation for his continuing problems. In the court's view, Mr. Campbell had described a period of unconsciousness or passing out following the pool accident that he had not mentioned initially because he had later learned that this was an important indicator of a brain injury.

**2002 to 2005: Further Complications to the Plaintiff's Medical Condition, the Dismissal for Want of Prosecution, and the Settlement**

**71**  Sometime in 2002, Mr. Campbell slipped and fell in a McDonald's restaurant washroom. His head hit a urinal. He lost four teeth and complained of blurred eyesight. He was diagnosed with a concussion at the Richmond hospital and afterwards complained of depression.

**72**  The damages assessment in Mr. Campbell's Hong Kong action was never set down for hearing.

**73**  In January 2004, the first Hong Kong defendant brought an application for dismissal of Mr. Campbell's action for want of prosecution.

**74**  Two months later, in March 2004, Mr. Campbell was diagnosed with prostate cancer. He immediately began hormone therapy.

**75**  On March 30, 2004 Mr. Campbell advised AHBL that he had been diagnosed with prostate cancer, and that the cancer had metastasized from the prostate throughout his abdomen. In May 2004, Mr. Campbell attempted suicide.

**76**  On June 9, 2004, the Hong Kong High Court granted the defendant's application to dismiss the action for want of prosecution.

**77**  On June 17, 2004, Ong & Chung retained Mr. Michael Ozorio to provide an opinion on the merits of an appeal from the strike out.

**78**  An appeal was filed, but Hong Kong counsel advised that the prospect for success was no greater than 50 percent.

**79**  On June 30, 2004, the solicitors for the Hong Kong first defendant offered to settle the Hong Kong motor vehicle action for HK$ 200,000. Ong & Chung recommended against acceptance. Mr. Campbell declined the offer.

**80**  Following the cancer diagnosis and the Hong Kong defendant's successful application to dismiss his action for want of prosecution, Mr. Campbell's depression returned. Mr. Campbell testified at the trial of this action that he was suicidal in November and December of 2004.

**81**  In October 2004, Mr. Campbell underwent surgery for his prostate cancer. The stress of the surgery, and the fact that Mr. Campbell had stopped taking some of his medications before and after the surgery, caused Mr. Campbell to suffer a psychotic episode on October 14, 2004, immediately after the surgery. He left the hospital against medical advice, and was incoherent, irrational, and delusional at that time.

**82**  Mr. Campbell's surgery was not successful. He learned in October, 2004 that his cancer was terminal. He received 33 radiation treatments between December 2004 and February 2005.

**83**  In November 2004 Mr. Ragona negotiated the settlement that Mr. Campbell now contends was improvident. The insurers for the first Hong Kong defendant paid HK$1,100,000, and Ong & Chung contributed a further HK$400,000. On March 1, 2005, Mr. Campbell attended at the offices of AHBL, and signed releases in favour of the Hong Kong defendant and Ong & Chung. After deduction of disbursements and AHBL's fee, the plaintiff received the net settlement funds in the amount of CDN $63,478.79.

**84**  In April 2005, Mr. Campbell's one remaining kidney began to malfunction, causing high blood pressure and high blood protein levels, which made him feel even more ill. Mr. Campbell was also diagnosed with diabetes in August 2005.

**85**  Throughout the trial of this action, Mr. Campbell was a very ill man. He continued to complain of severe migraine headaches, and was heavily medicated for the treatment not only of his headaches and depression, but also for the management of his cancer and kidney problems. Sadly, he passed away in late September, 2009.

**F. APPLICABLE LEGAL PRINCIPLES**

**86**  In order to assess the damages caused by a lawyers' ***negligence*** in the conduct of litigation, a plaintiff must establish that had the lawyer exercised a reasonable degree of skill and care, the plaintiff would have had a reasonable prospect of success in the litigation: *Cridge v. De Vooght*, [*2004 BCSC 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S38W-00000-00&context=) at para. 9, aff'd [*[2005] B.C.J. No. 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0X4-00000-00&context=) (C.A.).

**87**  I must determine whether the defendants breached their contract with Mr. Campbell, or the duty of care owed to him. If I do find a breach or breaches, then I must determine what, if any damages were caused by the breach.

**88**  The damages arising from a breach of contract or ***negligence*** by the defendants in the conduct of the Hong Kong litigation will be measured by the value of the plaintiff's lost chance to prove entitlement to damages for the Hong Kong motor vehicle accident in excess of the settlement.

**89**  The parties agree that the law of Hong Kong applies to the assessment of damages for the injuries sustained by Mr. Campbell in the accident of March 5, 1992.

**90**  In this action, the plaintiff makes additional allegations against the defendants which go beyond the reasonable value of his personal injury claim in Hong Kong. Those allegations concern the standard of practice expected of lawyers in British Columbia, and alleged breaches of fiduciary duty by the defendants. In addition, the plaintiff claims separate compensatory damages for mental distress he allegedly suffered as a result of the defendants' delay in prosecuting the action, as well as punitive damages. The law of British Columbia applies to these claims.

**91**  In order to establish liability in ***negligence*** against the defendants, Mr. Campbell must prove on a balance of probabilities:

1. the existence of a duty,
2. the breach of that duty, and
3. the breach caused the plaintiff damages.

**92**  The plaintiff must prove, on a balance of probabilities, each element of the cause of action: *Roberge v. Huberman*, [*1999 BCCA 196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1DS-00000-00&context=), [*62 B.C.L.R. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1DS-00000-00&context=) at para. 18.

**93**  The defendants are required to bring reasonable care, skill and knowledge to the professional services which they undertook to perform on Mr. Campbell's behalf: *Central Trust Co. v. Rafuse*, [*[1986] 2 S.C.R. 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=) at paras. 58, 59.

**94**  In *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, [*[1999] B.C.J. No. 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M33W-00000-00&context=) (S.C.), the court summarized the elements of the duty of care owed by a reasonable and prudent solicitor to his or her client at paras. 45-47:

[45] The competing principles of law here are that firstly, the reasonable prudent solicitor has a duty:

1. To be skilful and careful.
2. To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
3. To protect the interests of his client.
4. To carry out his instructions by all proper means.
5. To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
6. To keep his client informed to such an extent as may be reasonably necessary according to the same criteria.

(*Tiffin Holdings v. Millican* [*(1964), 49 D.L.R. (2d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-F81W-219M-00000-00&context=) (Alta. S.C.))

[46] Secondly, the duty does not extend to ensuring or guaranteeing the expected results of the client, not does it extend to performing tasks beyond the solicitor's normal retainer without explicit instructions to do so. (*Midland Bank Trust Co. v. Hett, Stubbs and Kemp,* [1978] 3 All E.R. 571 (Q.B.))

[47] Finally, a professional's conduct should not be judged with the wisdom of hindsight but rather in light of the knowledge that reasonably ought to have been possessed at the time of the alleged ***negligence***. (*Haida Inn Partnership v.Touche Ross* [*(1989), 42 B.C.L.R. (2d) 151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2196-00000-00&context=) (B.C.S.C.))

**95**  In this case, the plaintiff bears the burden of establishing on a balance of probabilities that he would not have settled his claim had he been provided with different advice from an independent solicitor: *Sykes v. Midland Bank Executor & Trustee Co. Ltd.*, [1970] 2 All E.R. 471 at p. 478 (Eng. C.A.), cited with approval in *Income Trust Co. v. Watson* [*[1984] O.J. No. 405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-JCBX-S0H4-00000-00&context=) at para. 23 (H.C.J.).

**96**  The object of an award of damages for ***negligence*** is to put the plaintiff in the position he would have enjoyed had the ***negligence*** not occurred. The plaintiff must establish what that position would have been on a balance of probabilities: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [*[1991] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6045-00000-00&context=) at paras. 22-24.

**97**  Damages for breach of the duty of reasonable care and skill will be measured by the foreseeable consequences of the breach: *Webber v. Ernst &Young*, [*2003 BCCA 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G04C-00000-00&context=) at para. 86.

**98**  In *Startup v. Blake*, [*2001 BCSC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2SW-00000-00&context=) at para. 69, Kirkpatrick J. (as she then was) discussing the special considerations that apply where it is alleged that a solicitor was negligent in the settlement of an action, adopted the following passage from *Karpenko v. Paroian, Courey, Cohen & Houston* [*(1980), 117 D.L.R. (3d) 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M4N7-00000-00&context=) at 397-398 (Ont. H.C.J.):

In my view, an important element of public policy is involved. It is in the interests of public policy to discourage suits and encourage settlements. The vast majority of suits are settled. It is the almost universal practice among responsible members of the legal profession to pursue settlement until some circumstance or combination of circumstances leads them to conclude that a particular dispute can only be resolved by a trial. I say nothing of the suits which are settled by reason of sloth, or inexperience, or lack of stomach for the fight. They have nothing to do with this case. What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes ***negligence***, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error, to use the phrase adopted by my brother Krever in Demarco, that ***negligence*** would be found.

**99**  With respect to settlement, the lawyer has a duty to inform the client of all relevant matters and to warn of the risks that may accompany a proposed course of action. The extent of the lawyer's duty will vary with the sophistication of the client: *Newton v. Marzban*, [*2008 BCSC 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1BS-00000-00&context=) at para. 686. Ultimately, the client makes the decision on whether to settle or not, after having been fully advised of the options and risks: *Newton v. Marzban* at para. 696.

**100**  Even where the court finds that a solicitor has breached his duty to warn, the plaintiff must still prove what steps the solicitor ought to have recommended, that he would have taken the solicitor's advice, and that if he had done so, he would not have sustained the loss: *Haag & Haag v. Marshall*, [*[1989] B.C.J. No. 1576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B036-00000-00&context=), [*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=) (B.C.C.A.) at 8-9.

**101**  Similarly, with respect to his allegation that the defendants breached their duty to avoid conflict of interest, the plaintiff must prove that the conflict caused a loss: *DeCotiis v. McLellan*, [*2009 BCCA 596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24VW-00000-00&context=) at para. 36.

**102**  The defendants' theory of the case is that Mr. Campbell wanted a great deal more money than he was advised was realistic. The Hong Kong barristers, Mr. Wong and Mr. Lau, had recommended that Mr. Campbell settle for substantially less than the amount of up to HK$9 million, that Mr. Campbell sought until late November 2004. The defendants argue that between November 19 and November 26, 2004 Mr. Campbell suddenly decided to take the advice of the Hong Kong solicitors and counsel. They submit that (unknown to them) at this time Mr. Campbell was looking at ending his life. He had been devastated by the diagnosis of terminal cancer. The defendants submit that this was the overriding consideration for Mr. Campbell in changing his mind and agreeing to settle for HK$1.1 million. According to the defendants, all of the options were properly explained and Mr. Campbell made the decision to settle.

**Hong Kong Law and Procedure**

**103**  Mr. Clarence Cheng, who has practised as a solicitor in Hong Kong and as a Barrister and Solicitor in British Columbia gave expert evidence on behalf of the plaintiff respecting procedural and substantive law in Hong Kong from the 1990s to the present. He explained that Hong Kong ceased to be a British colony and became a special administrative region out of the People's Republic of China on July 1, 1997. Before and after the transfer of sovereignty, Hong Kong has had a common law legal system. Before the transfer of sovereignty in 1997, the Judicial Committee of the Privy Council was the final appellate court for Hong Kong. In 1997, the Hong Kong Court of Final Appeal was established as the appellate court of last resort. The Court of Final Appeal hears appeals from the High Court, which is comprised of the Court of First Instance, and the Hong Kong Court of Appeal. Since 1997, the Hong Kong courts have continued to treat decisions of the English Court of Appeal and House of Lords as persuasive authority.

**104**  In Hong Kong, the legal profession follows the English model and is divided into two separate branches of barristers and solicitors. Barristers must be instructed by solicitors and lay clients do not have direct access to barristers. In a personal injury action, when the pleadings are closed, the solicitor will instruct a barrister to advise on liability, quantum and evidence. Once a case is set down for trial, the solicitor will prepare a brief to instruct the barrister conducting the trial.

**105**  Due to the division in the Hong Kong legal profession, instructions or inquiries from AHBL generally went to Ong & Chung, who would then pass them on to the Hong Kong barrister, obtain his response, and then respond to AHBL.

**106**  In April 1996, the Hong Kong High Court issued Practice Directions for the case management of personal injury actions. These Practice Directions provide for a Check List Hearing before a Master to ensure that each case is ready to be set for trial. Once the Court grants leave to set down an action for trial, the Court may order a case to be set down on either on the Fixture List or the Running List. Mr. Cheng testified that if a case is set on the Fixture List, the Court fixes a trial date which on average will be within four to six months after the case is set, but may be up to a year, depending on the Court's case load. Cases set on the Running List can get to trial much more quickly, and may be "warned for trial" two or three months after they are set down on the Running List.

**107**  Mr. Cheng explained that the Rules of the High Court provide for discovery of documents within 14 days after the pleadings are deemed to be closed, with inspection of documents to take place seven days thereafter. The Hong Kong Rules of the High Court provide for the exchange of expert reports. The number of expert witnesses a party is entitled to call is limited to two medical experts and one expert in any other field.

**108**  The Rules of the High Court also provide for the exchange of witness statements for use at trial. Witness statements must provide a full and complete account of the evidence the witness will give at trial and must be confined to statements of material facts within the personal knowledge of the witness. Evidence not included in the witness statement may not be adduced at trial without the consent of the other parties or leave of the Court. The plaintiff's solicitors are required to file witness statements at least seven clear days before the Check List Hearing. The plaintiff must provide a signed statement verifying his claim for his lost wages and all other special damages claimed.

**109**  Practice Direction 18.1 of the Rules of the High Court provides for the discovery of all documents directly relevant to the issues between the parties.

**110**  The Hong Kong Supreme Court Practice Direction of April 15, 1996 for the Personal Injuries List also provided for a pre-trial review, to be conducted by a judge. All parties to the action were required to obtain counsel's advice on liability, quantum and evidence by the time of the pre-trial review. The Practice Direction required the plaintiff to file, seven days before the hearing of the pre-trial review, its pleadings, documents and witness statements. The plaintiff was also required to file and serve a revised statement of damages 14 days before the hearing of the pre-trial review, and the defendant was required to file and serve an answer to the revised statement seven days before the pre-trial review. A party that failed to comply with the requirement to serve a revised statement of damages or an answer could be required to pay the costs thrown away by any adjournment of a pre-trial review resulting from such failure. When the personal injury judge considered the case ready for trial, he or she would fix a date for trial.

**111**  In his report, Mr. Cheng discusses the award of interest in Hong Kong civil litigation. Interest is payable on special damages from the date of the accident to the date of judgment. Mr. Cheng advised that in practice, interest on special damages is set at half of the judgment rate. The judgment rate is prescribed by the Chief Justice from time to time. Paragraph 34 of Mr. Cheng's report sets out the judgment rates from July 1, 1996 through January 1, 2005. From the date of judgment until the date the plaintiff receives payment, the full judgment rate applies to awards of special damages. Interest is usually awarded on damages for pain, suffering and loss of amenities at the rate of two percent per annum, payable from the date of issue of the writ until judgment. No interest is payable on damages for loss of future earnings or loss of earning capacity because the plaintiff is receiving payment in advance for these future losses.

**112**  In 1980, in *Lee Ting Lam v. Leung Kam Ming* [1980] HKLR 657 the Hong Kong High Court of Appeal adopted guidelines for the assessment of damages for pain, suffering and loss of amenities according to the following four categories of injury:

1. Serious Injury

This is the lowest category. It covers those cases where the injury leaves a disability which mars general activities and the enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving recurrent pain.

1. Substantial injury

This category extends to injuries which require treatment in hospital for many months and leave the victim with a much reduced degree of mobility, for example, a leg amputated from the thigh, so that an artificial leg cannot be used satisfactorily or multiple injuries which leave a condition requiring regular treatment for rest of the victim's life.

1. Gross disability

This comprises injuries which leave the victim with very restricted mobility or cause serious mental disability or behavioral changes. This bracket includes paraplegics who, particularly if young, can expected to be placed at the upper end of the bracket.

1. Disaster

This is where the victim requires constant care and attention and is incapable of ever leading or appreciating an independent adult life. This bracket includes tetraplegics and those reduced to being "living cabbages" and those left with the mental age of a very young children.

**113**  The Hong Kong Court of Appeal in *Chan Pui Ki v. Leung On*, [1996] HKCA 522 updated the amounts of awards for each category as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Serious injury | $400,000 to $540,000 |  |
|  | Substantial Injury | $540,000 to $660,000 |  |
|  | Gross Disability | $660,000 to $1,000,000 |  |
|  | Disaster | $1,000,000 upwards |  |

**114**  *Chan Pui Ki* also confirmed that Hong Kong courts in assessing damages for loss of future earnings use a conventional multiplier/multiplicand approach. The appropriate award for loss of present and future earning capacity is assessed by taking a suitable multiplicand (representing the periodical amount which, but for the accident, the plaintiff might have been expected to earn), and applying it to a suitable multiplier (representing the number of years during which he or she might have been expected to continue earning, subject to discount for the uncertainties and vicissitudes of life, and the fact that a present lump sum payment is received for a future loss). As Mr. Cheng explained at paragraph 36 of his report, the basic purpose is "to convert the plaintiff's current annual loss of income and benefit determined at the date of trial (the multiplicand), into a sum that represents the present value of the plaintiff's prospective loss".

**115**  In *Chan Pui Ki*, the Hong Kong Court of Appeal affirmed that the multiplier chosen, when multiplied by the multiplicand should produce an amount which if invested at an annual real rate of return of between four percent and five percent would produce an income stream which together with the gradual depletion of the capital amount, will replace the lost future earnings to the end of the period for which the plaintiff was compensated.

**G. THE TRIAL WITHIN THE TRIAL**

**Notional Trial Date for the Hong Kong Damages Assessment**

**116**  It is necessary to determine a notional trial date when the Hong Kong court, but for the delays in the prosecution of the litigation in Hong Kong, would have assessed Mr. Campbell's damages.

**117**  The plaintiff relies upon the expert opinion of Mr. Darrell Roberts, Q.C. on the standard of practice for a reasonable competent solicitor in the field of personal injury litigation to investigate, plead and prepare for trial a case similar to Mr. Campbell's Hong Kong motor vehicle accident. Mr. Roberts is a leading litigation counsel with extensive experience in the conduct of complex personal injury and medical ***negligence*** cases.

**118**  At page 10 of his report, Mr. Roberts observed:

In this case, when Mr. Campbell first attended on Alexander Holburn in June of 1993 and subsequently entered into a written contingent fee retainer, he provided Alexander Holburn with full details of the accident and of his injuries including some of the damages suffered in a letter dated May 30, 1993, which was accompanied by the first medical report of Dr. Birnbaum hand-dated March of 1993. As well, a police report confirming the careless driving conviction in the accident of the Hong Kong police officer who became Defendant # 1 was readily available. As for potential claims against the driver of the taxi (who became Defendant #2) or the owner of the taxi (who become Defendant #3) there does not appear to be any evidence of lack of care and their inclusion appears to have been tactical. In the result, the case was from the outset ready to be plead as a pleading task and could have been plead within the first two or three months.

From the assumed facts however, it appears it was not plead until the Spring of 1994 with the Writ and Statement of Claim being filed on June 6, 1994, and these documents then served on the Defendants. In my opinion, this was a delay in pleading the case that is not within the standard of practice of a reasonably competent lawyer practicing in this field.

**119**  Mr. Roberts went on to express the opinion that generally the standard of practice for preparing a personal injury claim arising from a motor vehicle accident for trial is to have the case ready within two years of the close of pleadings. In the opinion of the plaintiff's expert, Mr. Campbell's case should have been set for trial by the spring or fall of 1996 at the latest.

**120**  With respect to proof of damages, Mr. Roberts was of the opinion that two years from the close of pleadings would provide adequate time to fully investigate and prepare the medical evidence.

**121**  In cross-examination, Mr. Roberts did acknowledge that Mr. Campbell's loss of consciousness in the Hong Kong motor vehicle accident was a serious matter requiring AHBL to deal with the various medical opinions of the general practitioners, neurologists, psychiatrists and neuropsychiatrists. When pressed, he accepted that a period of up to three years from the close of pleadings would be a reasonable time for preparation of a case of this complexity for trial. Mr. Roberts acknowledged that the pool accident could have been a contributing factor to the delay in bringing the Hong Kong case on for trial, but maintained that even assuming Mr. Campbell sustained a second injury in October 1994, it should still have been possible to take the Hong Kong case to trial in 1996.

**122**  Mr. Campbell's wrongful dismissal action against Wellfund was not an impediment to the timely prosecution of the Hong Kong motor vehicle accident claim. The wrongful dismissal action was already underway when Mr. Campbell engaged AHBL in 1993. Mr. Campbell was represented by experienced counsel in that litigation. AHBL kept informed of developments in the wrongful dismissal action as it proceeded.

**123**  With respect to the pool incident, in cross-examination, Mr. Cheng agreed that if he were the instructing solicitor for the defendant in the Hong Kong motor vehicle accident and became aware that Mr. Campbell claimed to have suffered a second brain injury in the pool accident, he would want time to investigate the pool incident to determine its relevance as a potential intervening event. Mr. Cheng also agreed that even if the Hong Kong case had been ready for trial in 1995 or 1996, Hong Kong defence counsel would have sought an adjournment in order to permit time to investigate the pool accident and its relationship to the damages claimed by Mr. Campbell from the Hong Kong motor vehicle accident.

**124**  I accept that the pool incident was a complicating factor in the preparation of Mr. Campbell's case for trial and one that would extend the time for investigation and preparation of the medical evidence beyond the two years from the close of pleadings said by Mr. Roberts to be the standard. Assuming timely disclosure of the pool incident, and allowing reasonable time for both the plaintiff and the defence to obtain and exchange medical evidence relating to Mr. Campbell's injuries and their causation, I find that Mr. Campbell's Hong Kong motor vehicle accident claim ought to have been ready for trial on both liability and quantum three years after the close of pleadings, by the fall of 1997. Once the case was ready for trial, the Hong Kong court would conduct the trial directions hearing and set the case for trial. Taking the time for that process into account, I find that the notional trial date for Mr. Campbell's damages assessment is January 31,1998.

**Causation and Injury: Expert Medical Evidence**

**125**  On the trial within the trial, the parties presented more extensive medical evidence than was before either Mr. Justice Clancy in the Wellfund case, or Mr. Justice Sigurdson in the pool case. For example, reports of the independent medical examinations conducted by Drs. Janke, Piper, and Jones for the Hong Kong first defendant were not adduced before Clancy J or Sigurdson J. I proceed on the basis that all of the medical evidence adduced on the trial within the trial in this action would have been available to the Hong Kong court trying Mr. Campbell's case at the notional trial date.

**126**  Medical reports were not sought or obtained from the two Hong Kong hospitals where Mr. Campbell was treated until several years after the Hong Kong motor vehicle accident. Dr. Kam Mak Tin, the senior medical officer at Tang Shiu Kin Hospital, provided a brief medical report to Ong & Chung dated January 18, 1996. Dr. Kam noted that:

The above-named was attended to by Dr. Lee Samuel at 04:10 hours on 5-3-92 at the Accident & Emergency Department of Tang Shiu Kin Hospital after being injured in a traffic accident.

2. On examination, the following conditions were found:-

1. Tenderness over the left side of neck. The range of movement of the neck was restricted
2. The medical aspect of the right knee was swollen with tenderness
3. The dorsum of left foot was swollen
4. He was treated and transferred to Queen Mary Hospital

For further information and eventual outcome of this patient, please write to the Hospital Chief Executive of Queen Mary Hospital.

The degree of permanent disability as the result of this injury has to be assessed by an Assessment Board.

**127**  Dr. Tang Wai Man of the Department of Orthopaedic Surgery at Queen Mary Hospital in Hong Kong provided the following report, dated August 24, 1995, in response to a request from Ong & Chung of the same date:

Mr. William Campbell was admitted to our ward on 5.3.92 at 7:18 am.

He was injured in a traffic accident and he claimed that he has lost of consciousness for 1-2 minutes. He was not able to walk after the injury. He also complained of neck pain.

Mr. Campbell had history of meniscectomy of both left and right knees and physical examination showed locking of Right knee together with click at near full extension. Mr. Campbell was found to be conscious after admission.

Mr. Campbell was discharged against medical advice on the same day.

**128**  No other hospital or ambulance records were obtained from Hong Kong.

1. Dr. Birnbaum -- Family Doctor

**129**  Dr. Birnbaum was the only doctor who treated Mr. Campbell before and after the Hong Kong MVA. Unfortunately, Dr. Birnbaum died in June 1997.

**130**  Mr. Campbell was a patient of Dr. Birnbaum from May 1984 through March 1996. Dr. Birnbaum's clinical records indicate that Mr. Campbell was involved in three motor vehicle accidents prior to the Hong Kong MVA. Following the first motor vehicle accident in July 1989, Mr. Campbell saw Dr. Birnbaum with complaints of occipital headaches and neck pain, for which 222s, Tylenol 3 and Rivotril provided relief. The plaintiff was involved in a second motor vehicle accident in October 1990. Mr. Campbell reported to Dr. Birnbaum that his left forehead hit the visor, that he was disoriented, vomited and experienced headaches. Mr. Campbell reported that he went to emergency with a mild concussion. Dr. Birnbaum's clinical records indicate that Mr. Campbell's symptoms had resolved later in 1990.

**131**  Mr. Campbell saw Dr. Birnbaum again in May 1991 following the third motor vehicle accident. He complained of poor sleep secondary to mechanical low back pain. Dr. Birnbaum's clinical records contain no entry for headaches or any head injuries associated with this accident.

**132**  With respect to each of the three motor vehicle accidents preceding the Hong Kong accident, Mr. Campbell's headaches, neck pain and soft tissue injuries were fully resolved within a matter of weeks of each event.

**133**  Following the Hong Kong motor vehicle accident of March 5, 1992, Mr. Campbell first saw Dr. Birnbaum on March 25, 1992. Dr. Birnbaum made the following note:

Back of taxi in Hong Kong about 10 days ago 3:00 p.m. BMW, hit front right of cab. Smashed chest. Middle of back pain. Admitted to hospital overnight, Queen Mary Hospital. Right head hit window and went forward smacking chest. Not belted, hit steel bar. Banged left knee. Loss of consciousness for several minutes. Neck pain for weekend]. Very stiff as with BMW MVA. On exam, neck spasm. Range of motion painful at extremes. Knee discomfort persists.

Plan : Toradol, Flexeril.

**134**  Dr. Birnbaum's clinical records indicate that Mr. Campbell was seen again on April 13 and June 2, 1992, however the notes for each of those days make no reference to headaches.

**135**  The first entry specifically referring to headaches occurs on June 4, 1992, where Dr. Birnbaum notes "left shoulder pain, occipital headache and tenderness".

**136**  On September 4, 1992, Dr. Birnbaum noted that Mr. Campbell's occipital headaches continued, and made this entry:

Seems to have been precipitated post Hong Kong MVA, recently visual auras with headaches.

**137**  At this time, Mr. Campbell was complaining of tension, migraine headaches and depression. Dr. Birnbaum prescribed Tylenol 3, Toradol (a muscle relaxant), and Luvox, an antidepressant.

**138**  In his report of March 29, 1993 to Mr. John McLennan, the Hong Kong solicitor initially consulted by the plaintiff, Dr. Birnbaum advised that on March 25, 1992 Mr. Campbell had consulted with him for neck pain, headaches, right knee pain and chest pain which had persisted since the motor vehicle accident of March 5, 1992. Dr. Birnbaum noted that on the office visit of September 4, 1992 Mr. Campbell was very concerned about the headaches, and that the plaintiff had never suffered migraine-type headaches or severe muscle tension headaches prior to the Hong Kong MVA. In Dr. Birnbaum's opinion, Mr. Campbell was suffering from both varieties of headaches by September 4, 1992, and they were interfering with all aspects of his social, recreational and work routines. Dr. Birnbaum went on to state:

When I last saw Bill on Feb 25, 1993 he was still suffering from neck pain and migraine headaches. I fell that these were precipitated by the MVA of Mar. 5, 1992. Recent events at his work have been very stressful and have contributed to a prolonged disability. Nevertheless, the MVA was the causative incident and the stressful job circumstances merely an aggravating factor.

**139**  Dr. Birnbaum diagnosed Mr. Campbell with post concussion migraines and tension headaches related to whiplash. The primary cause of his medical condition was the Hong Kong MVA. In his report of April 13, 1994, prepared for Mr. Campbell's counsel in the Wellfund action, Dr. Birnbaum opined that stress from Mr. Campbell's employment difficulties with Wellfund aggravated the primary injury and was a complicating and major factor in his depression, insomnia, nightmares, inability to concentrate, and headaches. By the spring of 1994, Dr. Birnbaum considered Mr. Campbell to be "totally disabled" and "merely surviving" as a result of his Hong Kong MVA injuries.

1. Dr. Kastrukoff -- Neurologist

**140**  Dr. Kastrukoff first saw Mr. Campbell on November 20, 1992. Dr. Birnbaum had referred Mr. Campbell to Dr. Kastrukoff for treatment for his headaches.

**141**  Dr. Kastrukoff initially diagnosed Mr. Campbell with two types of headaches. The first type was severe, occurred about four times a month, and was accompanied by nausea, vomiting, and photophobia. The second type was less severe and occurred up to twice a day. By his letter of January 18, 1993 to Dr. Birnbaum, Dr. Kastrukoff advised that there did not appear to be any precipitating factors for the headaches aside from "the obvious stress of [Mr. Campbell's] job". Dr. Kastrukoff also reported that following Mr. Campbell's motor vehicle accident in Hong Kong his headaches increased in frequency and severity and were occurring about twice a week prior to the Wellfund incident in the summer of 1992, but were not as frequent or severe as they were by January 1993. Dr. Kastrukoff also diagnosed Mr. Campbell with insomnia, post traumatic fibrositis, post traumatic vascular headaches, and anxiety.

**142**  Dr. Kastrukoff's opinion evolved over time, depending on the information Mr. Campbell supplied to him.

**143**  Through the summer and fall of 1993, Mr. Campbell reported to Dr. Kastrukoff that he suffered from claustrophobic attacks, compulsive and ruminatory thought processes, insomnia, and constant headaches. In late March, 1994, Mr. Campbell was hospitalized and treated overnight with narcotic analgesics for a debilitating headache.

**144**  In his medical-legal report of April 18, 1994 prepared for the Wellfund case, Dr. Kastrukoff attributed the cause of the serious migraines to the stress arising from the Wellfund case. He stated that the onset of the headaches "coincided with the fact that he apparently had witnessed an assault on his Controller". However, he also said that Mr. Campbell suffered from headaches "about twice a week prior to the incidents in the summer, but were not as frequent or severe as they are now". Dr. Kastrukoff concluded that Mr. Campbell had suffered from mild headaches which were vascular (migrainous) in nature prior to the loss of his employment. However, Dr. Kastrukoff believed the primary factor behind Mr. Campbell's continuing and severe migraine headaches was stress associated with his employment, and the loss of employment.

**145**  In November 1994, Dr. Kastrukoff reported to Dr. Birnbaum that Zoloft was appearing to help Mr. Campbell's depression, but that the plaintiff continued to suffer from headaches. He attributed the headaches and depression to the pressures then confronting Mr. Campbell, which included the Wellfund litigation and the plaintiff's reduced financial circumstances. Dr. Kastrukoff stated believed that with resolution of the Wellfund case Mr. Campbell's "ultimate prognosis is good ... I believe it is likely he will be able to work again in the future".

**146**  Dr. Kastrukoff saw Mr. Campbell on December 9, 1994. In his report to Dr. Birnbaum he stated that he believed Mr. Campbell was somewhat improving until the pool accident. Since then, Mr. Campbell "continues to be quite symptomatic ... He appears to have had a head injury on October 28, 1994 at Lord Byng Pool. Although he was not rendered unconscious, he appears to have a worsening of his post concussion syndrome symptoms."

**147**  Nearly a year later Dr. Kastrukoff saw Mr. Campbell again, on December 4, 1995. He made a new finding of jerking movements of the eye, which indicated to him a potential brain abnormality. He ordered a brain MRI which was completed in January 1996. In Dr. Kastrukoff's opinion, the MRI scan was abnormal and showed areas of decreased signal intensity within the left frontal lobe and the globus pallidus on the left side consistent with previous hemorrhage and a subsequent hemosiderin deposit. In Dr. Kastrukoff's view, the MRI scan provided definitive evidence of head trauma, which had implications not only for Mr. Campbell's headaches, but also possibly for his behavioral problems.

**148**  In the pool case judgment, Sigurdson J. stated that Dr. Kastrukoff believed the abnormalities revealed by the MRI were the result of the pool incident. Mr. Justice Sigurdson came to the following conclusion regarding Dr. Kastrukoff's evidence in the pool case:

115 It appears to me, from the cross-examination of Dr. Kastrukoff, that he based his opinion that Mr. Campbell suffered a brain injury in the pool in part on a change in headaches, cognitive problems, affective disorder and vertigo or dizziness that were reported to him by Mr. Campbell.

116 The weight that I attach to Dr. Kastrukoff's opinion is affected by certain factors. Some of the information Dr. Kastrukoff relied upon in reaching his opinion of a brain injury was information from Mr. Campbell. I think Mr.

Campbell, following the pool accident, early on believed it exacerbated his medical difficulties and he was influenced by a checklist of symptoms that he received from the Head Injury Association. I believe that Mr. Campbell, when he did not improve following the pool accident, began, to a degree, looking for a physical explanation for some of the symptoms that he continued to have. I also think that some of the facts relied on by Dr. Kastrukoff, such as an abnormal neurological examination, the MRI, and the changed circumstances reported by Mr. Campbell, were very marginal as to whether they indicated a brain injury. The change in circumstances depended significantly on Mr. Campbell's reporting of changes and the accuracy of that reporting. ... The MRI, if abnormal, could have been, and I think more likely was, the result of the Hong Kong accident. Neurological examinations conducted by others were normal after the pool accident. ... Moreover, the diagnosis of benign postural vertigo is not necessarily the result of a head injury.

**149**  In this action, Dr. Kastrukoff testified that following the pool accident he believed that Mr. Campbell had suffered head trauma as a result of that accident. He based his opinion on the two new findings of vertigo and jerking eye movements that he made following the pool accident, and on Mr. Campbell's self-reporting of symptoms. Dr. Kastrukoff stated that if he had testified at a trial in 1998 his opinion would have been that Mr. Campbell had not suffered a brain injury before the swimming pool accident, and that his brain injury was the result of the swimming pool accident. However, Dr. Kastrukoff testified that he did not know the speed at which Mr. Campbell was swimming when he hit the ladder.

1. Dr. Claman -- Psychiatrist

**150**  Dr. Claman first assessed Mr. Campbell in November 1993. By the time Dr. Claman examined him, Mr. Campbell had been dismissed by Wellfund, and was preoccupied with his dispute with his former employer. Mr. Campbell reported classic migraines since August 1992, four per month, and different less severe daily headaches that began in March 1992. Mr. Campbell reported to Dr. Claman that his depressive symptoms and his migraine symptoms began in approximately August of 1992.

**151**  Dr. Claman noted in his consultation report to Dr. Kastrukoff prepared on June 16, 1994 that Mr. Campbell responded well to the antidepressants, in that there was improvement of all symptoms within one month. However at the time of Dr. Claman's report, Mr. Campbell was continuing to suffer from migraines twice per month. Mr. Campbell reported that his memory and cognitive abilities had "improved substantially". Mr. Campbell also reported to Dr. Claman that his father suffered from classic migraines that took their onset in his father's middle age. The plaintiff denied any past psychiatric history or any symptoms of psychosis or mania, past or present.

**152**  Dr. Claman diagnosed Mr. Campbell with a major depressive disorder, in remission, as well as classic migraine, both of which seemed to have arisen in the context of stressful events and which had improved with the use of antidepressants. He also concluded that Mr. Campbell previously suffered from non-migraine headaches associated with the Hong Kong MVA. Mr. Campbell continued to see Dr. Claman until April 1995. Dr. Claman increased Mr. Campbell's dosage of Zoloft twice in March 1995 to the maximum dosage, which Mr. Campbell stated was working somewhat better. However, on his last visit Mr. Campbell complained of cognitive impairment. Dr. Claman reduced the dose back down to 200 mg, because in his opinion it was possible that Zoloft affected cognition.

1. Dr. Robinson -- Neurologist.

**153**  Dr. Robinson is a neurologist whose practice focuses on the treatment of patients with headache disorders. The plaintiff was examined by Dr. Robinson on May 26, 1994.

**154**  In a report prepared in September 1994, Dr. Robinson stated the following:

Although relatively unusual, a migraine pre-disposition or migraine proneness can occur following minor head injury such as the one he experienced in March 1992. Prior to that there was little to support him as having any significant headache disorder. ... It is well recognized that stress and tension whether ongoing or in the let down phase may be one of those factors. It would appear that this man has had an underlying migraine pre-disposition either brought forward or uncovered as a direct result of the motor vehicle accident. His ongoing difficulties are a combination of this and likely the stresses and tensions involving his litigation, mood disturbance and economic plight.

**155**  At the trial of this action, Dr. Robinson testified that Mr. Campbell suffered from "migraine-like" headaches associated with trauma, rather than migraine headaches, which are not associated with trauma. He stated that after Mr. Campbell struck his head in the Hong Kong MVA, and had headaches immediately after the accident which became more severe in July 1992. These headaches had characteristics similar to migraines. Dr. Robinson's diagnosis was post-traumatic chronic headaches apparently related to the trauma arising from the Hong Kong MVA.

**156**  Dr. Robinson testified that he had seen patients like Mr. Campbell who after trauma develop headaches that have migraine-like characteristics. According to Dr. Robinson, it is as if the traumatic event changes the predisposition of the brain to headaches. He stated that the probabilities are that the more severe headaches that Mr. Campbell reported experiencing from July 1992 onward were related to a change in the predisposition of Mr. Campbell's brain to headaches directly related to the trauma experienced during the Hong Kong MVA. In Dr. Robinson's opinion, Mr. Campbell suffered from post-traumatic migraine-like headaches, which began immediately after the Hong Kong MVA, and which were rendered more severe by employment- related stress in the summer of 1992. According to Dr. Robinson, the Hong Kong MVA caused Mr. Campbell to become headache prone.

**157**  Dr. Robinson agreed in cross examination that generally the more prolonged the delay in the onset of headaches, the less likely the connection to a traumatic event. However, he testified that he has seen cases of delayed onset in his clinical experience. He believes that it is probable that the connection between the Hong Kong MVA and the July 1992 onset of more severe headaches is real. He further stated that stress does not cause migraines; it merely "turns up the volume".

1. Dr. Berzen -- Neuropsychiatrist

**158**  As a neuropsychiatrist, Dr. Berzen studies the connection between brain structure, brain function and psychiatry.

**159**  At trial, Dr. Berzen described the mechanics of an acceleration/deceleration injury to the brain. He explained that the various parts of the brain have different densities, and that the tissues of the brain accelerate and decelerate at different rates of speed, producing shearing forces. Dr. Berzen explained that the density of the different jells in the brain causes the shearing or tearing of microscopic tissues. This can produce a diffuse axonal injury. A patient may sustain a brain injury without any damage to the exterior of the head.

**160**  Dr. Berzen testified that the most useful investigation for diffuse axonal injuries is an MRI scan. A diffuse axonal injury can be picked up on an MRI scan if there is bleeding.

**161**  Dr. Berzen testified that the 1996 MRI was consistent with a frontal lobe syndrome. The key feature of diffuse axonal injury is an MRI finding of microscopic blood shearing or hemorrhaging. However, in Dr. Berzen's opinion, the evidence of frontal lobe change revealed by the 1996 MRI was equivocal.

**162**  Dr. Berzen first assessed Mr. Campbell in April 1996. Psychological testing revealed no distinct pattern of any focal organic pathology. He did find evidence of impaired memory, particularly verbal memory, and evidence of attention disturbance. Dr. Berzen concluded that there was clear evidence that Mr. Campbell's intellectual functioning had dropped off, and that his decrease in function was more significant following the swimming pool head injury than following the Hong Kong MVA. He diagnosed Mr. Campbell with impairment to intellectual functioning, depressed mood, disinhibition, post traumatic headaches, post traumatic vertigo, likely as the result of a left labyrinth concussion. In Dr. Berzen's opinion, these diagnoses were all symptoms of a brain injury.

**163**  In subsequent visits Dr. Berzen noted incidents of wandering that occurred at times of emotional stress, as well as significant shifts in Mr. Campbell's mood tied to events and changing situations in his life. He found that the prescribed antidepressants appeared to have beneficial effects, but that the headaches persisted and were only partially responsive to treatment.

**164**  In his medical-legal report dated April 8, 1997 prepared for AHBL, Dr. Berzen noted that Mr. Campbell's depression was in remission, but that the migraines persisted. He also noted that Mr. Campbell had lost all memory of his childhood until grade nine. Dr. Berzen concluded, as follows:

... Subsequent to the motor vehicle accident on March 5th, 1992, [Mr. Campbell] suffered a post concussion syndrome characterized by fatigue, cognitive impairment, and depressive symptomatology. The post concussion syndrome probably arose out of a closed head injury sustained in the taxicab accident of March 5th, 1992. The post concussion syndrome, major depression, and post traumatic headaches were exacerbated by his subsequent unfair dismissal from his work.

He appeared to be making some progress towards recovery following this accident, but he suffered a further setback by the swimming pool accident, which occurred in October 1994. This accident caused a further decline in the patient's functioning. His post traumatic headaches became worse, he suffered with positional vertigo, he became increasingly more depressed, and began to demonstrate increased irritability, poor social judgement, and uncontrolled rage attacks. In addition, he suffered worsening of his cognitive functioning.

**165**  In his progress note dated August 7, 1997 Dr. Berzen noted that Mr. Campbell had a new girlfriend, and that his depression was in remission. Mr. Campbell reported that his cognitive functions had stabilized. And that he was better at listening and reading. However, the plaintiff complained of headaches twice-weekly. In August 1998, Dr. Berzen noted that Mr. Campbell's cognitive abilities remained unchanged.

**166**  Dr. Berzen testified at the trial of this action that when he wrote his medical report of April 8, 1997, he did not know how much to attribute to the Hong Kong MVA and how much to attribute to the pool accident. He testified that he was not aware that Mr. Campbell was swimming at an extremely slow speed when he hit the ladder, and that this would have been a critical factor to his determination of what caused Mr. Campbell's injuries.

**167**  Dr. Berzen agreed in cross examination that if he had testified at a trial in 1998 he would have given his opinion as stated in his report of April 8, 1997. However, with the benefit of hindsight, and with the information regarding Mr. Campbell's swimming speed, he testified that his current opinion was that the bulk of the plaintiff's symptomology was attributable to the Hong Kong MVA.

**168**  On September 11, 1999 Dr. Berzen provided a medical report for Owen Bird, counsel for Mr. Campbell in the pool case. At this stage, Mr. Campbell's complaints included early-morning waking, decreased energy, poor concentration, panic attacks, and decreased attention span. Dr. Berzen noted that since his original assessment in 1996, he had diagnosed Mr. Campbell as suffering from disinhibited frontal lobe syndrome with rage attacks, post-traumatic headaches, and impaired intellectual functioning characterized by impaired concentration and memory. Dr. Berzen concluded that Mr. Campbell was suffering from a major depressive disorder superimposed on his traumatic head injuries.

**169**  Dr. Berzen noted that Mr. Campbell was currently taking two antidepressants, a stimulant, a soporific, narcotic analgesics, and a minor tranquilizer. Mr. Campbell had responded to the antidepressant medications and his depression was currently in remission. Dr. Berzen reported that Mr. Campbell had a profound sense of loss of his former functioning.

**170**  Mr. Campbell's migraines remained intractable and non-responsive to treatment.

**171**  In his report of September 11, 1999, Dr. Berzen restated his opinion that Mr. Campbell suffered a closed head injury in the Hong Kong motor vehicle accident, which caused a post concussion syndrome characterized by fatigue, cognitive impairment and depressive symptoms. The plaintiff's post concussion syndrome, major depression and posttraumatic headaches were all exacerbated by the Wellfund dismissal.

**172**  Dr. Berzen went on to state that had the swimming pool accident not occurred, Mr. Campbell was making good clinical progress and could have recovered from his pre-existing injuries from the Hong Kong motor vehicle accident, likely to the point of being able to return to gainful employment.

**173**  Dr. Berzen, in his report of September 11, 1999, diagnosed Mr. Campbell with dementia secondary to closed head trauma, depression and anxiety, and personality change due to frontal lobe injury, post concussion syndrome secondary to head injury and probable axonal injury; post-traumatic headaches; and a global assessment of functioning at 40 (90-100 being normal) .

**174**  According to Dr. Berzen, it was unlikely that Mr. Campbell's intellectual impairment would improve. The reversible components of his impairments had been addressed using cognitive retraining strategies, medications, and time to heal. In Dr. Berzen's opinion, it was unlikely that Mr. Campbell would be able to return to regular full-time employment due to his headaches and cognitive problems.

**175**  In his report dated December 8, 2007 prepared for plaintiff's counsel, Dr. Berzen advised that based upon his review of the medical documents relating to Mr. Campbell's father, there was no evidence that the plaintiff's father had suffered from migraine headaches. Thus, there was no family history that would support a genetic pre-disposition to migraines. Dr. Berzen also advised that the CT scan of Mr. Campbell's neck performed during Dr. Piper's orthopaedic evaluation of Mr. Campbell for the Hong Kong defendant in June 1999 revealed an old healed odontoid (first neck vertebra) fracture. In Dr. Berzen's opinion, the odontoid fracture, when considered with Mr. Campbell's complaint of soft tissue neck injury following the Hong Kong MVA, could be seen as supporting evidence for a significant head injury at the time of the taxi cab accident.

**176**  Dr. Berzen also testified that he was not aware of Mr. Campbell's delusions in 1992 and 1993 when he gave the medical opinions set out in his written reports. He testified that those delusions are consistent with complications that could have arisen from a head injury sustained in the Hong Kong MVA.

1. Dr. Gimbarzevsky -- General Practitioner

**177**  Dr. Gimbarzevsky became Mr. Campbell's family doctor in April 1996 after Dr. Birnbaum's retirement. In his first and undated report Dr. Gimbarzevsky noted that Mr. Campbell was unable to concentrate, was easily frustrated, and had lowered intellectual abilities. In Dr. Gimbarzevsky's opinion, Mr. Campbell had suffered a significant diminution of his intellectual capacity as a result of the two head injuries he had experienced in 1992 and 1994. Dr. Gimbarzevsky also stated that it was "difficult to dissociate side-effects of brain injury from the emotional effects of loss of income and stress of litigation".

**178**  In his report prepared on March 23, 1998 for AHBL, Dr. Gimbarzevsky diagnosed Mr. Campbell as having suffered a closed head injury during the Hong Kong MVA, which had resulted in post-traumatic migraines, post-traumatic vertigo, depression, and assorted resolved soft tissue injuries. Dr. Gimbarzevsky stated that Mr. Campbell suffered an injury to his dominant frontal lobe as a result of the Hong Kong motor vehicle accident, and that his deterioration of intellect was consistent with such an injury. However, Dr. Gimbarzevsky frankly stated that it is "impossible to give a balanced impression of the effects of the MVA", and that Mr. Campbell's cognitive problems are not clinically quantifiable by the "crude state of current neuropsychologic testing". He stated that failure of executive functions is a "far more sensitive indicator of frontal lobe dysfunction than any clinical trial". In conclusion, Dr. Gimbarzevsky attributed Mr. Campbell's fatigue, diminished motivation, memory dysfunction, panic disorder, migraine headaches, vertigo, and depression to the brain injury he suffered as a result of the Hong Kong MVA.

**179**  It was also Dr. Gimbarzevsky's opinion that Mr. Campbell had suffered an additional head injury in the pool accident, which made it difficult to ascertain what fraction of his symptoms were due to the 1992 motor vehicle accident, and what was due to the swimming pool accident.

**180**  In cross-examination, Dr. Gimbarzevsky stated that in 1998 he believed Mr. Campbell had suffered a second brain injury as a result of the pool accident. In reaching that conclusion, Dr. Gimbarzevsky relied in large part on Mr. Campbell's self reporting.

**181**  In his report dated November 5, 2003, prepared for AHBL, Dr. Gimbarzevsky repeated his diagnosis that the Hong Kong MVA was the cause of Mr. Campbell's many problems. He stated that the Hong Kong MVA was the triggering event for the migraines, but that at the present time "there is likely a significant component of analgesic withdrawal headache", and that stress has exacerbated his headaches. Dr. Gimbarzevsky stated that "many of Mr. Campbell's 'depressive' symptoms in fact represent the effects of brain injury on the frontal lobes." Dr. Gimbarzevsky noted that at the time of writing Mr. Campbell was taking 28 doses of butorphenol (a narcotic analgesic) every eight days, and approximately 240 caplets of codeine and acetaminophen monthly.

**182**  After the cancer surgery and the subsequent psychotic episode in October 2004, Dr. Gimbarzevsky concluded that Mr. Campbell had a problem with butorphenol dependence, because it can cause hallucinations and may have fairly significant cognitive side effects. On Dr. Gimbarzevsky's advice, Mr. Campbell began to transition to long-lasting morphine in 2004. Mr. Campbell was taking 60 mm of morphine three times a day at the time of the trial of this action.

**183**  In a final report dated October 11, 2007 prepared for plaintiff's counsel, Dr. Gimbarzevsky expressed the opinion the Mr. Campbell had been "obsessed with the litigation process" during most of the time he had known him, and that this had contributed to Mr. Campbell's depression and worsened his headaches. Dr. Gimbarzevsky noted that, since the Hong Kong MVA, Mr. Campbell's headaches became more severe every time he came under stress.

**184**  Dr. Gimbarzevsky concluded by stating that the Hong Kong MVA "is the probable cause of Mr. Campbell's neurologic symptoms".

1. Dr. Schmidt -- Clinical Psychologist and Neuropsychologist

**185**  Dr. Schmidt assessed Mr. Campbell in January 1999 at the request of Mr. Ragona. He noted a high degree of variability in Mr. Campbell's performance of various psychological and neuropsychological tests. While Mr. Campbell's verbal comprehension and perceptual organization were quite strong, his working memory and psychomotor speed were poor. Dr. Schmidt explained that such discrepancies were unusual in the general population, were typical of a traumatic brain injury, but could also reflect psychological or mood disorders. He also noted that Mr. Campbell's test results may have been affected by his pain medications. Ultimately, Dr. Schmidt formed the opinion that the variability in test results was attributable to psychological factors, including Mr. Campbell's significant level of depression. The variability in test results made it impossible for Dr. Schmidt to reach any opinion regarding the presence or absence of neuropsychological deficits at the time of his assessment of Mr. Campbell.

**186**  Dr. Schmidt concluded that Mr. Campbell had suffered a mild traumatic brain injury from the Hong Kong MVA. On the question of whether the brain injury or psychological factors were the cause of Mr. Campbell's medical problems, Dr. Schmidt made the following comments:

It would appear that in the first accident in question Mr. Campbell suffered some disruption of his ability to cope adaptively with the demands of his life. It is reasonable to conclude that this disruption may well have arisen from, at least in part, the traumatic brain injury that he suffered in the taxi cab accident. As his life became disrupted, his ability to cope with the changes in his life deteriorated rapidly. This is not an uncommon pattern in high achieving individuals who suddenly find themselves no longer able to perform at the level to which they are used to seeing themselves functioning. Their self esteem rapidly suffers, as does their general performance and a vicious cycle of failure and decreased self esteem becomes established. ... As time has passed Mr. Campbell's situation continued to deteriorate from a psychological standpoint and ultimately moved into a fairly chronic or stable pattern that he currently shows. At this point in time, it is impossible to determine whether he has persisting neuropsychological problems, or whether his deficits are now solely the result of psychological factors.

**187**  In letters dated March 28, 2007 and July 9, 2008 to Mr. Creighton, Dr. Schmidt wrote that the frontal lobes of the brain are extremely complex and injury is difficult to detect. Injury can result in significant behavioral and functional disruption. He further stated that over the past decade there has developed an increasing awareness of the role of traumatic brain injury in creating behavioral and emotional changes. Previously such symptoms were viewed as psychological in origin, but it is increasingly recognized that they can be the direct result of damage to the brain itself.

**188**  In Dr. Schmidt's opinion Mr. Campbell's cognitive deficits after the accident, even if mild, were a significant contributing factor to the deterioration that he showed.

**189**  Dr. Schmidt confirmed that collateral information can be extremely important in cases where brain injury may have occurred. Some patients tend to over-respond to or catastrophize their problems. Others may not notice anything wrong with their behavior. Persons who know the individual may be able to provide reliable information respecting changes in behavior or performance.

**190**  Dr. Schmidt said that some of Mr. Campbell's depression may be due to a brain injury. He also stated that the longer the symptoms of depression persist and resist treatment, the more likely it is that they arise from brain injury, at least in part, as opposed to being simple reactions to the individual's situation.

**191**  At trial, Dr. Schmidt testified that the pool accident seemed like a fairly minor event and that in his opinion it was hard to imagine it having a big impact.

**192**  Dr. Schmidt testified that when Mr. Campbell found he could not cope as well following the Hong Kong MVA, depression and anxiety came into play. He stated that the mild traumatic brain injury started this process in motion, and then the other factors came into play. The Hong Kong MVA may have made Mr. Campbell more susceptible to the impacts of stress related to his dispute with his employer. Dr. Schmidt said that the mild traumatic brain injury was "the spark that started the fire".

1. Dr. Cameron -- Neurologist

**193**  Dr. Cameron never examined Mr. Campbell. His opinion is based on a review of medical records and reports.

**194**  In his report dated December 17, 2007 prepared for plaintiff's counsel, Dr. Cameron states that Mr. Campbell "probably did sustain a traumatic brain injury at the time of the motor vehicle accident of March 5, 1992."

**195**  Dr. Cameron regarded the report prepared by Dr. Tang of the Department of Orthopaedic Surgery at Queen Mary Hospital in Hong Kong on August 8, 1995 as incomplete and insufficient to provide a medical opinion on the medical condition of Mr. Campbell on March 5, 1992.

**196**  Accordingly, Dr. Cameron based his opinion respecting Mr. Campbell's brain injury on Dr. Birnbaum's clinical records and Dr. Gimbarzevsky's report of March 23, 1998. Dr. Cameron referred to Dr. Birnbaum's notes of Mr. Campbell's description of the accident, his loss of consciousness, disorientation and nausea. In Dr. Cameron's opinion, the problems that Mr. Campbell reported concerning memory, concentration, speech difficulties, difficulty with train of thought, increased impulsive behavior and developing feelings of depression were typical of the problems suffered by patients following a traumatic brain injury. Dr. Cameron noted that these symptoms were also documented by Mr. Campbell's daughter Johanna, as described in Dr. Gimbarzevsky's report. In addition, Dr. Cameron took into account the clinical information reported by Drs. Kastrukoff, Berzen, and Schmidt in concluding that Mr. Campbell had sustained a mild traumatic brain injury or concussion at the time of the Hong Kong MVA.

**197**  According to Dr. Cameron, patients may suffer delusions following a traumatic brain injury. The delusions may be associated with the development of psychological dysfunction as a reaction to the original traumatic brain injury, or may be due to the traumatic brain injury itself. He agreed with Dr. Berzen that Mr. Campbell's delusions were probably also a direct result of the traumatic brain injury sustained on March 5, 1992, but acknowledged that he would defer to a specialist in psychiatry regarding the relationship between Mr. Campbell's psychiatric symptoms and the brain injury.

**198**  Dr. Cameron stated that psychological problems can and often do exacerbate pre-existing symptoms, and that this occurred in Mr. Campbell's case.

**199**  Dr. Cameron also said that the pool accident probably did not cause a traumatic brain injury or concussion, but that it caused a head injury that exacerbated pre-existing headaches for a period of weeks to months, and also exacerbated Mr. Campbell's psychological and cognitive problems.

**200**  Dr. Cameron believes that the head injury sustained during the Hong Kong MVA is the most probable cause of the brain abnormalities revealed in the 1996 MRI. He states that the record reveals no other head injuries that would have resulted in the abnormalities, including the pool accident.

**201**  In Dr. Cameron's opinion, Mr. Campbell's behavioral changes were likely due to frontal lobe dysfunction, due to focal traumatic brain injury sustained at the time of the Hong Kong MVA. Dr. Cameron further opined that Mr. Campbell's disabling psychological dysfunctions were in part due to brain injury from the Hong Kong MVA.

**202**  Dr. Cameron concluded by stating that all of Mr. Campbell's brain injury symptoms:

... have been aggravated and complicated by subsequent psychiatric problems which developed as a result of these original injuries, and the psychological problems as well as the cognitive problems have probably been aggravated and prolonged due to the fact that Mr. Campbell has had to take medications for psychological problems, cognitive problems, and chronic headaches following the accident of March 1992.

**203**  In his testimony at trial, Dr. Cameron elaborated on the cause of brain injuries and their effects. He stated that a mild traumatic brain injury or concussion may produce axonal or nerve disruption. This may occur where a patient is dazed, stunned or unconscious for a short period. In the vast majority of cases, CT and MRI scans will be normal. When a brain injury occurs, bleeding usually happens during the acute phase and develops within a few hours of the injury. However, if the artery is severed, bleeding can be prolonged.

**204**  Dr. Cameron testified that a patient's psychological problems may be due in part to the brain injury and in part to psychological factors. If the patient suffers disruptions and cognitive disabilities shortly after an accident, it is more likely that the psychological problems are the result of a brain injury. Where there is a delay of the onset of these symptoms, the psychological problems may be the result of a psychological reaction to the brain injury.

**205**  Dr. Cameron disagreed with Dr. Berzen's opinion that the 1996 MRI results were equivocal. He ruled out the alternative interpretation, that the noted abnormalities could be associated with aging. In his opinion the MRI report is consistent with hemosederin deposits producing hypodensity lesions, and that these are not changes due to aging. Dr. Cameron testified that if the MRI scan showed such changes in 1996, then one would expect that a subsequent scan would show more of these lesions reflecting the continuation of the normal aging process. However, the next MRI scan in 2002 was normal. In his opinion, this is accounted for by the evolution of the scar tissues that enveloped the brain.

**206**  Dr. Cameron testified that the stress Mr. Campbell experienced as a result of witnessing the sexual assault on his co-worker could have aggravated his pre-existing headaches. Dr. Cameron's opinion is that the Hong Kong MVA and the stress associated with the sexual assault resulted in headaches which increased in severity over the summer of 1992.

1. Dr. Janke -- Forensic Psychiatrist

**207**  Dr. Janke saw Mr. Campbell in December 1998 and February 1999 for the independent medical examination he conducted on behalf of the first Hong Kong defendant's solicitors. In his report dated March 29, 1999, Dr. Janke came to the following conclusion:

It is clear in reviewing the materials that Mr. Campbell's most severe headaches arose in the context of his dismissal from work and in fact were at most moderate in nature following the accident. I know of no mechanism whereby post-traumatic headaches will begin to occur several months post-trauma.

His functioning following the March 1992 MVA is consistent with at most a mild Post-Concussion Syndrome and soft tissue injuries. He subsequently develops depression and severe migrainous headaches related to a very stressful work situation. Again, I am unaware of any mechanism by which we will see a later generation of symptoms such as those from a traumatic brain injury. Rather, what one expects to see is most marked symptoms immediately following the motor vehicle accident with improvements over one to two years.

**208**  In his report, Dr. Janke attributed Mr. Campbell's ongoing problems to the Wellfund stress and the pool incident. Based on his review of Dr. Berzen's medical/legal report of April 8, 1997, Dr. Janke concluded that there had been a marked change in Mr. Campbell's functioning following the pool incident of October 1994. Dr. Janke referred to the neuropsychological testing performed by Dr. Berzen in 1996 and later which showed impairment in Mr. Campbell's short term memory, as well as impairment in verbal generation, verbal naming, and new verbal learning.

**209**  At trial, Dr. Janke testified that in his opinion the impairment of Mr. Campbell's functioning both in the past and up to the time he prepared his report was not the result of the Hong Kong MVA. He testified that the 1996 MRI results were likely the result of the pool accident because of the significant changes experienced by Mr. Campbell after that incident. Dr. Janke did not believe that Mr. Campbell required any treatment related to the Hong Kong MVA.

**210**  When Dr. Janke prepared his report, he was not aware of the very slow speed at which Mr. Campbell was swimming when he struck his head in the pool.

**211**  In cross-examination Dr. Janke agreed that a minor traumatic brain injury can create significant secondary consequences in some cases, and that a previous high performing individual may no longer be able to perform at the same level. However, in his experience, a minor term affect brain injury would not cause depression.

1. Dr. Jones -- Neurologist

**212**  Dr. Jones conducted an independent medical examination of Mr. Campbell, and set out his findings in a report dated February 3, 1999.

**213**  Mr. Campbell told Dr. Jones that he did not think his headaches began in July 1992; rather they changed both in severity and in number. The plaintiff also reported to Dr. Jones that he developed his rage control and disinhibition problems right after the Hong Kong accident.

**214**  Dr. Jones testified that migraines are diagnosed on the basis of information received from the patient. Migraine headaches are severe and disabling and are accompanied by sensitivity to light and noise; nausea and vomiting are usual. Migraines may last anywhere from four to 48 hours. Dr. Jones said that there is no biological marker for migraine headaches.

**215**  Dr. Jones agreed with the other doctors who diagnosed Mr. Campbell as suffering from migraines. He stated that stress is the leading cause of migraines and that "there is no good research evidence to suggest that trauma plays a significant etiological role or a causative role in migraine." He viewed trauma as an aggravating factor in someone who is genetically and biologically prone to developing headaches".

**216**  Dr. Jones opined that when post-traumatic migraine patients do not respond to anti-migraine therapy, one should look for other problems that may be the cause of the migraines, such as medication abuse or depression. As Dr. Jones observed, Mr. Campbell had stress and depression "by the bucket full".

**217**  Dr. Jones believed that Mr. Campbell's head injury was at most moderate and far more likely was mild. Dr. Jones concluded by stating the following:

Two psychiatrists and a psychologist felt he had significant psychiatric problems in the form of depression and furthermore he had been on multiple antidepressants. What apparent "behavioural and cognitive" shortcomings he might have had can be ascribed to his depression that sounded quite profound. He was exceedingly stressed out and there are multiple reasons why he should have been; furthermore he was having a lot of headaches. ... There is no reason to make a diagnosis of "brain damage".

**218**  At trial, Dr. Jones reiterated his belief that there was no evidence of brain injury resulting from the Hong Kong MVA.

**219**  In cross-examination, Dr. Jones agreed that Mr. Campbell's treating neuropsychiatrist, Dr. Berzen, was in a better position to make a diagnosis than he was. He agreed that in order to get a good indication of Mr. Campbell's pre and post accident functioning, one would need to obtain information from collateral witnesses, because a patient with a brain injury may not report reliably.

**220**  Dr. Jones agreed that the magnitude of force experienced by the patient is an indicator of brain damage. In his view, there is no good evidence that a whiplash-type injury alone would produce an axonal shearing injury to the brain. Dr. Jones testified that the patient's head would need to come into contact with a solid object for the brain to sustain damage. Dr. Jones also gave evidence that 85 percent of patients who suffer mild traumatic brain injury will recover with no ongoing damage or symptoms. The remaining 15 percent experience depression, anxiety or other conditions, which in Dr. Jones' opinion can be better explained by either psychosocial issues, such as emotional or psychological issues, or litigation related issues. It is not his experience that people who do not recover from mild traumatic brain injury have lasting brain damage. However, he did not say it could never happen. Dr. Jones acknowledged that Mr. Campbell may have had a brain injury, but that in his opinion that injury had certainly resolved.

**221**  When questioned about post-traumatic "migraine-like" headaches, Dr. Jones said he could accept such a diagnosis if there was a close temporal connection between the traumatic event and the onset of the headaches. He testified that if there is a delay between the traumatic event and the onset of the headaches, then very likely they are actual migraines, unrelated to trauma. Dr. Jones stated that he disagreed with Dr. Robinson's opinion on post-traumatic headaches because, in his opinion, 80 percent of post-traumatic headaches are tension related. He further testified that Mr. Campbell had all the indicia of migraine headaches that are actual migraines, not post-traumatic migraine-like headaches. He stated that migraine-like headaches are characterized by pounding headaches without the other migraine characteristics.

1. Dr. Y.S. Hollander -- Psychiatrist

**222**  Dr. Hollander conducted an independent psychiatric examination of Mr. Campbell for Mr. Creighton, who was then counsel for the defendant City of Vancouver in the pool case.

**223**  In his report dated September 5, 1999, Dr. Hollander reported that Mr. Campbell, in describing the Hong Kong motor vehicle accident, did not remember where in the vehicle he struck his head, did not remember going to the hospital, had no memory of being released, but had a vague memory of yelling at hospital staff.

**224**  Dr. Hollander's general psychiatric diagnoses of Mr. Campbell included a major depressive episode since September 1992 of moderate severity, opioid related disorder with effects on cognition, balance, and speech and "Other Substance-related Disorder not otherwise specified - antidepressants, stimulants, anti-inflammatories, muscle relaxants, and benzodiazepines." Dr. Hollander also diagnosed Mr. Campbell with chronic, severe migrainous type headache since 1992.

**225**  In Dr. Hollander's opinion, the diagnosis of a major depressive episode accounted for Mr. Campbell's cognitive difficulties. In addition, the opioid and substance-related disorders likely contributed to Mr. Campbell's cognitive and speech difficulties. Dr. Hollander also opined that there was insufficient medical evidence to support a diagnosis of traumatic brain injury. Although Johanna Campbell's report of immediate post-accident changes was consistent with head injury, in Dr. Hollander's view, her observations regarding Mr. Campbell's longer-lasting personality changes were also consistent with depression.

**226**  In Dr. Hollander's opinion, while Mr. Campbell's headaches were consistent with head injury, all of his other symptoms were equally consistent with a depressive mood disorder. He regarded the possibility of head injury as the least likely probability and believed that it was more probable that Mr. Campbell had been programmed by his many interviews to respond in particular ways, or that he was consciously manipulating the clinical picture. Dr. Hollander concluded by observing that clinical depression had likely exacerbated Mr. Campbell's chronic pain and that his ongoing severe migraine had likely been an exacerbating factor in his depression.

**CONCLUSIONS ON MEDICAL EVIDENCE AND CAUSATION**

**227**  Mr. Campbell sustained soft tissue injuries to his right knee, chest, and back a all of which resolved within months of the March 5, 1992 motor vehicle accident. His neck pain persisted from the time of the Hong Kong MVA through 1994.

**228**  After the Hong Kong motor vehicle accident, Mr. Campbell suffered from two types of headaches. The first type, which commenced immediately following the accident, were occipital tension headaches which occurred up to twice a day during the spring of 1992, but were less severe than the migraine, or migraine-like headaches which began in July or August, and by August were accompanied by nausea, vomiting and auras. I accept the evidence of Drs. Claman and Kastrukoff that the non-migraine headaches were caused by the Hong Kong motor vehicle accident.

**229**  With respect to Mr. Campbell's severe migraine, or migraine-like headaches, cognitive and memory impairment and mood disorders, the medical experts divide into two camps. One group of doctors, which includes Drs. Birnbaum, Berzen and Gimbarzevsky, believed that Mr. Campbell's severe headaches, cognitive loss and mood disorders were caused by a brain injury suffered in the Hong Kong motor vehicle accident, and that these medical problems were aggravated by his dispute with Wellfund and the pool accident. The second group of medical experts, which includes Drs. Janke and Jones, believes that Mr. Campbell's complex medical problems, excepting some of his headaches, were caused by a severe depression or mood disorder suffered by the plaintiff as a result of the events leading to his dismissal by Wellfund, and the subsequent multiple stressors in his life, including his descent into poverty, and the diagnosis of terminal cancer.

**230**  Analysis of the medical evidence is complicated by the fact that Mr. Campbell gave inconsistent accounts of his symptoms to the various doctors who treated or examined him. Whether intentionally or unintentionally, Mr. Campbell had a tendency to change his story to suit the particular claim he was pursuing at the time of his examination. Different doctors received different information from Mr. Campbell. The result was that in some cases the doctors were not aware of relevant information communicated to other physicians by the plaintiff.

**231**  For example, Mr. Campbell told Dr. Claman that his father had suffered from migraines starting in middle age, suggesting a genetic pre-disposition to migraines. The plaintiff told Dr. Kastrukoff that he occasionally suffered from headaches prior to the Hong Kong motor vehicle accident but did not reveal a family history of migraines. Dr. Kastrukoff refers in his reports to Mr. Campbell's family medical history as being unremarkable.

**232**  The Queen Mary Hospital record indicates that Mr. Campbell reported that he lost consciousness for one to two minutes following the Hong Kong motor vehicle accident. Mr. Campbell told Dr. Birnbaum that he had lost consciousness for a few minutes. Dr. Robinson recorded that Mr. Campbell thought that he was unconscious for 15 to 20 minutes.

**233**  The evidence is clear that Mr. Campbell did not suffer from migraines or migraine-like headaches before the 1992 motor vehicle accident. Dr. Berzen reviewed Mr. Campbell's father's medical records and found no evidence that he had suffered from migraines.

**234**  As Dr. Berzen testified, an individual may suffer a mild traumatic brain injury without visible evidence of trauma to the head. Mr. Campbell did strike the right side of his head on the taxi window or door frame, and was subsequently thrown forward into the front passenger's side compartment. There is no record of him sustaining any visible head injury in either of the perfunctory records provided by the Hong Kong hospitals, or in Dr. Birnbaum's records.

**235**  I find that Mr. Campbell did lose consciousness for a brief period following the Hong Kong motor vehicle accident, probably for one to two minutes, possibly for several minutes. In the statement he gave to the Hong Kong police within hours of the accident, Mr. Campbell reported that the taxi driver woke him up, because he was unconscious. Mr. Campbell's recollection of speaking with the driver of the other vehicle shortly after the accident strongly suggests that he was unconscious for considerably less than 15 to 20 minutes. When Mr. Campbell saw Dr. Birnbaum on March 25, 1992, about three weeks after the accident, he reported that he had lost consciousness for a few minutes.

**236**  Following the Hong Kong motor vehicle accident, Mr. Campbell suffered from two different types of headaches. The first were tension headaches and the second were migraines, or migraine-like headaches. There is a conflict in the evidence about whether the migraine headaches began shortly after the Hong Kong motor vehicle accident or during Mr. Campbell's employment dispute with Wellfund, which began in July 1992. The tension headaches began immediately following the Hong Kong motor vehicle accident, but according to Dr. Robinson, were not severe. The migraine or migraine-like headaches were severe, afflicted Mr. Campbell for the remainder of his life, and were largely resistant to treatment. The medical experts agree that Mr. Campbell suffered from severe migraine or migraine-like headaches since August 1992 but disagree on whether the Hong Kong motor vehicle accident caused these headaches. The medical experts do agree that the stress arising from Mr. Campbell's employment dispute with Wellfund during the period July to November 1992, if it did not cause the migraines, increased their frequency and severity.

**237**  The dispute respecting the timing of the onset of the migraine, or migraine-like headaches originates from Mr. Campbell's inconsistent reporting to the various doctors. Between 1993 and 1995, Mr. Campbell told the doctors that his migraines started at the time of the Wellfund dispute, beginning in July 1992. The Wellfund litigation concluded with the judgment in Mr. Campbell's favour released in September 1995. Thereafter, Mr. Campbell saw various specialists in relation to the pool accident litigation. Mr. Campbell told Dr. Gimbarzevsky and Dr. Jones that he had suffered from migraines with aura, nausea, and vomiting before his dispute with Wellfund, and that the stress of his employment problems only made these headaches more frequent and severe. That information conflicted with his previous accounts of his headaches to Drs. Birnbaum, Kastrukoff, Claman and Robinson.

**238**  The only clinical note made by a physician regarding Mr. Campbell's headaches between March and July 1992 is the note made by Dr. Birnbaum on June 4, 1992 in which Mr. Campbell reported "left shoulder pain, occipital headache and tenderness". That note supports the existence of tension headaches rather than migraine headaches at that time. In September 1992, Dr. Birnbaum made the following notes:

September 4, 1992, occipital headaches continue and seems to have been precipitated post Hong Kong MVA ... recent visual auras with headaches.

September 10, 1992 While in movie, up-chuck in WC x2. Episodes just before (illegible) right-sided headache.

September 18, 1992, Luvox (antidepressant) helped his sleep "but not the headaches".

**239**  These September notes support the theory that Mr. Campbell suffered from occipital or tension headaches from the time of the 1992 motor vehicle accident, but that the migraine or migraine-like headaches probably did not begin until July or August 1992, as Mr. Campbell originally reported to his physicians.

**240**  The timing of the onset of the migraine headaches bears upon the question of whether Mr. Campbell's migraines, or migraine-like headaches were caused by a brain injury suffered during the Hong Kong motor vehicle accident, or whether these headaches were triggered by a subsequent stress-induced psychological disorder unrelated to the brain injury. If the migraines began immediately following the Hong Kong accident and were later aggravated by the Wellfund dispute and other stressors, then these headaches would probably be post-traumatic, resulting from a brain injury. However, if the migraines did not begin until July or August of 1992, their onset may have been triggered by psychiatric factors and stress unrelated to the Hong Kong accident.

**241**  The physicians who maintain that Mr. Campbell's severe headaches and other persistent complaints were not attributable to a brain injury suffered in the Hong Kong motor vehicle accident contend that if Mr. Campbell's injuries were the result of a brain injury, then his symptoms should not be significantly affected by external events. If, for example, Mr. Campbell's cognitive and memory problems resulted from a brain injury, he should not have experienced improvement from external factors, including treatment by antidepressants. Mr. Campbell's cognitive and memory problems do appear to have been affected by his mood which at various times was improved temporarily by treatment with antidepressants, or by the elimination or reduction of stressors. However, Dr. Berzen reported that while treatment with an antidepressant appeared to improve Mr. Campbell's subjective mood state, and kept his depression in remission for much of 1996 and 1997, there was no significant improvement in his cognitive functioning.

**242**  There is considerable uncertainty in the medical evidence about whether Mr. Campbell's headaches caused or contributed to his depression, or whether the depression caused the headaches. However, there does appear to be a consensus among the doctors that whether stress or brain injury initially caused the migraines, depression and mood disorder, over time the headaches and depression became mutually reinforcing.

**243**  The medical experts also differ on whether and to what extent Mr. Campbell suffered cognitive impairment. Dr. Schmidt and Dr. Hollander, who examined Mr. Campbell for the defendant in the pool case, suggest that Mr. Campbell had a chronic depressive disorder, which together with the array of antidepressants and narcotics Mr. Campbell took, explained his cognitive, memory, and behavioural disorders. Dr. Hollander suggested that during his examination, Mr. Campbell attempted to demonstrate symptoms consistent with a head injury.

**244**  According to Dr. Schmidt, the disruption of Mr. Campbell's ability to cope adaptively with the demands of life was attributable at least in part to the motor vehicle accident. Furthermore, Mr. Campbell's cognitive deficits after the motor vehicle accident were a significant contributing factor to his deterioration. Some of his depression was due to the mild traumatic brain injury he sustained in the Hong Kong MVA. Dr. Schmidt believed that the pool incident was unlikely to have had any major impact and that the Hong Kong MVA may have made Mr. Campbell more susceptible to impacts of stress related to the deterioration and termination of his employment relationship with Wellfund. Dr. Schmidt described the mild traumatic brain injury sustained by Mr. Campbell in the Hong Kong MVA as "the spark that started the fire".

**245**  I find on the balance of probabilities that Mr. Campbell did suffer a mild traumatic brain injury in the Hong Kong motor vehicle accident. The 1996 MRI is consistent with the plaintiff having sustained a traumatic head injury. The Hong Kong motor vehicle accident, which involved his taxi being struck broadside by another vehicle travelling at a speed of between 40 and 45 kilometres an hour, causing Mr. Campbell to strike his head against the window or door frame of the taxi before being thrown forward into the front passenger wheel-well, is the most likely cause of that head injury.

**246**  The plaintiff's brief loss of consciousness following the Hong Kong motor vehicle accident is also an indicator of a mild traumatic brain injury sustained at that time.

**247**  It is unlikely that the evidence of previous head trauma detected in the 1996 MRI is associated with any of the three relatively minor motor vehicle accidents in which Mr. Campbell was involved in 1989, 1990 and 1991. With respect to the May 1991 accident, Mr. Campbell made no complaint of headaches or head injuries associated with that accident. In the case of all three accidents, all of Mr. Campbell's symptoms including his complaints of headaches associated with the first two accidents, all resolved within weeks of each accident.

**248**  Although Mr. Campbell informed some of the physicians who examined him that there was a family history of migraines, that is not borne out by Dr. Berzen's evidence regarding the results of his examination of Mr. Campbell's father's medical file. Dr. Robinson, who specializes in the treatment of headaches, testified that although such cases are rare, on occasion, a brain injury may trigger migraine-like headaches. There is no evidence that Mr. Campbell suffered from migraine headaches prior to the Hong Kong motor vehicle accident.

**249**  I am not persuaded that depression, brought on by the stress of the Wellfund dispute, was the sole cause of Mr. Campbell's migraine or migraine-like headaches. Those headaches afflicted Mr. Campbell for the rest of his life and proved to be intractable to all forms of treatment, including treatments with antidepressants that provided some relief to Mr. Campbell from his depression and mood disorders. That suggests that the migraine-like headaches had their source in a cause independent of his depression. I accept Dr. Robinson's opinion that Mr. Campbell's migraine-like headaches were triggered by trauma and resulted from the brain injury sustained in the Hong Kong motor vehicle accident. Those headaches were then rendered more severe by the stress of the Wellfund dispute. In preferring Dr. Robinson's evidence to that of Dr. Jones, I take into account his extensive experience in the treatment of headaches, and his evidence he had encountered cases in his practice where the onset of migraine-like headaches following trauma was delayed.

**250**  I also accept Dr. Schmidt's evidence that some of Mr. Campbell's depression was attributable to his brain injury, and flowed from the deterioration of his capacity to cope adaptively with the demands of life following the Hong Kong MVA. There is collateral evidence which, when considered as a whole, shows that the Hong Kong MVA produced some disruption to Mr. Campbell's ability to cope with the care of his daughters, and was a cause of the deterioration of his cognitive functioning.

**Collateral evidence and some credibility issues**

**251**  Ms. Johanna Campbell testified in chief that her father's behaviour changed following his return from Hong Kong. Where previously Mr. Campbell had been outgoing and involved in his daughter's lives, he became withdrawn, prone to outbursts of rage, and suffered from severe headaches and rapid mood swings. In cross-examination, Ms. Campbell testified that she was not able to recall whether her father's angry outbursts began right after his return from Hong Kong or during the summer of 1992. Nor could she say exactly when her father's headaches started.

**252**  During the trial of this action, Mr. Campbell denied having a "short fuse" before the Hong Kong MVA and denied any violent behaviour toward his first wife, Donella, during their marriage. Johanna Campbell testified that her father had a "quick temper" and a "short fuse" prior to the 1992 accident and that he occasionally displayed excessive anger. At the pool trial, Johanna Campbell testified that before 1990, Mr. Campbell had threatened to kill her mother, and on occasion, had assaulted her mother. At the pool trial, Mr. Campbell acknowledged that during the breakdown of his first marriage, there were occasions when he threw things and yelled at his wife, and said that at the heat of the moment, he may well have told his wife that he would kill her. Johanna Campbell also testified that before the Hong Kong MVA her father also when frustrated by the lack of success in house-training the family dog, would react with disproportionate anger. Mr. Campbell clearly had some difficulties with anger management prior to the Hong Kong MVA, however the frequency of his outbursts of rage increased following the Hong Kong MVA, and again during and after his dispute with Wellfund.

**253**  The plaintiff also called Mr. Campbell's younger daughter, Jenny Campbell She testified that upon Mr. Campbell's return from Hong Kong, he started to have headaches, was angry and nervous about his work. She confirmed that it was shortly after Mr. Campbell's return from Hong Kong following the motor vehicle accident that he told her that Chinese agents were pursuing him. Jenny Campbell testified that her father gave her a $1,000 bill to keep in her sock so that if anything happened to him, she could use the money to support herself.

**254**  In cross-examination, Jenny Campbell agreed that her father continued working during March, April and May of 1992.

**255**  There are inconsistencies in Mr. Campbell's evidence concerning his capacity to work following the Hong Kong MVA. Mr. Campbell testified that after the accident he had "horrible times" with his concentration, meeting deadlines, and forgetting information. Despite these complaints, Mr. Campbell acknowledged in cross-examination that between April 1 and early June 1992, he negotiated with two banks for a $10 million operating line of credit for Wellfund, negotiated bridge financing, sourced materials in Asia required for his employer's manufacturing plant in Richmond and dealt with Revenue Canada on behalf of Wellfund. Dr. Birnbaum's clinical notes at this period make no reference to the plaintiff having difficulties at work as a result of injuries sustained in the Hong Kong MVA. Mr. Campbell informed Dr. Robinson that he did not lose any time from work following the Hong Kong MVA.

**256**  During the pool trial, Mr. Campbell held up his performance in delivering his speech at the Wellfund ground-breaking ceremony as a model of his eloquence and interpersonal skills before he suffered the damage he then attributed to the pool incident. At the trial of this action Mr. Campbell testified that his cognitive functioning was impaired, and that he suffered from severe headaches and vomiting at the Wellfund ground-breaking ceremony. That evidence is difficult to reconcile with the plaintiff's testimony at the pool trial. The plaintiff's focus had shifted at the trial of this action to the injuries sustained in the Hong Kong MVA. The plaintiff's account of his condition at the Wellfund ground-breaking ceremony is not supported by the testimony of his friend Mr. Stewart Duncan, who attended the event, and described Mr. Campbell as "perfectly normal" on that occasion.

**257**  I find that the inconsistencies in Mr. Campbell's evidence regarding his condition at the Wellfund ground-breaking ceremony render his testimony about that event unreliable. The passage of time since 1992, the plaintiff's cognitive impairment, his heavy use of medications, and his obsessive tendency to attribute the cause of his complaints to the particular defendants against whom he was litigating at any given time all likely contributed to the distortion of the plaintiff's recollection of this event.

**258**  During the trial of this action, Mr. Campbell denied that he had the creative and thinking skills necessary to complete his novel "*China's Terror*" after the Hong Kong motor vehicle accident. The plaintiff testified that he attempted to re-write material he had written before the Hong Kong MVA and suggested that the poor quality of his work prevented him from finding a publisher for the novel.

**259**  During the pool trial, Mr. Campbell claimed that in order to write *China's Terror* after the Hong Kong MVA, he had to retain and digest the same amount of material that he had done in the 1980s. Again, the plaintiff's evidence at the trial of this action contradicts his testimony at the pool trial.

**260**  The collateral evidence of Mr. Larry Belkin, a long-time friend of Mr. Campbell, does support a finding that the degeneration in the plaintiff's cognitive functioning began following the Hong Kong MVA and continued during and after the Wellfund dispute. Mr. Belkin knew Mr. Campbell from the time they were students in grade eight, attended university with him, and was a co-founder and financial supporter of the Canadian Conservative Institute. Mr Belkin described the plaintiff as a prolific writer and a dynamic speaker who, prior to the Hong Kong accident, had a close relationship with his two daughters.

**261**  Mr. Belkin recalled a telephone conversation with Mr. Campbell within a day or so of his return to Hong Kong in which he told Mr. Belkin about the Hong Kong accident and referred to headaches and a knee injury. He also recalled a conversation in which Mr. Campbell had expressed concern about how well he would do in giving his speech at the ground-breaking ceremony for the Wellfund factory in Richmond. In cross-examination, Mr. Belkin was adamant that during a telephone conversation with Mr. Campbell at the end of May 1992, he noted a degeneration in Mr. Campbell's thought processes. He said that about two or three months after the Hong Kong accident and continuing into the summer of 1992, Mr. Campbell seemed to be a different person. Mr. Belkin testified that Mr. Campbell said things that did not make sense and had developed delusions that the Chinese were out to get him.

**262**  According to Mr. Belkin, Mr. Campbell had been working on his novel, *China's Terror*, before the Hong Kong accident. Following the accident, Mr. Belkin encouraged the plaintiff to try to work on the novel. When Mr. Belkin visited Mr. Campbell in Vancouver in 1993, he was attempting to work on the novel, but was disorganized, and suffering from severe headaches. Mr. Belkin testified that Mr. Campbell sent him drafts of portions of the book, and that he attempted to "clean up" what Mr. Campbell had written. Mr. Belkin testified that the final product was not very good.

**263**  While Mr. Campbell wrote or attempted to edit several hundred pages of "China Terror" after the Hong Kong MVA, he never found a publisher for the novel.

**264**  I find that Mr. Belkin's evidence supports the plaintiff's claim that following the Hong Kong MVA and before the Wellfund dispute he began to suffer some impairment of his cognitive functioning. Although Mr. Campbell managed to cope with the demands of his work for Wellfund from March through June of 1992, his home life was beginning to unravel as his relationship with his daughters deteriorated, and he experienced delusions.

**265**  Jenny Campbell maintained that her father's paranoia started after the Hong Kong motor vehicle accident, and testified that she did not recall it becoming worse in the summer of 1992, after the harassment of the female Wellfund employee. Jenny Campbell remembered that her father had started the novel *China Terror* before the Hong Kong motor vehicle accident. She testified that after the accident, Mr. Campbell became obsessed with the novel, and was convinced that God was telling him what to write.

**266**  I recognize that Jenny Campbell's evidence must be assessed with some care. As the plaintiff's daughter, she may consciously, or unconsciously, have had a desire to assist her father in the presentation of his case. In her cross-examination, Jenny Campbell tended to downplay the impact of the Wellfund incident on her father. Nonetheless, Ms. Campbell's evidence concerning her father's delusional behaviour upon his return from Hong Kong is consistent with the evidence of Lisa Dewar, who testified about Mr. Campbell reporting his encounter with a Chinese agent and then enlisting the assistance of her father-in-law, who was a CSIS employee, in March, 1992. Ms. Dewar described Mr. Campbell as not being rational or logical when he told her and her husband about the Chinese agent in the back of his car, and asked for their help in contacting her father-in-law.

**267**  Jenny Campbell's testimony provides collateral evidence that Mr. Campbell began to suffer from delusions following the Hong Kong motor vehicle accident and provides additional support for the conclusion that her father sustained a mild traumatic brain injury in that accident.

**268**  The onset in March 1992 of Mr. Campbell's delusion that he was being pursued by Chinese agents is consistent with him having sustained a brain injury in the Hong Kong motor vehicle accident, according to Drs. Berzen and Claman.

**269**  The delusion that he was being pursued by Chinese agents was a significant stressor in Mr. Campbell's life well before the outbreak of his dispute with Wellfund.

**270**  There was a significant deterioration in Mr. Campbell's cognitive functioning following his dispute with Wellfund, and the termination of his employment in November 1992. The stress associated with the Wellfund dispute undoubtedly compounded Mr. Campbell's depression and contributed significantly to the deterioration in his cognitive abilities.

**271**  The finding of Dr. Piper that the medical imagery he examined showed that Mr. Campbell had sustained an odontoid fracture is also consistent with the plaintiff having suffered a significant injury to his neck and head, and with the plaintiff's complaint of severe neck pain immediately following the Hong Kong MVA. The most likely cause of that injury is the Hong Kong MVA. The" T-bone" collision between two moving motor vehicles, in which Mr. Campbell struck his head on a hard surface, is a more likely cause of the odontoid fracture than the pool accident, where the plaintiff, swimming slowly, bumped his head on the pool ladder.

**272**  To summarize, I conclude that Mr. Campbell suffered a mild traumatic brain injury in the Hong Kong MVA and that injury was a cause at the onset of migraine-like headaches in July 1992. The stress of the Wellfund dispute played a major role and increased the severity of those headaches over the summer and fall of 1992. The Hong Kong motor vehicle accident and the Wellfund dispute each played a role in the development of Mr. Campbell's severe and disabling migraine headaches. Similarly, Mr. Campbell's loss of cognitive functions, depression and mood disorders were due in part to the mild traumatic brain injury sustained in the Hong Kong motor vehicle accident but were aggravated by the stress of the Wellfund dispute. As Dr. Cameron opined, Mr. Campbell's brain injury symptoms were aggravated by psychiatric problems and as time went on, his psychiatric problems and cognitive difficulty were aggravated and prolonged by the effects of his multiple medications.

**Hong Kong Law on Causation, Successive Torts and *Novus Actus***

**273**  In *Lee Kin Kai v. Ocean Tramping Co.* [1991] 2 HKLR 232, the Hong Kong Court of Appeal stated the following principles relating to the judicial determination of a causal connection between an accident and a plaintiff's injuries at p. 5:

... First causation is essentially a matter for the judge not for the doctors. It is a matter upon which the judge will no doubt be assisted by the medical evidence but he is not dictated to buy it. Secondly, it is important to bear in mind that the law in medicine here, it seems to me, apply quite different standards. In law there is a sufficient causal connection if it is shown on the balance of probabilities that the accident was a substantially contributing cause of the injury. A cause is sufficient; it need not be shown to be the sole cause. ...

Thirdly, a judge when considering causation is not only entitled, he is bound, to use his common sense, to approach the question in the same way as would a juror. ...

**274**  *Shum Ting Yuk v. Lam Kam Luen and Another* [1995] HKCFI 351 concerned a motor vehicle accident in which the plaintiff, a young woman, suffered injuries including a significant but not severe head injury which the court found had healed completely within a relatively short time, a back injury resulting in permanent disability and facial scarring. At p. 6, the court found that the plaintiff's difficulties were "exaggerated and exacerbated" to a marked degree by her psychological problems which included severe depression. The plaintiff became obsessed that one of her main assets, her appearance, had suffered as a result of the scarring she sustained in the accident. This led to the onset of depression which the court found was aggravated by subsequent events. At pp. 7-8, the court held:

I accept that, on the authority of *Jobling v. Associated Dairies* [1981] 3 W.L.R. 155, if a supervening illness totally unconnected with the accident renders the Plaintiff disabled, then this cannot be disregarded in assessing general damages for pain, suffering and loss of amenities, and any loss of earnings would only fall to be awarded up to the date of the supervening illness. Equally, where there are a number of possible causes of an illness or disability, only one of which the Defendant is liable for, and the Plaintiff cannot prove the causative link between the Defendant's ***negligence*** and the disability, the Plaintiff must fail in seeking damages for that disability (*Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871). However, the medical evidence here clearly points to the accident as being the prime cause of the Plaintiff's depression, whether as a result of the trauma itself, or the results of the injuries and the fear of the Plaintiff of the consequences. While there are a number of events which might have' triggered that depression if the accident had not occurred, and it does appear that the Plaintiff was a young lady of fragile mental balance, the fact remains that it was the accident which triggered it, and the subsequent events aggravated it to the extent that, as the doctors largely agreed, she became totally unemployable until the condition should be successfully treated.

I am accordingly satisfied on the evidence that the Plaintiff's present condition is solely attributable to the accident and therefore to the ***negligence*** of the Defendant. Each of the physical injuries on their own would not have been extremely serious. Indeed, without the mental problems, the Plaintiff would probably have made a substantial recovery and returned to work some time ago, albeit with some continuing loss of earning capacity. The depression added to the other injuries has, however, as Dr. Choa concedes in his report, made her presently incapable of work at all.

**275**  An example of a case where a Hong Kong court applied *novus actus interveniens* to limit a defendant's liability is *Yu Yun v. Attorney General* [1990] HKCFI 189. This was a medical malpractice action. There, when the plaintiff underwent surgery, a surgical pad was left inside her abdomen. Twenty years elapsed before the pad was first detected and then removed by another operation. After the first operation, the plaintiff sought medical assistance for abdominal pain from a Dr. Wong, who was not a party to the original ***negligence***. However, Dr. Wong twice failed to identify the surgical pad and have it removed when he examined chest and spinal x-rays of the plaintiff taken in 1975 and 1982. With respect to Dr. Wong's first failure to detect the surgical pad, the court found that the alleged ***negligence*** was not sufficient to break the chain of causation:

While this mistake or miscalculation by Dr. Wong may be considered unreasonable, rather than a mere innocent mistake, it cannot said to be so improbable or unforeseeable that the Defendant as the original wrongdoer can escape responsibility on the basis of foreseeability. Furthermore, Dr. Wong's conduct cannot be considered sufficiently unreasonable that it gives rise to an intervening act or *novus actus interveniens*.

**276**  However, the court found that Dr. Wong's second failure, seven years later, to detect the surgical pad constituted ***negligence*** that amounted to a *novus actus interveniens*. The plaintiff's damages for pain, suffering and loss of amenities against the surgeon who had performed the original operation were reduced for the period of five years between Dr. Wong's ***negligence*** and the ultimate removal of the surgical pad.

**277**  *Yu Yun* applied the principle where an injury is divisible each defendant is liable for the damage that they have caused. In *Yu Yun*, if Dr. Wong had detected and removed the surgical sponge, the plaintiff's suffering would have ceased.

**278**  It is likely that the same result would have followed in Canada. In *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), the Court held that the usual rule in a case of divisible injuries is to make each defendant liable only for the damage they caused.

**279**  In *Yu Yun*, at para. 33, the Court adopted the following passage from the speech of Lord Wright in *The Oropesa* that was cited by Lord Justice Stevenson in *Knightley v. John* [1982] 1 W.R. 349:

To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic.

**280**  Thus, under Hong Kong law, the intervening event or cause must disturb the sequence of events set in motion by the original cause of the plaintiff's injury or loss.

**281**  In *Madam Ho Hing Mui v. Attorney General and others*, [1981] HCA 4321, a surgical sponge was left inside the plaintiff, after she had given birth by caesarean section. When the plaintiff returned to have the surgical sponge removed, she left it to her surgeon to decide whether her uterus should be removed. The surgeon removed the uterus during surgery. The defendants denied liability for any damages suffered by the plaintiff stemming from the removal of the uterus. The court held that if the hysterectomy was performed negligently, it would constitute a *novus actus interveniens*. However, if the operation was not performed negligently, then the further damage was not merely foreseeable but was a natural and probable consequence of the original wrong. The Hong Kong Court of Appeal held that the original defendant was liable and rejected the defence of *novus actus*:

It is trite to observe that a plainly unnecessary operation will, in some (perhaps most) circumstances, break the chain of causation and so excuse the original wrongdoer from responsibility for its consequences, as being improbable and unforeseeable, but it seems to me an operation and its consequences cannot be relied upon as *novus actus* if it was performed as a result of a reasonable (even if possibly mistaken) decision, for such treatment is very much a natural consequence of the wrongdoing.

**282**  In *Wai Yan Wa v. Laminate Enterprises Ltd.*, [1999] HKCFI 1225, the plaintiff suffered a crushed hand in an industrial accident, which was subsequently complicated by herbal treatment. The Court, at p. 6, adopted the following passage from Munkman on *Damages for Personal Injuries and Death*, 10th ed.:

In general, if the original damage has left the plaintiff exposed to risks of misfortune, misjudgment or accident which would not otherwise have risen, further damage from the materialization of these risks may be recoverable, unless it was wholly due to the ***negligence*** or deliberate act of the plaintiff or a third party (at p. 27).

**283**  Even though the court found that a reasonable inference could be drawn that the herbalist was negligent in treating the plaintiff, the court was satisfied that the nature of the subsequent medical mistreatment did not amount to a new intervening event. The court found that the chain of causation was not broken and declined to apportion damages. The original defendant was liable for all damages caused by its ***negligence***.

**284**  In *Tsoi Wing Kwok v. Secretary for Justice*, [2002] HKCFI 1056 at para. 33, the Court adopted the following passage from *Clerk & Lindsell on Torts* (18th ed.) that "no precise or consistent test can be offered to define when the intervening conduct of a third party will constitute a *novus actus interveniens*" and the question of the effect of a *novus actus* can only be answered on a consideration of all the circumstances and, in particular, the quality of that latter act or event."

**285**  The Hong Kong courts have treated English jurisprudence as persuasive authority following the transfer of sovereignty in 1997. Under English case law, in a case of indivisible damages and concurrent torts, the plaintiff is entitled to recover in full from any defendant who has made a material contribution to that damage. However, where the causes of damage are divisible a plaintiff is only entitled to recover that measure of damages for which each individual defendant is responsible: *Holtby v. Bringham & Cowan (Hull) Ltd.* [2000] EWCA Civ. 111 at para. 20. In *Holtby*, at para 17, the court observed that "where causes are sequential in time, it is not likely that an injury will be truly indivisible".

**286**  In *Rahman v. Arearose Ltd. & Anor*, [2000] EWCA Civ. 190 the English Court of Appeal analyzed causation in a case of successive torts and divisible psychiatric injuries.

**287**  In *Rahman*, the plaintiff was the manager of a fast food restaurant where he was assaulted by two black males while at work. The defendant employer was aware of the danger of assaults upon its employees, and was held liable for failing to take steps to ensure the safety of the plaintiff. During the assault, one of the attackers struck the plaintiff in the eye while wearing a ring. The plaintiff was required to undergo eye surgery and the operating surgeon negligently caused the loss of the plaintiff's eye. In addition to the loss of the use of that eye, the plaintiff suffered various psychiatric disorders.

**288**  All of the medical experts in *Rahman* agreed that the plaintiff suffered post-traumatic stress disorder, a severe depressive disorder of psychotic intensity, a specific phobia of black people, and enduring personality change. The experts agreed that the post-traumatic stress disorder was largely due to the assault, although some symptoms were also related to the operation, and that the plaintiff's severe depressive disorder was largely a psychological reaction to the loss of the eye. The experts attributed the plaintiff's phobia of black people to the assault and thought that the plaintiff's enduring personality change was due to the synergistic effect of the depression and the post-traumatic stress disorder, and probably would not have developed if Mr. Rahman had not lost his vision in one eye.

**289**  The court began its analysis by stating at para. 17 that tortfeasors were concurrent when their wrongful acts or omissions caused a single indivisible injury. In such cases, each tortfeasor is liable to compensate the claimant for the whole of the injury. At para. 19, the court referred to a "single indivisible injury" as "a shorthand description of a case where there is simply no rational basis for an objective apportionment of causative responsibility for the injury between two tortfeasors".

**290**  At para. 24, the court observed that on the medical evidence it was "plain beyond doubt" that neither tort caused the whole of the plaintiff's psychological deficit. The respective torts caused distinct aspects of the plaintiff's overall psychiatric condition. Thus neither defendant caused the whole of the damage suffered by the plaintiff.

**291**  In the course of assessing damages for which the employer was liable, Lord Justice Laws held at para. 26:

The question for the court is, and is only, what would the position have been if there had been no second tort ...

**292**  Lord Justice Laws said this at para. 33:

*Novus actus interveniens*, the eggshell skull, and (in case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered.

**293**  After referring to the trial judge's finding that the effects of each tort had a synergistic interaction, Lord Justice Laws continued at para. 34:

Once one leaves behind, as for reasons I have given one should, the dogmas of *novus actus* and eggshell skulls, there is nothing in the way of a sensible finding that while the second defendants obviously (and exclusively) caused the right eye blindness, thereafter each tort had its part to play in the claimant's suffering. [Emphasis added.]

**294**  The insurers for the surgeon conceded liability for the physical effects of the negligent operation but denied liability for the plaintiff's psychiatric injuries. At paras. 35-36, Lord Justice Laws upheld the apportionment of the psychiatric damages between the two defendants at 75% to the second defendant and 25% to the first defendant.

**295**  In *Sutherland v. Hatton*, [2002] EWCA Civ 76, the Court of Appeal reviewed the principles for determining causation in the course of hearing four appeals by employers against findings of liability in ***negligence*** for employees' psychiatric illness caused by workplace stress. At para. 35, the court held that the employee did not have to show that the employer's breach of duty was the whole cause of his ill-health: it was enough to show that it made a material contribution. At para. 36, after observing that many stress-related illnesses are likely to have a complex aetiology with several different causes, the court held that in principle the wrongdoer should pay only for the proportion of the harm suffered for which he, by his wrongdoing, was responsible. However, if the harm is truly indivisible, a tortfeasor who has made a material contribution is liable for the whole, although he may be able to seek contribution from other joint or concurrent tortfeasors who have also contributed to the injury (at para. 37).

**296**  In *Sutherland* at para. 41, the court held that:

... if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. ...

**297**  The court in *Sutherland* referred to *Rahman* as an example of the apportionment of psychiatric injuries suffered by a primary victim between different tortfeasors:

Neither tort caused the whole injury, some was caused mainly by one, some mainly by the other, and some by their combined effect. Neither tortfeasor would have been held liable for the whole.

At para. 43(15), the court reiterated that where the harm suffered has more than one cause, the defendant should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible.

**298**  In *Allen v. British Rail Engineering Ltd.*, [2001] EWCA 242, another case involving the determination of an employer's liability for occupational injuries, Lord Justice Schiemann, for the court, summarized the principles for determining liability and quantifying damages in the following terms:

1. In our judgment the case law as it now stands establishes five propositions of which the first is concerned with liability and the others with quantifying damages.
2. The employee will establish liability if he can prove that the employer's tortious conduct made a material contribution to the employee's disability.
3. There can be cases where the state of the evidence is such that it is just to recognize each of two separate tortfeasors as having caused the whole of the damage of which the claimant complains; for instance where a passenger is killed as the result of a head on collision between two cars each of which was negligently driven and in one of which he was sitting.
4. However in principle the amount of the employer's liability will be limited to the extent of the contribution which his tortious conduct made to the employee's disability.
5. The court must do the best it can on the evidence to make the apportionment and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct.
6. The amount of evidence which should be called to enable a judge to make a just apportionment must be proportionate to the amount at stake and the uncertainties which are inherent in making any award of damages for personal injury.

**299**  In a case of successive torts and divisible injuries, English and Hong Kong courts will apportion liability to give effect to the principle that the amount of a defendant's liability should be restricted to the extent that his tortious conduct contributed to the plaintiff's injuries.

**300**  In this case, the soft tissue injuries to Mr. Campbell's foot, knee, chest and neck are indivisible and are solely attributable to the Hong Kong MVA. I have also found that Mr. Campbell sustained a mild traumatic brain injury in the Hong Kong MVA, and that Mr. Campbell's migraine-like headaches were triggered by that trauma. However, those headaches were then rendered more severe by the stress of the Wellfund dispute. Neither the Hong Kong motor vehicle accident nor the Wellfund dispute were sufficient causes of Mr. Campbell's severe and disabling migraine headaches - each tort played a role in the development and life-long duration of Mr. Campbell's severe and disabling migraine headaches. I have also found that Mr. Campbell's depression and cognitive decline were due in part to his mild traumatic brain injury but were aggravated by the stress of the Wellfund dispute.

**301**  This case is analogous to *Rahman*, where neither tort caused the whole injury, and where as a result of a "synergistic interaction" between the effects of each tort, both torts continued to contribute to the plaintiff's suffering. Taking into account the role of the brain injury in triggering Mr. Campbell's migraine-like headaches, and its role as a cause of Mr. Campbell's depression and cognitive dysfunction, but balancing against that the significant role of the Wellfund dispute in increasing the severity of the plaintiff's headaches, depression and cognitive disorders, I would apportion 50 percent of liability to the Hong Kong motor vehicle accident, and 50 percent to Wellfund.

**302**  I think it likely that a Hong Kong court hearing this case at the notional trial date of January 1998, and applying common sense would have come to the same conclusion as Sigurdson J. in the pool case - that Mr. Campbell was swimming too slowly to have suffered a brain injury in the pool incident. I find that the pool incident was not a *novus actus interveniens*, and did not cause or contribute to Mr. Campbell's head injury, debilitating headaches, depression, mood disorders or cognitive deficit.

**303**  In short, Mr. Campbell's disabling migraine-like headaches, depressive symptoms and cognitive impairment were caused by the combination of the mild traumatic brain injury he sustained in the Hong Kong accident and the severe stress he experienced during the Wellfund incident. Both factors were necessary and neither was independently sufficient to cause the loss and damage suffered by Mr. Campbell.

**Assessment of Mr. Campbell's Damages sustained in the Hong Kong MVA**

Pain, Suffering and Loss of Amenities (PSLA)

**304**  Mr. Campbell suffered soft tissue injuries to his foot and chest which resolved within about one month of the accident. In addition, he suffered injuries to his knee which continued to cause pain for some months following the accident. the plaintiff experienced neck pain, at times severe, for a couple of years following the Hong Kong MVA. The plaintiff's milder occipital tension headaches had resolved by April or May of 1992. However, his severe post-traumatic migraine-like headaches, accompanied by vomiting and nausea, proved largely intractable to treatment and continued for the duration of his life. As a result of his use of prescribed narcotic pain killers, Mr. Campbell suffered a narcotic addition to Butorphanol.

**305**  In addition, Mr. Campbell suffered a mild traumatic brain injury in the Hong Kong MVA, accompanied by post-traumatic delusions, which began around March 11, 1992 and continued intermittently through 1995. The Hong Kong MVA also contributed to Mr. Campbell's depression and the deterioration of his relationship with his daughters. Although there were occasions before the Hong Kong MVA when Mr. Campbell had outbursts of rage, the intensity and frequency of his mood swings, anxiety and anger increased after the Hong Kong MVA, and were further exacerbated by the Wellfund dispute.

**306**  The mild traumatic brain injury was also a cause of the decline in Mr. Campbell's previous high level of executive functioning. The head injury, combined with the plaintiff's depression, and the effects of his heavy medication, contributed to the impairment of his cognitive functions.

**307**  As a result of the Hong Kong MVA, the plaintiff suffered a profound loss of enjoyment of life. He suffered from bouts of chronic pain, was heavily medicated, was frustrated by the decline in the level on his executive functioning and no longer enjoyed the close involvement in his daughters' upbringing that had defined his relationship with them before the Hong Kong MVA. Mr. Campbell also suffered a loss of recreational activities with his family when he was no longer able to participate in Tae Kwon Do, skiing, camping trips, family vacations or attending cultural events and after school activities with his daughters.

**308**  For ease of reference , I reproduce here the four categories of injury as described in the guidelines for the assessment of damages for PSLA first adopted by the Hong Kong Court of Appeal in 1980, and confirmed by that court in *Chan Pui Ki* in October 1995:

1. Serious Injury

This is the lowest category. It covers those cases where the injury leaves a disability which mars general activities and the enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving recurrent pain.

1. Substantial injury

This category extends to injuries which require treatment in hospital for many months and leave the victim with a much reduced degree of mobility, for example, a leg amputated from the thigh, so that an artificial leg cannot be used satisfactorily or multiple injuries which leave a condition requiring regular treatment for rest of the victim's life.

1. Gross disability

This comprises injuries which leave the victim with very restricted mobility or cause serious mental disability or behavioral changes. This bracket includes paraplegics who, particularly if young, can expected to be placed at the upper end of the bracket.

1. Disaster

This is where the victim requires constant care and attention and is incapable of ever leading or appreciating an independent adult life. This bracket includes tetraplegics and those reduced to being "living cabbages" and those left with the mental age of a very young children.

**309**  *Chan Pui Ki* revised the amounts of the awards for each category as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Serious Injury | $400,000 to $540,000 |  |
|  | Substantial Injury | $540,000 to $660,000 |  |
|  | Gross Disability | $660,000 to $1,000,000 |  |
|  | Disaster | $1,000,000 upwards |  |

**310**  In *Chan Pui Ki* at para. 26, the Court of Appeal emphasized that these guidelines must be flexibly applied. In cases involving physical, mental and psychological injuries, the total effect of the injuries must be assessed rather than the artificial "category" into which they fit most comfortably.

**311**  The monetary range in each category is subject to adjustment for inflation to the notional trial date of January 1998.

**312**  Counsel for the plaintiff submits that Mr. Campbell's injuries fall within the high end of the "Gross disability" category, or the low end of the "Disaster" category. The "Disaster" category applies to victims requiring constant care and attention and includes tetraplegics, persons reduced to the state of "living cabbages" and those left with the mental age of a very young child. The effect of Mr. Campbell's injuries falls well short of the degree of impairment required for the "Disaster" category. Paraplegics are placed within the upper end of the "Gross Disability" category. Again, in my view, the total effect of Mr. Campbell's physical, mental and psychological injuries does not involve the degree of impairment that would place him at the upper end of the "Gross Disability" category.

**313**  Counsel for the plaintiff and the defendant each referred to numerous decisions of the Hong Kong High Court on PSLA awards. I have reviewed those decisions and will deal briefly with those that I found of most assistance in determining the category of injury applicable to Mr. Campbell's case.

**314**  In *Fung Yiu v. Cheung Siu Ping* [1986] HKCFI 414, the 60-year-old plaintiff suffered injuries in a motor vehicle accident including post-traumatic dementia and memory defect in moderate in degree, post-traumatic epilepsy, post-concussion syndrome, moderate post-traumatic stress disorder, and partial paralysis of the right arm and right leg. For PSLA, the court placed him at the upper end of the "substantial injury" category.

**315**  In *Tsoi Kwong Ming v. Green Valley Landfill Ltd.*, HCPI 407 of 1997, decided September 30, 1999, the plaintiff, a 36-year-old labourer, suffered a mild blow to his head, and a bulging of the disc at L4/5 which left him with continuing low back pain. As a result of the accident, his injuries, and his subsequent inability to secure employment, the plaintiff suffered from depression, including a severe depressive episode for which he was admitted to hospital for a month. At the time of trial, it was anticipated that he would require medication and regular psychiatric treatment for two to three years. Damages for PSLA were agreed at HK$ 560,000. As this case was decided in 1999, the adjustment for inflation since *Chan Pui Ki* placed the award toward the upper end of the serious injury category. The degree of the plaintiff's impairment was less than that of Mr. Campbell. The plaintiff in *Tsoi Kwong Ming* was expected to recover from his depression, and did not suffer from the complex of psychiatric disorders or the severe and intractable headaches which afflicted Mr. Campbell at the notional trial date.

**316**  In *Hong Kong Macao Hydrofoil Co. Ltd. v. Ng Chan-Wai & Yeung Ying and others*, 1984 AJ Folio 209, (December 8, 1989), the Supreme Court of Hong Kong assessed damages for six claimants injured in a collision between two hydrofoils. The amounts awarded to each plaintiff range from amounts below the "Serious Injury" level to one award toward the lower end of the "Gross Disability" range. The amounts awarded for each category of injury increased by 308 percent between the ranges in place when *Hong Kong Macao Hydrofoil Co. Ltd.* was decided and October 1995, when *Chan Pui Ki* was decided. In order to compare the awards in *Hong Kong Macao Hydrofoil Co. Ltd.* with the ranges for each category in *Chan Pui Ki*, I will increase each of the PSLA awards discussed below by 308 percent.

**317**  Charles Tsoi, a 49 year old tour operator, suffered a broken right shoulder, severely sprained neck and degenerative changes to the cervical spine, likely permanent double vision and fracture of the left orbital floor, and multiple bruises and abrasions. Mr. Tsoi was hospitalized for four days, wore a neck collar for two months and had his arm in a sling for five weeks.

PSLA Award: HK$ 150,000 increased by 308 percent equals HK$ 462,000 (Serious Injury category)

**318**  Lee Ngan Ching was a 58-year-old female whose occupation was not specified. She suffered spots and "clouds" in her visual field, depressed right eyeball, numbness in her right cheek, loss of taste in right side of tongue, loss of two teeth, damage to a third tooth, and pain in her right chest requiring constant medication. Her worst injuries were post-traumatic dementia, post-concussion syndrome, post-traumatic stress disorder and depression.

PSLA Award: HK$ 200,000 increased by 308 percent equals HK$ 616,000

(Substantial Injury category)

**319**  The claimant Choi Chung Fai, a 23-year-old male factory worker suffered a fractured left clavicle, fractured fibula, lacerations to the face and left knee and bruising to the chest and abdomen. Mr. Choi was hospitalized for six days and attended physiotherapy three times a week for four months. The court attached little, if any, weight to his claim that he suffered from psychological trauma following the accident.

PSLA Award: HK$ 35,000 increased by 308 percent equals HK$ 107,800 (less than Serious Injury category)

**320**  Yeung Leung Yam was a male plaintiff who suffered a fractured nose and some minor residual discomfort.

PSLA Award: HK$ 15,000 increased by 308 percent equals HK$ 46,200

**321**  Ho Sau Ying was a 24-year-old female whose severe injuries included shock and post-traumatic amnesia lasting for four days, fractured left humerus, three fractured ribs, surgical emphysema over the chest and neck, bilateral pneumatothorax and left radical nerve palsy. Ms. Ho developed a psychiatric disorder attributable to localized cerebral atrophy which was caused by the accident. She was twice hospitalized for psychiatric treatment. Following her discharge she required regular attendances for treatment at a psychiatric clinic. Ms. Ho's mental condition was not expected to improve, and she required daily medication for her psychiatric disorder. Although Ms. Ho had made a reasonably good recovery from her physical injuries, she found it difficult to run her home, and there was no realistic likelihood of her ever working again. The court found that Ms. Ho's injuries fell within the substantial injury category.

PSLA Award: HK$ 240,000 increased by 308 percent equals HK$ 739,200 (amount adjusted for inflation falls within current Gross Disability category)

**322**  Lam Siu King, a 42-year-old male plaintiff suffered amnesia for eight hours, fracture of the odontoid process, fracture of the second cervical vertebrae, scalp laceration, and damage to the left side of the spinal cord at C5, 6 and 7. He was hospitalized for two months, underwent traction for six weeks, and was placed in a Minerva plaster cast for three months, after which he wore an orthopaedic collar.

PSLA Award: HK$ 90,000 increased by 308 percent equals HK$ 277,200 (below Serious Injury category)

**323**  Plaintiff's counsel referred to a number of Hong Kong PSLA damage awards decided after the notional trial date. The amount of damages awarded in each case therefore includes the effects of inflation since the notional trial date. In referring to some of these cases, I do so not for the amounts awarded, but rather for any assistance they provide in determining the category of injuries applicable in this case.

**324**  In *Ho v. Tse World Pacific Scaffolding and Hyundai*, [2006] HCPI 1168/2003, the plaintiff suffered a skull fracture and fractured ribs in a fall. He was hospitalized for 39 days and complained of headaches, dizziness, and impaired mental acuity. The court found that the plaintiff was still capable of performing work that did not require managerial skills, and characterized his injuries as falling somewhere between the high end of the serious category and the low end of the substantial injury range. Unlike Mr. Campbell, the plaintiff in *Ho* was not totally disabled from employment by chronic pain and the effects of heavy medication.

**325**  In *Chan v. Sutera Harbour Resort and Sutera Harbour Gold & Country Club*, [2003] HCPI 386/2003, the plaintiff sustained injuries in a fall which included three fractured ribs, and a head injury requiring an emergency bilateral craniectomy, and three subsequent operations. The court found that the plaintiff suffered a mild to moderate head injury, mild cognitive deficits, and anxiety and depression at the time trial. However the plaintiff was capable of returning to work in a sedentary position. The court placed the plaintiff at the top end of the serious injury category.

**326**  In *Chan Yuk v. Dragages Et Travaux Publics (H.K.) Limited*, [2000] HKCA 27, the Court of Appeal upheld the trial judge's award for PSLA to a 44-year-old construction worker who was severely injured in an industrial accident. The plaintiff suffered organic brain damage resulting in gross impairment of all of his cognitive functions. The plaintiff's personality changed; he ceased to communicate with his children; and he was no longer employable. The plaintiff also suffered a loss of libido, loss of sense of smell and taste, and suffered from incontinence. His cognitive functions were so severely impaired that it was impossible for him to live on his own. The plaintiff's doctor assessed his brain damage as moderately severe, placing it at 4 on a scale of 1 to 5. The court noted that the plaintiff's consciousness of his cognitive deficiencies may have exacerbated the seriousness of those injuries.

**327**  The trial judge in *Chan Yuk* placed the plaintiff's injuries in the gross disability category, but awarded HK $1,250,000, an amount which went beyond the scale for gross disability and fell within the range appropriate for injuries in the disaster category. The Court of Appeal referred to its previous judgment in *Lee Ting-Lam v. Leung Kam-Ming* [1980] HKLR 657 at 659, which held that the severity of injury presents a sliding scale, and that there is no rigid distinction between two categories. The court upheld the trial judge's assessment. Although the plaintiff's physical injuries might, in some aspects, have come within the category of gross disability, the Court of Appeal held that there were "aspects of the case which clearly hark to disaster."

**328**  Mr. Campbell, like the plaintiff in *Chan Yuk*, suffered a personality change, was alienated from his daughters for several years, was rendered unemployable by his injuries, and was conscious of and frustrated by the impairment of his cognitive functions. However, the cognitive impairment of the plaintiff in *Chan Yuk*, who could not live on his own, and the severity of his brain damage, was significantly greater than Mr. Campbell's.

**329**  Taking into account the total effect of Mr. Campbell's injuries, both physical and psychiatric, I find that his injuries place him at the high end of the Substantial Injury range. His severe headaches were intractable and disabling. He suffered from severe, chronic pain. Management of the chronic pain associated with his headaches required Mr. Campbell to take large quantities of pain medication, including narcotic medication, for the rest of his life. The range for a substantial injury in *Chan Pui Ki* is HK$ 540,000 to $660,000. I would assess Mr. Campbell's damages for PSLA within that range at HK$ 650,000 before the 50 per cent apportionment to Wellfund.

**330**  In *Tsang Chung Wan v. Li Ming and others* [1998] HKCFI 397, decided February 11, 1998, the court applied an adjustment of six percent per annum to account for inflation since *Chan Pui Ki*. Accordingly, I find that the award for PSLA, adjusted for inflation to January 1998 would have been HK $650,000 x 1.060 x 1.060 = HK $730,340, less 50 percent apportionment to Wellfund = HK $344,500.

**331**  On January 31, 1998 the conversion rate from Hong Kong dollars to Canadian dollars was 0.1880. The PSLA award converted to Canadian dollars at the notional trial date was $68,651.96.

**332**  Later in these reasons, if I find that the defendants are liable for breach of contract or professional ***negligence***, it will be necessary to consider whether Mr. Campbell's death affects the measurement of damages determined in part by reference to what the Hong Kong court would have awarded for PSLA.

Loss of Society

**333**  The plaintiff claimed additional damages for "loss of society" to compensate him for loss of social functioning. A separate award under this head would result in double compensation because I have already taken into account the exacerbation of the plaintiff's anger, and the impact of his depression and mood disorders on his relationships and functioning with family and friends in the assessment of damages for pain, suffering and loss of amenities. See *Chan Yu Chau v. Fong On Construction Engineering Co. Ltd.* [2002] HKCFI 665 at paras. 86, 87.

**Past Loss of Income**

**334**  The Hong Kong courts use the plaintiff's net income for calculating both past and future loss of income: *Young v. Chu* [2004] HKCA 142 at para. 136. Typically, the court deducts 15 percent for income tax from the plaintiff's total gross annual income: *Donald Dean Bozarth v. Yuen Ping-Chor* [1997] HKCFI 378 at para. 167.

**335**  In the *Wellfund* case, Clancy J. found that Mr. Campbell's total earnings for 1992 were $60,000. Taking into account Mr. Campbell's average annual earnings of $31,000 for 1988 to 1991, Clancy J. concluded that Mr. Campbell would have earned less than $40,000 in the year following his termination and assessed his average income for the three years following the termination at $45,000.

**336**  A Hong Kong court would probably have reached a different conclusion than Clancy J. respecting the plaintiff's past loss of income. In determining Mr. Campbell's income for 1992 to be $60,000, Clancy J. did not include any income for November or December 1992, or any allowance for consulting fees earned by Mr. Campbell that year. Mr. Campbell reported gross income for 1992 of $83,980.76 and net income of $60,609.28. That amount did not include any employment income from Wellfund for the last 2 months of 1992. After considerable debate, the defendants and their Hong Kong counsel agreed that Mr. Campbell's total income for 1992 for the purpose of the assessment of damages was $72,628. That amount assumed earnings for 12 months rather than 10 and was calculated on the basis that damages for loss of income would not be subject to taxation in Hong Kong or Canada.

**337**  Although Mr. Campbell's earnings were modest before he joined Wellfund in 1991, due in large part to his decision to pursue his interests in public policy and strategic studies, he had a background in real estate development. Prior to the Hong Kong motor vehicle accident he possessed exceptional skills to digest, organize and present complex information. A Hong Kong court would probably have found that but for the motor vehicle accident, Mr. Campbell's skills and abilities would have enabled him to find employment that paid remuneration comparable to his position at Wellfund.

**338**  Neither the plaintiff nor the defendants provided evidence regarding average annual increases in the salaries for senior managers in British Columbia or Hong Kong from 1992 to January 1998. However, AHBL obtained a report from a vocational consultant, Derek M. Nordin dated January 18, 1999 in which Mr. Nordin reported that for 1996 the estimated average annual earnings for males in the senior manager-goods production, utilities, transportation and construction category was $101,000. In my view, Mr. Campbell would have been capable of earning a gross annual income of $100,000 by January 1998. The Hong Kong court would net that amount down to $85,000 for the purpose of assessing damages for loss of income. Stating from a net income of $72,000 for 1992, I assess Mr. Campbell's probable average net income for the five-year, three month period between November of 1992 and January 31, 1998 to be $78,000. Mr. Campbell would have earned $409,500 Canadian during the period November 1992 through January 1998 ($78,000 x five years, three months). From that amount, it is necessary to deduct his business consultancy earnings for 1993, 1994, 1995 and 1996 in the total amount of $24,900, and the award of $50,240 he received in the *Wellfund* case as damages in lieu of notice of the termination of his employment, and holiday pay. The net amount of the plaintiff's past income loss is $334,360.

**339**  I find that the Hong Kong court would have apportioned 50 percent of that amount to Wellfund, leaving CDN$167,180 payable by the Hong Kong defendant as damages for past income loss.

**Future Income Loss**

**340**  In *Chan Pui Ki*, the Hong Kong Court of Appeal affirmed the conventional approach to the assessment of damages for future income loss as explained in *Cookson v. Knowles* [1979] AC 556. The conventional approach assumes that a lump sum award will provide the plaintiff with a real return of between four percent and five percent for the duration of the period to be covered by the award.

**341**  In *Chan Pui Ki* at paras. 89 and 90, the Hong Kong Court of Appeal noted that in Hong Kong, unlike the United Kingdom, the income from investment is tax free but the four percent to five percent return referred to in *Cookson v. Knowles* is subject to tax in the United Kingdom. Nonetheless, the court concluded that nothing in the evidence before the judge below pointed to the conclusion that in Hong Kong plaintiffs had been under-compensated for future loss of earnings by the use of the conventional multipliers over the past 12 years.

**342**  In assessing future loss of income under the conventional approach, a suitable multiplier represents the number of years during which the plaintiff might have been expected to continue earning, subject to any discounts: *Chan Pui Ki* at para. 46.

**343**  Discounts are made to do justice between the parties. In addition to discounting for present payment, there must be discounts for future uncertainties, including premature death, sickness, or loss of employment: *Chan Pui Ki*, para. 46.

**344**  In *Chan Pui Ki* at paras. 44 and 45, the Court of Appeal emphasized that the process of assessing damages for future pecuniary loss involved the exercise of judgment by the trial judge and is not a mere matter of mathematics.

**345**  At trial, the plaintiff submitted that a Hong Kong court would have been open to revise the conventional discount rate of 4.5 percent affirmed in *Chan Pui Ki* to a rate of 2.5 percent. Counsel for the plaintiff referred to the decision of the House of Lords in *Wells v. Wells*, [1999] 1 AC 345 which revised the conventional discount rate from 4.5 percent to three percent in the United Kingdom. The House of Lords made that adjustment based on actuarial evidence regarding the introduction of index-linked government securities that were tied to the retail price index and protected against inflation. The three percent discount rate reflected the availability of these instruments in England, and House of Lords' conclusion that plaintiffs are not ordinary investors and must accept a lower rate of return for more secure investments.

**346**  *Wells v. Wells* was decided after the transfer of sovereignty of Hong Kong to the People's Republic of China and therefore is not binding on the Hong Kong courts. In *Choi Wai Chung v. Chun Wo Construction*, [2003] HKCFI 207 at paras. 103-107, and in *Lam King Tong v. Kam Hung Construction (Holdings) Limited and another*, [2004] HKCFI 1037, Hong Kong trial courts refused to depart from the conventional approach. In *Lam King Tong*, at para. 73, the court observed that it seemed unlikely that "the present depressed economic conditions will be unduly prolonged and there is every reason to suppose that more favourable conditions will arise in the future which will justify the present conventional approach."

**347**  I conclude that it is unlikely that a Hong Kong court at the notional trial date, which preceded the decision of the House of Lords in *Wells v. Wells*, would have been persuaded to depart from the conventional approach approved in *Chan Pui Ki*.

**348**  The plaintiff also argued that a Hong Kong court would accept actuarial evidence regarding Canadian rates of return, and would have adopted the 2.5 percent discount rate specified by the *Law and Equity Act*, *R.S.B.C. 1996, c. 253*. Counsel for the plaintiff cited no Hong Kong authority suggesting that the Hong Kong court would apply a special discount rate for foreign litigants. Again, I find that the Hong Kong court in 1998 would likely adhere to the "conventional approach" discount rate of 4.5 percent.

**349**  The plaintiff advanced his claim for future loss of income based on a projected annual income of $250,000. The plaintiff's proposed multiplicand was premised upon Mr. Campbell having lost the opportunity, as a result of the Hong Kong MVA, to earn up to $250,000 per annum in marketing his friend Richard Melchin's Three Sisters real estate development at Canmore, Alberta. For reasons I discuss in more detail later in these reasons, I am not persuaded that opportunity was ever available to Mr. Campbell. Therefore, in assessing his claim for future loss of income, I do so using a net annual income of $85,000 at the time of trial in January 1998.

**350**  The plaintiff's estimate of future income loss was also based on gross income, with no deduction for income tax. Although the plaintiff acknowledged that the Hong Kong court would deduct 15 percent for income tax, counsel for the plaintiff argued that deduction need not be taken into account because the plaintiff would be entitled to additional awards, which would more than offset any deduction for income tax. The plaintiff submitted that these additional awards would include an award for management fees in the amount of 10 percent of the fund to be managed, and an additional award for loss of mandatory pension fund contributions of five percent of earnings. The plaintiff's approach is flawed. The Hong Kong courts use the plaintiff's net income to assess loss of earnings even where additional awards are made for management fees or mandatory pension fund contributions: *Chan Pui Ki*.

**351**  Here, the multiplicand is $85,000. Mr. Campbell was 46 years old at the notional trial date. In additional to his two teenage daughters, he had a two-year-old son to raise and support. It is likely that a Hong Kong court conducting the trial of Mr. Campbell's action in January 1998 would have concluded that but for his injuries, the plaintiff would have worked to age 65. Under the *Ogden Tables*, Second Edition, August 1994, the multiplier for loss of earnings to age 65 for a 46-year-old male, allowing for mortality and a rate of interest of 4.5 percent, is 12.1. Allowing for contingencies, both positive and negative, other than mortality, including loss of employment through illness, disease or injury, labour market contingencies, including dismissal or termination of employment as the result of corporate restructuring, on the one hand, and prospects for promotion on the other, and also recognizing that Mr. Campbell might return to less remunerative work in the field of policy analysis before retiring, I find that the Hong Kong court would likely have applied a multiplier of 10.

**352**  At the notional trial date, applying a multiplicand of $85,000 and a multiplier of 10, the Hong Kong court would have assessed future loss of income in the amount of $850,000, and would have awarded Mr. Campbell CDN$425,000 under this head.

**353**  In the professional ***negligence*** action, it will be necessary to determine what effect, if any, the plaintiff's death before the delivery of this judgment has on the assessment of damages.

Costs of Past and Future Care

**354**  The plaintiff advanced a claim for costs of future care having a present value of $270,000 based on a report dated June 2, 2008 prepared by Mr. Paul Pakulak, an occupational therapist. In fact, Mr. Pakulak's report includes costs for care both before and after the January 31, 1998 notional trial date. For example, based on the recommendations of Drs. Schmidt and Berzen that Mr. Campbell would have benefited from intensive psychotherapy, Mr. Pakulak has included in his report 78 sessions of private psychotherapy between 1993 and 1996. He has provided an estimate of the cost of that treatment based on 2008 BCMA Guidelines. The claim is presented on the basis that Mr. Campbell would have benefitted from each of the recommended medical therapies or care services, and that he should be compensated for the loss of opportunity to receive this care.

**355**  Another recommendation concerns the provision of full-time nanny services between 1999 and 2002 at a cost of $30,000 per year, again based on 2008 labour costs. Again, the claim for full-time nanny services is based on the fact, which would have been unknown to a Hong Kong judge hearing Mr. Campbell's case in January 1998, that from 1999 to 2002 Mr. Campbell had the full-time care of his son, and would have benefitted from the assistance of a full-time nanny.

**356**  Although it is probable that Mr. Campbell would have benefitted from much of the care recommended, the plaintiff has provided no reliable evidence of the cost of providing these services at the notional trial date. Furthermore, none of the costs for care prior to the notional trial date included in Mr. Pakulak's report were actually incurred by Mr. Campbell.

**357**  The costs of Mr. Campbell's medications were fully subsidized by Pharmacare.

**358**  My task is to determine what a Hong Kong court would have awarded for the costs of past and future care at the notional trial date. The plaintiff's evidence does not assist me. Further, a substantial award for notional costs of care never received by the plaintiff would be unfair to the defendants.

**359**  In the absence of evidence of the estimated cost at the notional trial date of the various heads of care claimed for the plaintiff, I decline to make any award under this head of damages.

**H. AHBL's REPRESENTATION OF MR. CAMPBELL**

**360**  In order to assess Mr. Campbell's allegations of breaches by the defendants of their retainer, professional ***negligence***, and breach of fiduciary duty, it is necessary to set out in some detail the history of AHBL's representation of the plaintiff, and of AHBL's dealings with their Hong Kong agents, Ong & Chung.

**361**  Mr. Campbell first met with Mr. Ragona, on July 2, 1993. Mr. Ragona and AHBL agreed to act on behalf of the plaintiff on his claim for personal injuries sustained in the Hong Kong motor vehicle accident.

**362**  At or before their first meeting, the plaintiff provided Mr. Ragona with a letter dated May 30, 1993 in which he described the accident, advised that the driver of the other vehicle had been convicted and fined for careless driving, and identified the two Hong Kong hospitals where he had received treatment. He provided a copy of Dr. Birnbaum's report of March 29, 1993. Mr. Campbell also advised that the Hong Kong police had taken a statement from him at the first hospital, and described his injuries. Mr. Campbell described injuries to the tendons and ligaments of his right knee, complained that it was very painful to walk and stated that he continued to use the crutches he had purchased at the hospital in Hong Kong where he was first treated. Mr. Campbell said this respecting his head injury:

Head was smashed up against the window on the first impact and then again on the second impact when the taxi hit the steel rail head on.

My head hit the window of the taxi very hard - sufficient to really stun me. A moment later, after the taxi then ran into the steel rail I lost consciousness. I have now had a severe headache for the past four days.

**363**  The plaintiff went on to state that he continued to have very severe headaches since the accident. After referring to his dispute with Wellfund and his pending wrongful dismissal trial, Mr. Campbell acknowledged that the stress and pressure at his last employer, Wellfund, had possibly made the effect of the Hong Kong motor vehicle accident much worse.

**364**  Mr. Ragona initiated action on the file shortly thereafter. He requested medical reports from the plaintiff's treating physicians in Vancouver, contacted the relevant motor vehicle insurance companies, obtained a copy of the Hong Kong police report and liaised with Lawrence, Ong &Chung ("Ong & Chung"), the Hong Kong firm associated with AHBL that would have conduct of Mr. Campbell's case in Hong Kong.

**365**  In March 1994, AHBL drafted a Writ and Statement of Claim for the Hong Kong action and forwarded it to Ong & Chung together with initial medical reports obtained from Drs. Birnbaum and Kastrukoff.

**366**  In May 1994, AHBL and Mr. Campbell entered into a contingency fee agreement for the conduct of the Hong Kong motor vehicle action. The terms of AHBL's retainer under the contingency fee agreement were as follows:

1. Alexander, Holburn, Beaudin & Lang (hereinafter called "Alexander, Holburn") agrees to take over the handling of an accident occurring on March 5, 1992 (hereinafter called "this action").
2. The Client authorizes Alexander, Holburn to perform such services and to undertake such investigations, legal process and preparation as Alexander, Holburn may judge appropriate for the effective conduct of this action.
3. The Client authorizes Alexander, Holburn to obtain the services of such agents, consultants, and experts as it deems necessary or advisable in the prosecution of this action.

**367**  By the terms of the contingency fee agreement, AHBL agreed to devote their utmost skill, ability and effort to the action.

**368**  Mr. Campbell remained responsible for the payment of disbursements.

**369**  The agreement provided for a graduated contingency fee of 25%, 28%, or 33?% of the amount of settlement or judgment, depending upon the stage in the proceedings which the matter was resolved.

**370**  On June 16, 1994 Ong & Chung issued a Writ of Summons to commence the Hong Kong action on Mr. Campbell's behalf.

**371**  On August 1, 1994, the solicitors representing the Hong Kong first defendant requested disclosure of the plaintiff's wage loss and medical records, including the Hong Kong hospital records. Ong & Chung forwarded these requests to AHBL.

**372**  Ong & Chung wrote to AHBL on May 1, 1995 stating that they were ready to begin trial preparation. In that letter, Ong & Chung informed AHBL that Hong Kong procedure required the exchange of witness statements prior to trial. Ong & Chung advised AHBL that in Hong Kong witness statements are used both as a form of discovery and as evidence at trial, and that all evidence intended to be adduced at trial must be set out in the witness statement. Ong & Chung recommended that Mr. Campbell's witness statement be divided into two parts, liability and quantum, and that it provide a clear and simple narrative of the plaintiff's case.

**373**  On May 13, 1995, Ong & Chung advised AHBL that evidence about the relationship between the Wellfund lawsuit and the 1992 MVA lawsuit to Mr. Campbell's damages was of particular importance, and that causation should be clearly delineated. On May 24, 1995, Ong & Chung advised AHBL that its strategy for the file was to exchange witness statements with the Defendants, set the matter down for trial, and then negotiate. AHBL concurred with that strategy.

**374**  Also in May 1995, AHBL requested that Ong & Chung obtain medical records from the Hong Kong hospitals in response to the request from Hong Kong defense counsel for production of these records.

**375**  On September 28, 1995, Ong & Chung provided AHBL with a copy of the Queen Mary Hospital report and requested that AHBL prepare Mr. Campbell's witness statement for the Hong Kong action.

**376**  On October 30, 1995, AHBL sent Ong & Chung a copy of the reasons for judgment of Clancy J. in the Wellfund case, and requested Ong & Chung's opinion of the effect or persuasive value of that decision on the Hong Kong MVA case. Ong & Chung advised on December 4, 1995 that the judgment was admissible as evidence and would be attributed some weight, but would be given more weight in relation to liability than quantum, because the Hong Kong High Court had different rules than British Columbia for the calculation of quantum. Ong & Chung reiterated their request for Mr. Campbell's witness statement, saying it was a matter of considerable urgency, since without it "we cannot proceed to trial, nor will we have as much negotiating leverage", and that there existed some risk of a costs penalty for not proceeding expeditiously.

**377**  On December 4, 1995, Ong & Chung sent AHBL an authorization to obtain medical records from the Tang Shiu Kin Hospital, where the plaintiff was first treated after the motor vehicle accident. AHBL had Mr. Campbell sign the authorization, returned it to Ong & Chung, and obtained the brief report from that hospital in late January 1996.

**378**  On or about December 4, 1995, seven months after Ong & Chung had first requested that AHBL prepare Mr. Campbell's witness statement, AHBL assigned Mr. Cahan, then an associate recently called to the Bar, to assist Mr. Ragona with Mr. Campbell's file. An internal AHBL memo written to Mr. Cahan on behalf of Mr. Ragona on December 4, 1995 states the following:

Joe, MPR needs some assistance with this plaintiff file.

Our counsel in Hong Kong has been requesting for some time a witness statement on behalf of Mr. Campbell. MPR was waiting until Mr. Campbell's wrongful dismissal action had been resolved (which it is now) and I suspect that because he is unsure what the Hong Kong lawyer wants, he's been sitting on this.

Anyway, I see from counsel's latest letter that it is urgent that they receive a witness statement, could you look into this and perhaps draft something for Mr. Campbell's signature?

**379**  On December 5, 1995, Mr. Cahan requested more detailed instructions from Ong & Chung on what specifically was required in the witness statement. On December 19, 1995, Ong & Chung explained that the witness statement served as the witness's evidence-in-chief and should be prepared as if he were giving evidence in court. Mr. Campbell faxed a draft of his statement to Mr. Cahan on December 30, 1995. Mr. Campbell provided a detailed description of the Hong Kong motor vehicle accident. He described his head being smashed against the taxi window on the first impact and then again on the second impact when the taxi hit a steel rail. Mr. Campbell described losing consciousness and stated that he had suffered from a severe headache for several days following the accident. The plaintiff also stated that his headaches got worse during his dispute with Wellfund between August and November 1992, and then the pain reverted to the level of ongoing pain that he had in the period between March and July 1992.

**380**  Mr. Cahan testified that he found Mr. Campbell's memorandum to be more thorough than he had expected and that he had no concerns regarding Mr. Campbell's level of comprehension. According to Mr. Cahan, Mr. Campbell was capable of giving instructions whenever they met. There were times when he was excitable and when he would cancel meetings when he was suffering from migraine headaches. On January 4, 1996, Mr. Cahan met with Mr. Campbell, and then faxed his sworn witness statement to Ong & Chung. Mr. Campbell's first witness statement made no reference to either the pool incident or to the plaintiff suffering delusions in the immediate aftermath of the Hong Kong MVA.

**381**  In February 1996, Mr. Campbell expressed concern that the transfer of sovereignty over Hong Kong from the United Kingdom to China that would occur in 1997 might affect the prosecution of his case. For that reason, and because of his financial difficulties, Mr. Campbell told AHBL that he wanted to settle the action as quickly as possible.

**382**  Up to this point, there had been no attempt to set the Hong Kong action down for trial.

**383**  On February 6, 1996 and March 21, 1996, Mr. Ragona sent letters via fax to Ong & Chung requesting updates on the status of the claim and stating that Mr. Campbell desired an expeditious settlement of the claim. On March 26, 1996, Ong & Chung responded by advising that the only way the Hong Kong defendants would negotiate a settlement was if the case were set for trial. Ong & Chung concluded by stating the following:

To recap, if Mr. Campbell wants to negotiate a settlement, we need to put pressure on the Defendants by pushing the matter toward trial. Before trial, we need an up-to-date medical report and expert witness statement from Mr. Campbell's doctor. When you obtain the medical evidence, please revise Mr. Campbell's statement setting out all heads of damage. Once we have a comprehensive witness statement -admissible in evidence in most circumstances in our courts - and an updated, full medical report, we are then in a position to negotiate and/or push to trial. Without these things the Defendants know we are not serious.

**384**  On May 11, 1996, Ong & Chung advised that under Hong Kong law the witness statement is a very important document that substitutes completely for examination in chief and that it should therefore contain every detail that the witness might raise in examination in chief. Ong & Chung's advice respecting the witness statement was only partially accurate. Under Order 38 of the *Rules* of the High Court, witness statements must provide a full and complete statement of the material facts that the witness is able to prove from his own knowledge. While the witness statement has the same effect as oral evidence, a witness may be called to testify in chief at trial, as indeed Mr. Campbell was for the liability trial in 1998. Ong & Chung's letter also set out the various heads of damages under Hong Kong law, and stressed that Mr. Campbell's statement needed to precisely detail the damages and the facts supporting the damages.

**385**  On June 12, July 5, August 13 and September 13, 1996, Ong & Chung sent follow-up letters requesting Mr. Campbell's revised witness statement and a medical report as soon as possible in order to facilitate negotiation of settlement and/or to move toward a trial. During that time, AHBL conducted a number of interviews with Mr. Campbell, corresponded with Mr. Campbell's physicians, and requested a medical report from Dr. Berzen. Mr. Cahan, together with counsel from Owen Bird, the law firm representing Mr. Campbell in the pool case, also met with Dr. Kastrukoff.

**386**  In July 1996, after AHBL wrote to Dr. Birnbaum to request a medical report, they received advice that Mr. Campbell's physician had brain cancer. AHBL did not obtain a report from Dr. Birnbaum or take commission evidence from him before he died in June 1997, although Dr. Birnbaum offered to provide a video deposition. According to Mr. Cahan, AHBL decided not to obtain evidence from Dr. Birnbaum because they believed that a specialist report would carry more weight than evidence from a general practitioner.

**387**  Mr. Cahan gave evidence that the reason for delay in responding to Ong & Chung's request of May 11, 1996 for a comprehensive medical report was that AHBL were still trying to decide upon their medical expert. They also believed that they needed a number of opinions from medical experts before they could finalize Mr. Campbell's witness statement. There were difficulties in determining the cause of Mr. Campbell's ongoing complaints. The potential causes included the Hong Kong motor vehicle accident, his dismissal from Wellfund, and the pool incident.

**388**  In early August 1996, Mr. Cahan met with Mr. Campbell's counsel in the pool case, and Dr. Kastrukoff, who believed that the January 1996 MRI scan provided some objective findings of trauma. According to Dr. Kastrukoff, the presence of hemosiderin suggested a significant head injury. However, Dr. Kastrukoff was not at this stage prepared to say that the evidence of trauma depicted in the MRI related to a head injury sustained in the Hong Kong MVA, rather than the pool accident. He wanted to see the clinical records from Hong Kong to assist his assessment.

**389**  Dr. Kastrukoff had advised that it was difficult to assess the contributions of the Hong Kong MVA, Wellfund, and the pool incident, and that causation was still a difficult issue. At this stage, Mr. Ragona and Mr. Cahan understood that under the Hong Kong *Rules of Court* they might be limited to two medical reports. Given the complexity of the diagnosis and determination of causation, AHBL decided that they needed a report from a specialist, rather than Dr. Birnbaum, but were still considering whether to use Dr. Kastrukoff or Dr. Berzen.

**390**  In fact, while the *Rules* of the High Court restricted a party to calling two medical experts, they did not limit the number of medical reports that might be delivered by a party.

**391**  Ong & Chung wrote to AHBL again on October 24, 1996 to repeat their request for the revised witness statement from Mr. Campbell, and current medical reports. On November 15, 1996, Mr. Ragona advised Ong & Chung that a medical report from Dr. Berzen was pending. On December 16, 1996, Mr. Cahan wrote to Dr. Berzen requesting a comprehensive medico-legal report with respect to Mr. Campbell's injuries.

**392**  On January 16, 1997, Ong & Chung wrote to Mr. Cahan reiterating their request for Mr. Campbell's revised witness statement and a "comprehensive" medical report. On January 28, 1997, AHBL learned that it would take several months for Dr. Berzen to prepare his medico-legal report. In light of the anticipated delay in obtaining Dr. Berzen's report, on February 3, 1997 Mr. Cahan requested a comprehensive medico-legal report from Dr. Gimbarzevsky.

**393**  On February 25, 1997, Ong & Chung wrote Mr. Cahan stating that Mr. Campbell's case had been stagnant for a long time and that "the final step for preparation of the case is to prepare Mr. Campbell's statement and to obtain a comprehensive updated medical report of Mr. Campbell."

**394**  On April 10, 1997, Dr. Berzen wrote Mr. Cahan advising that he had completed his report, and on April 24, 1997 Mr. Cahan sent that report to Ong & Chung. Eleven months had elapsed since Ong & Chung first requested that AHBL obtain and provide them with an updated and comprehensive medical report.

**395**  On March 25, 1997, Ong & Chung wrote to Mr. Cahan advising that the solicitors for the second and third Hong Kong defendants were applying to the Court for an order for separate trials on liability and damages, with the issue of liability to be determined first. Ong & Chung recommended that Mr. Campbell take no position on this application, and further advised that if Mr. Campbell's witness statement was not done "urgently", the defendants might bring an application to strike out Mr. Campbell's claim.

**396**  AHBL deferred to the advice of their Hong Kong agents on splitting the trial. On the application, the second and third Hong Kong defendants, a Judge of the Hong Kong High Court ordered separate hearings on liability and quantum, and recommended that the parties set the matter down for trial.

**397**  No application was made in 1997 to schedule either the trial on liability or the subsequent hearing on quantum.

**398**  On May 27, 1997, some 14 months after Ong & Chung's first request for a revised witness statement, Mr. Cahan sent AHBL's Hong Kong agents a revised draft of Mr. Campbell's witness statement. It was not until August 29, 1997, following an inquiry from Mr. Cahan, that Ong & Chung provided their comments to AHBL on Mr. Campbell's revised witness statement. Ong & Chung advised that Mr. Campbell's claim for loss of past and future income would need to be explained in much greater detail. AHBL's Hong Kong agents also suggested that the witness statement should indicate how the taxi driver was at fault.

**399**  In January 1998, AHBL wrote to Ong & Chung expressing their view that there was no ***negligence*** on the part of either the driver or the owner of the taxi and suggesting that the action be discontinued as against the second and third Hong Kong defendants. AHBL did not press the point, and the driver and owner of the taxi remained parties to the action.

**400**  On March 24, 1998, Ong & Chung wrote to AHBL requesting HK$30,000 in order to obtain counsel's advice on liability, evidence, and quantum. AHBL's Hong Kong agents advised that without counsel's advice they could not proceed with the action, and went on to state that if they did not receive the requested funds within 10 days they would have no alternative but to apply to court to be removed from the record. This was the first occasion in which Ong & Chung raised the possibility of withdrawing from the file.

**401**  AHBL advanced the requested funds and Ong & Chung continued to act.

**402**  On April 17, 1998 Ong & Chung wrote to Mr. Ragona advising that the "checklist" or case management hearing had been fixed for May 22, 1998. Ong & Chung stated that Mr. Campbell's witness statement was still incomplete because there was insufficient information to permit a calculation of past, present and contingent medical expenses, and pre-trial and post-trial income loss.

**403**  On April 28, 1998, Ong & Chung wrote to AHBL enclosing an extensive and detailed list of documents required for the trial. By the same correspondence, Ong & Chung provided their preliminary opinion that Mr. Campbell's non-pecuniary damages would fall in the range of HK$540,000 to HK$1,000,000, based on his injuries falling within the limits for "substantial injury' or "gross disability" as revised by the Hong Kong Court of Appeal in *Chan Pui Ki* in 1996. Ong & Chung also provided a "rough estimate" that Mr. Campbell's loss of pre-trial and post-trial earnings amounted to approximately CDN$ 2,800,000.

**404**  On May 27, 1998, Ong & Chung wrote Mr. Ragona advising that the checklist hearing had occurred and that interrogatories were due by June 16, 1998. Mr. Cahan responded on June 10, 1998. He communicated AHBL's intention to provide the interrogatories on time, and forwarded Dr. Gimbarzevsky's medico-legal report. On June 15, 1998, Mr. Cahan sent the interrogatories requested by Ong & Chung along with a number of other documents provided by Mr. Campbell, together with the latest draft of Mr. Campbell's revised witness statement.

**405**  On July 7, 1998, Ong & Chung sent AHBL what they described as "the original version" of Mr. Campbell's revised witness statement for execution. Ong & Chung noted that some additional information was still required regarding the plaintiff's earnings and his income loss claim, and requested that AHBL complete the relevant portions of the witness statement, and then have it signed by Mr. Campbell. On the same date, Ong & Chung also sent to Mr. Ragona a copy of Counsel's Preliminary Advice on Liability, Evidence and Quantum, prepared by Mr. Victor Gidwani, the barrister then retained by Ong & Chung to argue the case in court. Mr. Gidwani advised that unequivocal medical evidence was necessary to prove that the plaintiff's injuries were caused by the March 5, 1992 motor vehicle accident.

**406**  In his revised witness statement, signed July 10, 1998, Mr. Campbell described the motor vehicle accident of March 5, 1992. He said that while his taxi was travelling through an intersection on a green light, it was struck on the right side by the vehicle driven by the first defendant. The plaintiff stated that on impact he was thrown about the interior of the taxi, striking his chest and right knee area on the rear of the front seat. Mr. Campbell stated that he struck his head and lost consciousness for a short while, about one to two minutes. The plaintiff stated that the taxi driver woke him up, his body was in the front of the taxi with his head in the region of the front seat passenger foot well. Mr. Campbell said that when he was transported by ambulance to Tang Siu Kin Hospital he was vomiting and in a disoriented state and had neck pain. Mr. Campbell described having experienced severe neck pain, left shoulder pain, left foot pain and bruising, chest pain and bruising, right knee and hand pain, severe headaches, vomiting and a disoriented sensation in the days immediately following the accident. He said the pain in his left foot and chest subsided after about a month, but that in the months following the accident he continued to experience recurrent severe headaches, right knee pain, neck stiffness and pain, occasional left shoulder pain, lower back pain, vomiting, dizziness, difficulty with concentrating, a sensation of disorientation, insomnia and sexual dysfunction.

**407**  Mr. Campbell said that his headaches increased in severity and frequency during the events leading up to his dismissal from Wellfund in November 1992, and that following the pool accident of October 28, 1994, he noted ongoing periodic dizziness, and his headaches increased in severity and frequency, as did his problems with anger management, concentration and depression. His revised witness statement described his current medical problems as constant neck pain and stiffness, right knee pain and stiffness, left shoulder pain and stiffness, jaw pain and lower back pain, several times per week, constant depression, insomnia several times per month, nightmares of the accident several times per month, constant inability to concentrate, disorientation and dizziness, vomiting several times per month, constant fatigue, and sensations of claustrophobia and anxiety attacks several times per month.

**408**  On July 14, 1998, Ong & Chung advised Mr. Ragona that a revised statement of damages was required by the Court by August 4, 1998. Ong & Chung also asked AHBL to provide as soon as possible additional documents and information necessary to revise the statement of damages. Mr. Cahan replied on July 30, 1998, advising that Mr. Campbell did not have some of the categories of documents, requested by Ong and Chung, that AHBL did not intend to request further medical reports, because the reports in hand were current, but that additional clinical records would be provided as they became available.

**409**  On August 3, 1998, Ong & Chung wrote to Mr. Ragona advising that the matters they had raised in previous letters had not been dealt with satisfactorily. Their letter then explained in detail exactly what questions required answers and what documents were required with respect to medical evidence and loss of earnings. With regard to the medical evidence, Ong & Chung explained that the principal problem continued to be causation in light of the Wellfund matter and the pool claim. Ong & Chung requested medical advice to show to what extent Mr. Campbell's condition should be attributed to the Hong Kong MVA, as opposed to the subsequent incidents. Ong & Chung also requested information on Canadian salary levels for positions comparable to Mr. Campbell's employment with Wellfund, and concerning attempts Mr. Campbell had made to mitigate his losses. The Hong Kong solicitors also reported on the time-lines set by the Hong Kong court for the disclosure of the plaintiff's medical reports, and for disclosure of all documents relating to the plaintiff's claim for past and future income loss. Ong & Chung explained that they required the requested documents and answers to their questions by August 25, 1998, after which they would be in violation of the court order, and would be assessed costs.

**410**  On August 24, 1998 Mr. Cahan wrote to Ong & Chung advising that further documents or evidence regarding Mr. Campbell's employment income were not available but that Mr. Campbell was scheduled for a vocational assessment on September 23, 1998. Mr. Cahan also pointed out that some of the tax documents requested had no equivalent in Canada and that the information Ong & Chung required was provided by the income tax returns previously submitted. With regard to the questions about causation and medical evidence, Mr. Cahan advised that "We will inquire of Dr. Berzen with respect to the appropriateness of obtaining a further medical report."

**411**  On August 31, 1998, Ong & Chung wrote AHBL requesting receipts for medical expenses other than the receipts for medications already provided, documents regarding Mr. Campbell's claim for compensation in the pool case, and any notices of assessment of income tax received by Mr. Campbell since 1989. Mr. Ragona responded on September 4, 1998 by explaining that there were no other medical receipts or income tax documentation, and enclosed the Statement of Claim and Statement of Defense for the pool case.

**412**  At this stage, AHBL remained optimistic that liability would be resolved in Mr. Campbell's favour, and that once liability was determined, the case might settle, or the quantum trial would proceed in due course.

**413**  In the late fall of 1998, the solicitors for the first Hong Kong defendant had made arrangements for three independent medical examinations of Mr. Campbell, by Drs. Janke, Robinson, and Piper. Mr. Ragona was very concerned about Mr. Campbell's lack of reliability in self-reporting to physicians, a matter upon which Mr. Justice Clancy had commented in the Wellfund judgment. Mr. Cahan and Mr. Ragona were concerned about the potential outcomes of the independent medical examinations. However, they were both quite properly of the view that it would have been inappropriate to "coach" Mr. Campbell in advance of the independent medical examinations.

**414**  Ong & Chung wrote to Mr. Ragona and Mr. Cahan on September 14, 1998 advising that the liability trial had been set for November 16 to 18, 1998, and that Mr. Campbell's attendance would be required. Ong & Chung also stated the following:

The trial or assessment of quantum of damages would be dealt with later, the exact dates of which have not been fixed. Nevertheless, we are not yet prepared for the assessment of quantum of damages.

**415**  In a second letter of the same date, Ong & Chung again requested complete records and documents regarding income tax and medical expenses. Mr. Cahan responded on September 18, 1998, advising that further income tax records were forthcoming.

**416**  On November 27, 1998, Ong & Chung reported to Mr. Ragona on the outcome of the liability trial. As anticipated, Mr. Campbell had succeeded in establishing that the driver of the other vehicle was 100 percent at fault.

**417**  On December 2, 1998, Ong & Chung wrote to Mr. Ragona emphasizing that they needed the medical report they had previously requested on the extent that each of the various accidents had contributed to Mr. Campbell's current condition in order to complete a revised assessment of damages. The Hong Kong solicitors advised that they were required to have the revised assessment of damages in hand before they could obtain a trial date for the quantum issue. Mr. Ragona then arranged for a neuropsychological assessment of Mr. Campbell by Dr. Schmidt, which occurred in January, 1999.

**418**  On January 26, 1999, Mr. Ragona wrote to Ong & Chung, stating that:

We are most anxious to bring this matter to a conclusion, and it appears to us that the responsible Defendant is prepared to do nothing unless extreme pressure is placed upon him. We have in mind obtaining a trial date so that the Defendant knows that there is a fixed date by which he must deal with this matter. Will you please advise us of the approximate date of hearing if this matter were to be placed on the trial list forthwith.

**419**  Ong & Chung responded on January 29, 1999, as follows:

We are also anxious to proceed with the case as fast as possible. However, as indicated in our letter of you dated 22nd December 1998 (copy enclosed) we have to comply with the Court Order dated 14th July 1998 and prepare the Revised Statement of Damages before we may proceed to have Pre-trial Review on the quantum issue and subsequently have the dates for quantum trial fixed. And by your letter of 6th January 1999, you have agreed to let us have the following documents as soon as possible for the proceedings of the case:

1. Vocational consultant report which we have requested for months;
2. A neuropsychological report to be prepared by Dr. Schmidt, and
3. An expert report from a certified accountant on Mr. Campbell's loss of income.

Thus, in the meantime, we cannot advise as to the approximate hearing date. We envisage that if the said Court Order has been complied with, we would apply to restore the quantum issue and attend 1 to 3 Pre-trial Reviews before the trial dates will be given by the Court. This would take at least 2 to 3 months after we have complied with the said Court Order.

**420**  Three and a half years had passed since Ong & Chung had advised that their strategy would be to set the action down for trial as soon as possible, and then negotiate a settlement.

**421**  On February 1, 1999, Mr. Ragona advised Ong & Chung that Mr. Campbell would be referred to a certified accountant as well as an economist, and enclosed a copy of the vocational consultant's report. AHBL sent Dr. Schmidt's report to Ong & Chung on February 22, 1999.

**422**  In March 1999, Mr. Campbell and Mr. Ragona discussed Dr. Schmidt's report, which was equivocal, insofar as it attributed some of Mr. Campbell's ongoing symptoms to psychological factors not directly related to a traumatic brain injury. As Mr. Cahan testified, by March 1999 AHBL was facing a situation where the medical experts were not providing unequivocal medical advice, and where there was a real potential that Mr. Campbell's claim for damages arising from the Hong Kong motor vehicle accident would be discounted by some percentage as a result of the complicating factors including the Wellfund and pool incidents.

**423**  On April 13, 1999, Mr. Ragona again wrote Ong & Chung expressing concern about getting Mr. Campbell's case scheduled for trial, and noted that the case was in excess of seven years old. On April 28, 1999, Mr. Ragona wrote to Ong & Chung as follows:

We inquire once again as to whether or not this matter can be scheduled for trial. We will be producing an accountant's report in accordance with your "assessment method for loss of future earnings" within the next short while. It is imperative that this matter be heard and concluded prior to year's end.

**424**  On May 14, 1999, Ong & Chung responded to Mr. Ragona noting that they could not set a trial date until all of pre-trial steps ordered by the Hong Kong court had been performed. These included the preparation and delivery of the plaintiff's Revised Statement of Damages, which was still outstanding. Ong & Chung further stated that Dr. Schmidt's medical report might not assist in the manner anticipated because he was unable to comment on the extent of contribution of the subsequent swimming pool accident toward Mr. Campbell's present condition.

**425**  On June 9, 1999, Ong & Chung advised Mr. Cahan that they had received an offer of HK$1 million in full and final settlement of the claim. Mr. Wong, who had replaced Mr. Gidwani as Hong Kong counsel, advised that the amount appeared somewhat low on first impression.

**426**  On June 30, 1999, Mr. Ragona again requested that Ong & Chung apply for a trial date and stated that he saw no possibility of settlement with the defendant until a trial date was set. Ong & Chung responded that a date would be set as soon as possible.

**427**  On September 2, 1999, Mr. Ragona reiterated his desire to have a trial date set, "as we are most anxious to bring this matter to a conclusion after seven years." And again, on September 24, 1999, Mr. Ragona wrote, "if the trial has yet to be scheduled, we would ask that you immediately take steps to do so as this matter has been outstanding since 1992".

**428**  On October 11, 1999, Ong & Chung advised Mr. Ragona that Mr. Wong had been asked to prepare the Revised Statement of Damages. On November 10, 1999, Ong & Chung advised Mr. Ragona that the Defendants had supplied additional medical reports and that they were still awaiting the Revised Statement of Damages from Counsel.

**429**  There was also continuing correspondence through the fall of 1999 regarding the provision of further medical reports. Ong & Chung made various requests for a report from Dr. Kastrukoff. However, Mr. Cahan and Mr. Ragona decided to rely on a report from Dr. Berzen, rather than Dr. Kastrukoff, due to Dr. Kastrukoff's conclusions regarding the pool accident as the cause of a second traumatic brain injury to Mr. Campbell. Despite this, Ong & Chung still wanted Dr. Kastrukoff to comment on the defendant's independent medical reports, although Mr. Ragona did not believe this to be in Mr. Campbell's best interests. Through February 2000, AHBL communicated with Dr. Berzen and requested an updated report providing a current assessment on the extent to wish Mr. Campbell's ongoing problems were related to the March 1992 motor vehicle accident and commenting on reports of the defence experts, Drs. Janke and Jones.

**430**  On November 24, 1999, Ong & Chung informed Mr. Ragona that Counsel had requested further comments from Dr. Kastrukoff regarding the causal link between Mr. Campbell's present condition and the 1992 motor vehicle accident, and regarding Mr. Campbell's employability. Mr. Cahan then wrote to Drs. Berzen and Gimbarzevsky requesting their opinions on Mr. Campbell's current diagnoses, causation of his injuries, and current prognosis, in light of the medical reports supplied by the defendant. Mr. Cahan wrote to Ong & Chung to advise them that Dr. Kastrukoff was no longer Mr. Campbell's attending physician, and that he had requested comments by Dr. Gimbarzevsky instead. Ong & Chung responded on December 9, 1999 that comments from Dr. Kastrukoff were required because the defendant's medical reports referred to Dr. Kastrukoff's reports.

**431**  On April 17, 2000, after several months' delay in obtaining new medical reports, Mr. Ragona wrote Ong & Chung advising that Dr. Berzen had prepared a new report, and that Dr. Kastrukoff declined to complete a medical report because he had not treated Mr. Campbell for many years.

**432**  On June 5, 2000, Ong & Chung wrote to Mr. Ragona stating that Counsel had encountered difficulties in determining Mr. Campbell's pre-trial loss of earnings, future loss of earnings, and past and future medical expenses. Ong & Chung made a detailed request for further information. The Hong Kong solicitors concluded by stating that "we are eager to get the matter going as quickly as possible". On June 12, 2000, Mr. Cahan answered Ong & Chung's questions regarding income loss and medical expenses. On July 15, 2000, Ong & Chung requested confirmation of certain information relating to Mr. Campbell's past income, and to issues concerning Canadian tax rules and medical coverage. Mr. Cahan addressed those matters in his letter of August 4, 2000 to Ong & Chung.

**433**  On October 23, 2000, Ong & Chung wrote to Mr. Ragona reiterating their request for documents that Counsel required to complete the Revised Statement of Damages. Ong & Chung stated that once the Revised Statement of Damages was complete, the quantum hearing might be restored, subject to Counsel's further advice. Mr. Cahan responded on November 15, 2000. He provided further documentation and advice to Ong & Chung regarding Mr. Campbell's income loss and the medical evidence.

**434**  On December 12, 2000, Ong & Chung wrote to Mr. Ragona advising that Counsel had prepared the Revised Statement of Damages. Ong & Chung advised Mr. Ragona that they could now proceed with the assessment of damages, but noted that a number of preliminary steps were required, and that a further witness statement of Mr. Campbell would perhaps be required regarding his condition since the liability trial.

**435**  Mr. Ragona and Mr. Cahan reviewed the statement of damages prepared by the Hong Kong Barrister, Mr. Wong, with Mr. Campbell. Mr. Wong's statement of damages was premised upon the plaintiff having sustained, in addition to his various soft tissue injuries, a post-concussion syndrome characterized by fatigue, headache, cognitive impairment and depressive symptomatology. The post-concussion syndrome was exacerbated by the stress suffered by Mr. Campbell as a result of his employment dispute with Wellfund. While Mr. Campbell's depression was in remission, he continued to suffer from intractable migraine headaches which, according to Mr. Wong, on the general consensus of the doctors consulted, was probably the result of a genetic predisposition to migraine attacks triggered by the March 1992 motor vehicle accident. According to Mr. Wong, the injuries and disabilities suffered by Mr. Campbell placed him within the middle to upper end of the "substantial injury" category of damages for pain and suffering and loss of amenities, for which the plaintiff was entitled to claim no less than HK$700,000. Mr. Wong based his assessment of Mr. Campbell's past and future wage loss on his total annual income from 1992 of about $60,000 Canadian. He estimated Mr. Campbell's loss of earnings for the period from November 1992 to March 5, 2001 (the assumed date for a hearing on the assessment of damages), to be $515,100 Canadian, and valued Mr. Campbell's claim for a loss of future earnings at $626,400. For these sums, there would be deduction of $50,240 Canadian, representing the amount of damages received by Mr. Campbell from Wellfund. Mr. Campbell was disappointed with Mr. Wong's assessment.

**436**  Mr. Cahan and Mr. Ragona replied on December 21, 2000 and January 25, 2001, requesting changes and corrections to the assessment of Mr. Campbell's earnings in Mr. Wong's Statement of Damages. Mr. Ragona also wrote as follows:

As you may be aware our client's claim arises out of a motor vehicle accident which occurred in 1992. His claim is now approximately nine years old. In the meantime, our client has undergone severe financial difficulties to the point where he is now destitute. It is imperative that this matter be heard at trial or settled in short order as nine years is simply too long for a matter such as this to carry on.

**437**  Ong & Chung responded on February 5, 2001 expressing confusion over the income adjustments requested by AHBL. Mr. Ragona replied on February 15, 2001. He provided further clarification of Mr. Campbell's income loss claim. By March 7, 2001, the differences between AHBL and Ong & Chung respecting Mr. Campbell's income loss had been resolved. AHBL and Ong & Chung agreed that CDN$72,628.00 should be used as Mr. Campbell's total earnings in 1992 for the assessment of his loss of earnings. In selecting this amount, both firms agreed that because an award of damages would not be subject to taxation in Hong Kong or Canada, the assessment would be based on Mr. Campbell's net income.

**438**  On March 19, 2001, Mr. Ragona sent Ong & Chung a copy of the reasons for judgment of Sigurdson J. in the pool accident case. Mr. Ragona took the opportunity to reiterate the need to take immediate steps to set the damages assessment for trial. On April 4, 2001, Ong & Chung sent a revised Statement of Damages for Mr. Ragona's approval. On April 5, 2001, Mr. Ragona responded, as follows:

Would you please advise whether or not any steps have been taken by your office to put this matter down for trial. Please advise what it takes to obtain a trial date. Please advise when it is anticipated that this matter may proceed to trial. ... Has any recent approach been made to solicitors for the Defendant. Have any settlement discussions taken place?

**439**  On April 10, 2001, Ong & Chung responded that the Statement of Damages would be filed with the Court and the matter would be restored. Negotiations for settlement might then begin. However, Ong & Chung noted that the matters referred to in their letter dated December 12, 2000, which included the discovery of documents since the liability trial, and the filing of any further medical evidence, would need to be attended to in order to set a hearing date.

**440**  On June 7, 2001, Ong & Chung advised Mr. Ragona that the Statement of Damages had been filed but that the Defendant had yet to serve its answer or make any settlement offers. Ong & Chung also advised that further medical evidence and a further witness statement from Mr. Campbell might be necessary. Mr. Ragona responded on June 8, 2001 by pointing out that it had been nearly 10 years since the accident. He requested that a trial date be set immediately, and repeated that request in writing on July 12 and August 21, 2001.

**441**  On June 15, 2001, Ong & Chung had inquired about Mr. Campbell having written a novel after the Hong Kong motor vehicle accident. Mr. Cahan testified that the plaintiff told him that he had written most of the novel before the motor vehicle accident and had edited it afterwards. Mr. Justice Sigurdson had found that several hundred pages of the novel were written after the motor vehicle accident.

**442**  On June 22, 2001, Mr. Cahan had completed a further witness statement of the plaintiff. Mr. Campbell swore that he currently experienced ongoing physical and psychological problems which he attributed to the Hong Kong motor vehicle accident including constant neck pain and stiffness, right knee pain and stiffness and left shoulder pain and stiffness several times per week, severe headaches several times per week, constant depression, constant inability to concentrate, disorientation and dizziness, and constant fatigue. The plaintiff also deposed that this lower back pain and jaw pain had resolved, that he had not worked since his first witness statement, and his only source of income was Canada Pension Plan disability benefits in the amount of $817 per month.

**443**  On August 24, 2001, Ong & Chung wrote Mr. Ragona advising that a second witness statement would be required from Mr. Campbell, as well as a Supplemental List of Documents. The Hong Kong solicitors made 11 specific document requests. Mr. Ragona responded on September 5, 2001. He pointed out that AHBL had already forwarded a number of the requested documents to Ong & Chung. Mr. Ragona also stated:

As more time goes on, it is clear that the Defendants are going to require more documentation, and our medical evidence becomes further and further out of date. It is for that reason that we again say that this matter must be put down for trial and must be brought to a conclusion. We hate to reiterate but that this accident is now 10 years old. Please take whatever steps necessary to put this matter down for trial as it is clear that that is the only way this case is going to come to a conclusion.

**444**  Ong & Chung responded on September 14, 2001 by stating that they had received the requested documents, and would disclose them to the defendant, but that they were still awaiting replies regarding Mr. Campbell's recent income tax returns, whether Mr. Campbell had written the novel *China Terror* after the accident, and the second witness statement. On October 3, 2001, following up on a telephone conversation between Ong & Chung and Mr. Ragona about why the damages trial had yet to be set down for hearing, Ong & Chung wrote that they were still awaiting responses from AHBL regarding documents, information and advice.

**445**  On October 12, 2001, Mr. Cahan sent Ong & Chung Mr. Campbell's second witness statement along with Mr. Campbell's income tax returns, and confirmed that Mr. Campbell had not written *China Terror* after the accident, but had done some limited editing of the novel following the accident. On October 19, 2001, Ong & Chung advised Mr. Ragona and Mr. Cahan that the Court had granted the defendants an extension for their Answer on damages to November 12, 2001.

**446**  On November 15, 2001, Ong & Chung forwarded the Defendant's Answer to AHBL. They advised that Mr. Wong was not available for trial for at least two months, and that Mr. Wong had recommended that other counsel take over the case. On November 16, 2001, Mr. Cahan advised that AHBL did not want to change counsel since Mr. Wong was experienced with the case. Mr. Cahan asked what further disclosure of documents would be required of the Plaintiff.

**447**  On November 23, 2001, Ong & Chung advised AHBL that Mr. Wong would not be available for trial for four to six months, and that Mr. Wong had advised that the case should be reassigned. On December 3, 2001, Mr. Ragona wrote to Ong & Chung stating that Mr. Campbell had instructed that Mr. Wong be retained. Mr. Ragona requested that the case be set for the earliest available trial date, not later than 6 months from the date of his letter. On December 4, 2001, Ong & Chung advised that if Mr. Wong were retained further updates would be required to Mr. Campbell's second witness statement because of the extended delay in getting to trial.

**448**  On January 16, 2002, Ong & Chung forwarded to AHBL an offer of settlement from the Defendants in the amount of HK$1,000,000, plus costs. Mr. Cahan testified that this was equivalent to about $200,000 Canadian, and that Mr. Campbell had rejected this offer out of hand. Mr. Ragona responded to Ong & Chung on January 22, 2002, rejecting the offer on Mr. Campbell's instructions.

**449**  On January 24, 2002, Mr. Wong sent his Advice on Quantum with regard to the settlement offer. In his Advice, Mr. Wong expressed his concerns respecting Mr. Campbell's credibility. He noted that in each of the Wellfund and pool trials, there were findings that the plaintiff had tried, either deliberately or subconsciously, to attribute the major part of his medical condition to the tortious conduct of the defendant then being sued. On apportionment, Mr. Wong opined that the Hong Kong court would likely apportion 50% of Mr. Campbell's damages to Wellfund, and another 20 to 25 % to the pool accident. Mr. Wong's opinion did not take into account the 1996 MRI or Dr. Piper's finding of the odontoid fracture, or whether this evidence of previous traumatic injuries to Mr. Campbell's head and neck related to the Hong Kong MVA rather than the pool accident. Nor did he explain the basis for his conclusion that the Hong Kong court would apportion 20 to 25% to the pool accident.

**450**  Based on his apportionment, Mr. Wong concluded that Mr. Campbell's claim was worth in the region of HK$1,150,000 and thus deemed the defendant's offer to be "not completely unacceptable, although it may well be on the low side". Mr. Wong recommended a counter-offer in the region of HK$1.75 - 2 million, and a settlement in the range of HK$1.2 - 1.4 million.

**451**  On January 31, 2002, Mr. Cahan and Mr. Ragona met with Mr. Campbell to discuss the Advice on Quantum. Mr. Campbell was not interested in a settlement in the range proposed by Mr. Wong. Mr. Cahan referred to AHBL as being the middleman between the client and the Hong Kong solicitors and barristers. According to Mr. Cahan, AHBL wanted the best possible outcome, but had to try to temper Mr. Campbell's expectations. At this point, in Mr. Ragona's view, it appeared that the case would have to go to trial because the parties were too far apart to make settlement likely.

**452**  On February 4, 2002, Ong & Chung wrote to AHBL requesting advice on whether a counter-offer should be made. On February 5, 2002, Mr. Ragona wrote to Ong & Chung with instructions to make a counter-offer of HK$6.5 million. Ong & Chung wrote back on March 4, 2002 with the defendant's response, which stated that the there was a "significant gap" between the two parties, and recommended a meeting to determine why Mr. Campbell believed that the amount of his counter- offer was realistic.

**453**  The Hong Kong defendant's suggestion for a without prejudice meeting was never acted upon because, given the distance between the parties' positions, and the absence of any counterproposal from the Hong Kong defendants, Mr. Ragona continued to be of the view that the case had to go to trial.

**454**  On March 22, 2002, Ong & Chung wrote to AHBL stating that Mr. Campbell's Counter-offer was unrealistic, and posed an obstacle to them proceeding further. At the same time, Mr. Wong's interest in continuing to act on the matter waned.

**455**  On April 19, 2002, Mr. Ragona wrote a detailed response to Ong & Chung outlining AHBL's reasons for pursuing HK$6.5 million. He concluded as follows:

While we appreciate that there are differences of opinion as amongst the experts with respect to the cause and extent of Mr. Campbell's ongoing difficulties, no expert has maintained that Mr. Campbell is not credible or that his ongoing complaints are non-existent. Therefore, in view of the medical opinion evidence, the fact that the Plaintiff has not returned to employment and will not likely return to employment in the foreseeable future, and the judicial finding that the pool accident did not cause a head injury, all suggests that the Plaintiff's ongoing total disability is likely attributable to the motor vehicle accident. At present, we are not prepared to substantially compromise Mr. Campbell's claim on account of minor inconsistencies or errors in his part evidence.

We ask that this matter be scheduled for trial immediately. If your office or Mr. Newman Wong is unable or unwilling to proceed further in scheduling this matter for trial, kindly advise.

In our view, there is ample evidence to press this case forward. After 10 years, it is time to bring it to a head. The only way to do so, in our view, is to put the matter down for trial. It is likely that the defence will come to the table once faced with a trial date. If not, we ought to proceed to trial. If our assessment of this matter is incorrect, then so be it. We are not prepared to accede to the defence position nor, indeed, some of the suggestions of Mr. Newman Wong at this point.

Please ensure that this matter is immediately set for trial. As noted above, if your office, or Mr. Newman Wong, is unable or unwilling to proceed further in this matter, please advise immediately and by return so that we may take steps to appoint alternative solicitor/counsel.

**456**  On May 8, 2002, Ong & Chung replied stating that a new counsel may have to be instructed on the case, and that they were contacting other counsel for that purpose. Ong & Chung also stated that they "are more than willing to proceed with the case further". By letter dated May 16, 2002, Ong & Chung recommended three new barristers. Mr. Ragona wrote on June 18, 2002 advising that Ong & Chung should retain Mr. Walter Lau, and emphasized that the matter must be concluded by the end of the year.

**457**  On July 24, 2002, Walter Lau wrote to Mr. Ragona stating that:

I have perused all the papers. I do not believe that the other side could be persuaded to agree to pay damages in the amount anywhere close to what Mr. Campbell expects. The assessment of damages will have to go ahead. I do not believe writing an advice on quantum will serve any useful purpose. Rather, it seems that what needs to be done is to see how to make the best of the medical evidence available, and to obtain further evidence to strengthen Mr. Campbell's case to obtain the best award on quantum possible.

My concern about the medical evidence is how to persuade the court to find on the balance of probabilities that the MVA in 1992 caused brain damage which directly caused Mr. Campbell's present disabilities and to rule out the intervening events of the sexual harassment incident, his dismissal and the pool accident as *novus actus interveniens* breaking the chain of causation.

**458**  After meeting with Mr. Lau in Vancouver on August 1, 2002, Mr. Ragona wrote Mr. Lau stating that witness statements would be drafted for his comments, and asked that a trial date be set, which he understood would be in nine months to a year.

**459**  On October 30, 2002, Ong & Chung wrote Mr. Ragona informing him that they were still waiting for the supplemental witness statement for Mr. Campbell, and witness statements for his daughter Johanna and Mr. Melchin, which were required in order for Mr. Lau to revise the Statement of Damages.

**460**  On November 27, 2002, Mr. Lau wrote to AHBL as follows:

The last time I dealt with Mr. Campbell's case was in probably early October when I went through all the papers to be included in the bundle to be lodged with the court for the hearing of the summons to fix a hearing date. The papers should have been ready except the supplemental witness statements of Mr. Campbell and the additional statements of his daughter and his friend, which Michael Ragona had promised to arrange. I haven't seen any draft of the witness statements yet. Anyway, I advised Mr. Tam of Ong & Chung to go ahead to issue the summons for fixing a date. I would have thought that the summons had been issued and the return date obtained. But I have not heard from Mr. Tam of Ong & Chung since. I had advised Mr. Tam of your firm's concern about getting a hearing date as soon as possible and asked him to communicate directly with Mr. Ragona on all steps he had taken.

You are fully aware of the work which is to be done by Mr. Tam and those to be done by me. I believe I had done everything counsel need to do.

**461**  On December 5, 2002, Ong & Chung wrote to Mr. Ragona advising that the witness statements were required, and that they were worried that if a date were fixed for the trial directions hearing and the court made the Order for Directions, then the witness statements and Revised Statement of Damages would have to be filed within the time prescribed in that Order. If that did not happen, Ong & Chung could be penalized in costs. Ong & Chung requested advice on how to proceed. On December 19, 2002, Ong & Chung sent a follow-up letter requesting a response. On January 3, 2003, Mr. Cahan instructed Ong & Chung to defer an application for directions until they had received the witness statements.

**462**  Ong & Chung next wrote to Mr. Ragona on March 31, 2003 requesting the witness statements as soon as possible so as to avoid further delay. On April 2, 2003, seven months after Mr. Lau had first requested them, Mr. Cahan sent Ong & Chung the witness statements of Johanna Campbell and Mr. Melchin. Ong & Chung confirmed receipt of those statements on April 9, 2003 and repeated their request for the supplemental witness statement of Mr. Campbell.

**463**  By letters dated April 15, June 11, August 13, and October 15, 2003 addressed to Mr. Ragona and Mr. Cahan, Ong & Chung noted that AHBL had not responded to their previous letters and requested that they be provided with Mr. Campbell's supplemental witness statement as soon as possible.

**464**  With their October 15, 2003 letter Ong & Chung enclosed a letter from Mr. Lau, in which he stated:

The accident in the present case occurred in 199[2]. Judgment on liability was entered in 1998. 5 years have since elapsed but apparently, no directions for the assessment of damages have yet been obtained.

I am beginning to get concerned about the delay in proceedings with the assessment of damages. I must sound a warning that if matter does not proceed, there is a risk of the other side applying to strike out for want of prosecution.

**465**  During this time, AHBL was awaiting an updated medico-legal report from Dr. Gimbarzevsky, which they had originally requested on January 9, 2003. AHBL required a current medico-legal report from Mr. Campbell's family physician in order to complete their client's supplemental witness statement on damages.

**466**  In response to a follow-up letter from Mr. Cahan of June 18, 2003, Dr. Gimbarzevsky advised that his report would be ready July 12, 2003. By September 2003, AHBL was calling Dr. Gimbarzevsky's office weekly to press for delivery of his report. In October 2003, Mr. Ragona e-mailed Mr. Lau to report on his firm's continuing efforts to obtain the report from Dr. Gimbarzevsky and to emphasize that it was imperative to set the case for trial once that report had been received. AHBL received Dr. Gimbarzevsky's report on or about November 6, 2003, and forwarded a copy to Ong & Chung the following day. By November 28, 2003, Mr. Cahan had completed and sent Mr. Campbell's third witness statement to Ong & Chung.

**467**  In December 2003, Ong & Chung and AHBL cooperated in preparing a letter to the solicitor for the insurer of the Hong Kong defendant requesting an interim payment to Mr. Campbell of HK$400,000. In that letter they stated that HK$ 6.5 million was only a "substantial fraction" of the total amount claimed in the plaintiff's statement of damages, and indicated that Mr. Campbell would be seeking HK$ 9 million at trial. Mr. Ragona testified that he had no recollection of ever making an assessment that high of Mr. Campbell's claim. He thought Ong & Chung placed Mr. Campbell's claim at HK$9 million in order to justify the advance they were requesting.

**468**  On December 17, 2003, Ong & Chung reported that they had made the request for the advance to Mr. Campbell, and that the solicitors for the first Hong Kong defendant anticipated that their client would respond favorably to this request.

**469**  The response of the Hong Kong defendant was anything but favorable.

**470**  On January 20, 2004, Ong & Chung wrote to inform AHBL that the defendant's solicitors had taken out an application to dismiss Mr. Campbell's action for want of prosecution. They enclosed the materials filed in support of the defendant's application. On February 9, 2004, Ong & Chung wrote AHBL requesting a response to their previous correspondence. On February 11, 2004, Mr. Cahan wrote to Ong & Chung to inquire about the process for contesting the defendant's application.

**471**  By February 20, 2004, Mr. Ragona had prepared, sworn and forwarded to Ong & Chung his affidavit in opposition to the defendant's application to dismiss Mr. Campbell's action for want of prosecution.

**472**  Master Wong of the High Court of Hong Kong heard the defendant's application on April 29, 2004, and delivered his judgment striking out Mr. Campbell's action on June 9, 2004. At paragraph 14 of his reasons, Master Wong, after referring to the two intervening events (Wellfund and the pool accident), went on to state that "It is absurd to suggest that the Plaintiff, including his legal advisors and experts in Hong Kong and Canada, is excused from taking the matters for assessment for a period over 12 years." Master Wong concluded that the delay was inordinate and inexcusable. He found that a fair assessment of damages was not possible in the circumstances, because there was no expert evidence of Mr. Campbell's pre-accident condition, and Dr. Birnbaum had died in 1997. The Master held that the first defendant had suffered serious prejudice as a result of the delay. On the same day, Ong & Chung provided AHBL with a copy of Master Wong's reasons for judgment. On June 12, 2004, Ong & Chung advised that Mr. Lau put the chance of success on an appeal at no better than 50 percent.

**473**  On June 15, 2004, Mr. Ragona wrote to Ong & Chung, expressing his displeasure about this state of affairs:

We are becoming extremely frustrated with this case and to say that the outcome is disappointing would understate our position in the extreme.

We shall prepare an Affidavit with respect to the delays in obtaining the medical reports, as it is our recollection that it took over one year to obtain a report, despite Mr. Cahan's continually phoning the doctors.

...

We suggest that you prepare an Affidavit attaching thereto the numerous letters which we have written over the last eight years requesting that this matter be put down for trial. It is our recollection that every time we asked you to put the matter down for trial, you asked for further documentation. When that documentation was produced, you then again asked for more. As the Judge said in his Reasons, this is a simple motor vehicle accident case. There is no reason why this matter ought to have been complicated in the manner in which it has been.

**474**  Mr. Ragona commented that the case should have proceeded to trial at least six years before the strike-out. AHBL gave instructions to Ong & Chung to launch an appeal, and to put its insurers on notice.

**475**  Ong & Chung wrote AHBL on June 17, 2004 to advise that senior counsel should handle the appeal of the dismissal for want of prosecution, and recommended three suitable counsel.

**476**  On June 18, 2004, Ong & Chung responded to Mr. Ragona's letter of June 15. They defended their actions over the past several years. In particular, Ong & Chung pointed out that Mr. Ragona had been warned of the risk of an application to dismiss for want of prosecution. The Hong Kong solicitors asserted that despite their repeated requests, Mr. Ragona had failed to advise them on how to proceed or to provide Mr. Campbell's witness statement with due dispatch.

**I. THE PLAINTIFF'S ALLEGATIONS OF PROFESSIONAL *NEGLIGENCE***

**(a) The Applicable Standard of Care - Vancouver law firm acting for client litigating in foreign jurisdiction**

**477**  The duties of the defendants with respect to the conduct of the Hong Kong action must be determined from their retainer. The contingency fee agreement made between AHBL and Mr. Campbell was more suited to the conduct of an action in British Columbia than litigation in a foreign jurisdiction. Nonetheless, AHBL drafted the agreement by which they agreed to "take over the handling of an accident occurring on March 5, 1992", and to devote their utmost skill, ability and effort to the action. Mr. Campbell authorized AHBL "to perform such services and to undertake such investigations, legal process and preparation as AHBL judged appropriate for the effective conduct of the action.

**478**  Although AHBL engaged Ong & Chung as their Hong Kong agent, Mr. Campbell remained AHBL's client; AHBL approved all major decisions on Mr. Campbell's file and relayed his instructions to the Hong Kong solicitors and counsel. AHBL's engagement of Ong & Chung to conduct the litigation in Hong Kong does not absolve them from all responsibility for delay in the prosecution of that action. The services performed by AHBL included the investigation and preparation of medical evidence in Vancouver required for the conduct of Mr. Campbell's case in Hong Kong, as well as oversight of the Hong Kong litigation on behalf of their client.

**479**  In *Gregory v. Shepherds (A Firm)* [2000] TNLR 769 (Eng, CA), the plaintiffs engaged the defendant firm of English solicitors to assist them with the purchase of property in Spain. The defendants in turn instructed a Spanish lawyer to carry out the necessary title searches and obtain an escritura, the document which guaranteed a purchaser clear title. The defendants paid their clients' purchase monies to the vendor without receiving confirmation he had obtained the escritura. When the plaintiffs sought to resell the property, they discovered that it remained encumbered, and suffered a loss.

**480**  The Court of Appeal, after noting that the defendants held themselves out as having a Spanish conveyancing service, held that a reasonably careful solicitor in England would not pay over his client's money to the foreign vendor without first obtaining confirmation that the searches he instructed the foreign lawyer to carry out had been satisfactorily completed. At page 780, the court said this:

A clean search was essential to obtaining a good title free from prior encumbrances whether the contract was completed by an escritura or not. An English solicitor providing a Spanish conveyancing service ought to know that. Mr. Jones did not suggest that he did not. In my view Mr. Jones was not entitled to assume that [the Spanish solicitor] had carried out his instructions and that the searches revealed no encumbrances. I disagree with the judge that he had no separate duty to do so.

The court found the defendant English solicitors liable to the plaintiff.

**481**  In my view, a firm of British Columbia solicitors that agrees to conduct litigation in a foreign jurisdiction, partly through its Vancouver office and partly through its agent and affiliated office in that jurisdiction, has a duty to acquire a sufficient knowledge of the rules of practice in the foreign jurisdiction to satisfy itself that its foreign agent is effectively moving the case forward in conformity with the foreign rules of court. The British Columbia law firm also has a duty to make all reasonable efforts to see that medical reports and other evidence for which it is responsible are obtained and delivered to the foreign agents in a timely way and in conformance with the requirements of the foreign rules of practice.

**482**  At the commencement of the litigation, the defendants ought to have developed, with the assistance of Ong & Chung, a plan for the effective conduct of the action, including the responsibilities of each firm, and should have determined at an early stage what evidence they needed to marshal and what pre-trial procedures needed to be completed in order to have Mr. Campbell's action set down for trial on both liability and damages in Hong Kong. Instead, the defendants dealt with the action for much of their retainer by reacting to their Hong Kong agents' myriad requests for documents, medical reports or instructions without first obtaining a clear understanding of what needed to be done in order to effectively prosecute the Hong Kong action to trial.

**483**  The defendants' failures to effectively oversee the conduct of the action in Hong Kong and to familiarize themselves with the requirements of Hong Kong practice fell below the standard to be met by reasonably competent British Columbia lawyers representing a client engaged in a personal injury action in a foreign common law jurisdiction. The defendants breached the term of their contract with the plaintiff by which they agreed to devote their utmost skill, ability and effort to the action, and breached the duty of care that they owed to Mr. Campbell to exercise reasonable skill and diligence on his behalf. AHBL's failure to effectively manage the conduct of the action was a cause of the delay which ultimately resulted in the dismissal of Mr. Campbell's action for want of prosecution.

**484**  The delay in the preparation of Mr. Campbell's first witness statement, which Ong & Chung requested in May 1995, but was not signed by Mr. Campbell until July 1998, was in part due to the defendants' lack of a clear understanding of what the witness statement must include. That deficiency could have been rectified by early familiarity with the Rules of the Hong Kong High Court. Before and after the liability trial, AHBL received and responded to numerous requests from Hong Kong for revisions to Mr. Campbell's witness statement, for documents, and for further medical reports. Some of these requests were initiated by Ong & Chung, others originated with counsel for the Hong Kong defendants. When AHBL responded, there were follow-up requests for yet more documents and medical reports. Rather than maintaining control of this process, the defendants reacted to each request without acquiring a complete understanding of what was necessary to ensure that Mr. Campbell's damages assessment could be set for trial.

**485**  On August 3, 1998, Ong & Chung wrote to AHBL complaining that matters that they had previously raised had not been satisfactorily dealt with by the defendants. The Hong Kong agents continued to press for additional medical evidence and more information relating to Mr. Campbell's loss of income claim. A meeting or telephone conference between AHBL and its Hong Kong agents at this point, enabling both offices to exchange information on what additional evidence was required, why it was needed, and whether it was available, would probably have avoided the lengthy, unproductive, and mutually frustrating exchange of correspondence that followed, and continued from year to year, as AHBL pressed for trial dates for the damages assessment and Ong & Chung continued to seek material which in some cases, did not exist, or had previously been provided to them by AHBL.

**486**  By January 1999, three and a half years after Ong & Chung and AHBL had agreed that the strategy they would adopt would be to set Mr. Campbell's case down for trial promptly, and then negotiate, the damages assessment was still not set down for hearing.

**487**  The frequency of AHBL's requests and demands that the damages assessment be set for trial increased through 2000 and 2001, with no effect. Again, these requests were met by further requests and demands from Ong & Chung for additional medical reports and further information required for the preparation of the plaintiff's revised statement of damages. Again, AHBL failed to take any effective steps to determine what remained to be done and who needed to do it in order to have the plaintiff's damages assessment set for trial.

**488**  The defendants initiated no steps to obtain statements from collateral witnesses until new Hong Kong counsel, Mr. Lau, asked them to do so in August 2002, nine years after Mr. Campbell first engaged AHBL, and almost four years after the liability trial. Even then, the collateral witness statements were not prepared or delivered by AHBL until seven months later.

**489**  Mr. Roberts expressed the opinion that it was not within the standard of practice of a reasonably competent personal injury lawyer to allow the case to proceed to separate trials on liability and damages when there was no issue regarding the liability of the main defendant, and no case to be presented against the other two defendants, the taxi driver and the owner of the taxi. In March 1997, AHBL deferred to the advice of its Hong Kong agents not to oppose the splitting of the trial. There was no sound reason for agreeing to split liability and damages. The driver of the other vehicle was clearly at fault. There was no suggestion of ***negligence*** by the owner or driver of the taxi in which Mr. Campbell was injured. The result was that the assessment of damages was deferred. The defendants' acquiescence to the splitting of the trial fell below the requisite standard of practice and contributed to the delay in the prosecution of the plaintiff's case.

**490**  Mr. Roberts was also asked to comment on whether the contingency fee arrangement between the client and AHBL had any impact on the standard of practice to be expected of reasonably competent solicitors in the circumstances of this case. The fee arrangement between Mr. Campbell and AHBL was a written contingency fee agreement and provided for a graduated percentage (25%, 28%, 33?%) for fees depending upon the timing of the resolution of the case. In addition, Mr. Campbell was to be responsible for disbursements. If he could not pay the disbursements, then they would be paid by AHBL who would charge interest on all monies advanced for disbursements at 1 1/2% per month.

**491**  AHBL retained Ong & Chung as their agent on a fee for service basis and AHBL treated Ong & Chung's charges as a disbursement to the plaintiff. The contingency fee agreement authorized AHBL to obtain the services of such agents, consultants and experts as it deemed necessary, and to pay all disbursements. Mr. Campbell agreed to indemnify AHBL for their out-of-pocket expenses. AHBL was entitled to charge Ong & Chung's reasonable fees as a disbursement, and in my view, did not contravene the *Legal Professions Act*, S.B.C. 1998 c. 99 by doing so.

**492**  I agree with Mr. Roberts that the fee arrangements have no impact on the standard to be met in the conduct of this litigation. Lawyers who agree to conduct litigation under a contingency fee agreement are under no lesser standard than any other solicitor.

1. **The Plaintiff's remaining allegations of *Negligence***

Failure to obtain Hong Kong medical records

**493**  The plaintiff claims that the defendants were negligent in failing to obtain medical records from the Hong Kong hospitals promptly, and in failing to make further inquiries, following the belated production of the very brief hospital records, to determine whether additional records were available, including ambulance records.

**494**  Mr. Cahan did not recall receiving any requests to interview Hong Kong witnesses, such as police, ambulance attendants or medical staff. He thought that the Hong Kong solicitors, Ong & Chung, would look after that. Mr. Cahan testified that he was surprised by the brevity of the Hong Kong hospital records. He made no inquiry about whether the signing physician on each of those records had any direct involvement in Mr. Campbell's treatment. Again, AHBL relied upon Ong & Chung to determine if the medical records were not complete, and if so, to seek further records.

**495**  In Mr. Roberts' opinion, the standard of practice for lawyers in British Columbia conducting a personal injury claim similar to Mr. Campbell's required that all hospital and medical records be immediately gathered and reviewed and that all further medical investigations be carried out so that medical reports could be prepared and the evidence of all witnesses, including experts could be made available to the defence.

**496**  AHBL were responsible for the preparation of the medical evidence for the plaintiff's case. They knew that the Hong Kong hospital records were a potential source of material evidence respecting Mr. Campbell's complaints, diagnosis and treatment immediately after the Hong Kong MVA. At his first meeting with Mr. Ragona in July, 1993, Mr. Campbell had identified the Hong Kong hospitals where he was treated. Mr. Ragona knew or ought to have known that the experts AHBL retained, as well as the defence medical experts, would want to review those records. AHBL's failure to initiate any request for those records until prompted to do so by Hong Kong defence counsel, or to follow up after delivery of the cursory records produced by the two hospitals fell below the standard of practice of reasonably competent British Columbia lawyers conducting personal injury litigation.

**497**  The defendants submit that the plaintiff has not shown that additional, material records were kept at either of the Hong Kong hospitals, or that, as a result of the delay in requesting the hospital records, those records were lost. That is true. However, the fact no further inquiries were made by the defendants, and that AHBL did not question the adequacy of the records that were produced is one more illustration of the lack of close supervision or effective oversight of this file by Mr. Ragona.

Failure to interview Dr. Birnbaum or take his evidence by deposition

**498**  The plaintiff alleges that the defendants were negligent in failing to obtain and preserve Dr. Birnbaum's evidence when they had notice of his terminal illness. In response, the defendants submit that there was a record of Dr. Birnbaum's evidence in the Wellfund litigation. Further, as Mr. Cahan explained, at the time when the defendants decided not to take Dr. Birnbaum's evidence, they were relying upon Ong & Chung's advice that the plaintiff would be limited to no more than two medical experts, thought that the evidence of a neurologist or neuropsychiatrist would carry more weight with the Hong Kong court, and that in any event, Dr. Gimbarzevsky would have access to Dr. Birnbaum's clinical records. The defendants also submit that the plaintiff has not shown that Dr. Birnbaum's evidence, had it been made available through deposition, would have assisted Mr. Campbell in the Hong Kong litigation. They argue that with respect to the onset and severity of Mr. Campbell's headaches, there were significant discrepancies between Dr. Birnbaum's report, which indicates that the plaintiff complained of headache on his first visit following the Hong Kong motor vehicle accident on March 25, 1992, and his clinical notes, which make no reference to headaches before June 1992.

**499**  In my view, a reasonably prudent solicitor responsible for the preparation of medical evidence in a case where causation was very much in issue would have interviewed Dr. Birnbaum to determine the extent to which his testimony would support the opinions he expressed in his reports. The defendants failed to do so, and breached the duty of care they owed to the plaintiff. While the plaintiff has not shown that deposition evidence from Dr. Birnbaum would have strengthened the case, the defendant's failure to take that evidence curtailed a line of inquiry that might have assisted Mr. Campbell. I am unable to conclude that any damage flowed from this particular breach of the defendant's duty of care.

Failure to interview Mr. Melchin regarding plaintiff's loss of Three Sisters business opportunity

**500**  The plaintiff claims that the defendants were negligent in failing to investigate his claim for loss of business opportunities in relation to the Three Sisters real estate development, a very large project undertaken by Mr. Campbell's friend, Richard Melchin, in Canmore, Alberta.

**501**  At the trial of this action, Mr. Melchin testified that in 1989 he had discussed with Mr. Campbell the possibility of engaging him in a senior marketing position on the Three Sisters development. Mr. Melchin testified that he did not hire any marketers until the early 1990s, and by that time Mr. Campbell had taken a position with Wellfund. According to Mr. Melchin, the marketers engaged by his company for the Three Sisters' development earned between $100,000 and $275,000 a year.

**502**  Mr. Ragona testified that he only became aware of the plaintiff's alleged loss of opportunity to participate in the Three Sisters' development after Mr. Campbell had commenced his action against AHBL. Mr. Cahan said that the Three Sisters' development was never raised with the defendants, either by the plaintiff, or by Mr. Melchin, who provided a witness statement in December 2003. That witness statement makes no reference to Mr. Campbell losing an opportunity to market Mr. Melchin's project.

**503**  Neither Mr. Campbell's letter of May 30, 1993 to Mr. Ragona, nor the lengthy memorandum that he prepared for Mr. Cahan in December 1995 to assist with the preparation of his witness statement referred to the Three Sisters development or the loss of a marketing opportunity related to Mr. Melchin's development at Canmore. Similarly, the vocational assessment of Mr. Campbell prepared by Mr. Derek Nordin in January 1999 is devoid of any reference to the Three Sisters project.

**504**  Mr. Melchin testified during the pool trial. He gave evidence that on several occasions between 1992 and 1994 he and Mr. Campbell got together and talked about what they were each doing. Referring to Mr. Campbell's inquiries about the Three Sisters development project, Mr. Melchin gave this evidence:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | On several occasions he asked whether or not there were any marketing opportunities that he could be involved in. For the most part those opportunities that he wanted to do would -- you know, from Vancouver, was there something I could do that would be beneficial and we were never able to come up with an activity that made any sense. |  |

**505**  At the trial of this action, Mr. Melchin acknowledged two reasons for why he had told Mr. Campbell that there were no opportunities at the Three Sisters project. First, the plaintiff was living in Vancouver and there were no opportunities for him to be involved in marketing the Three Sisters project out of Vancouver. Secondly, there were no opportunities for Mr. Campbell due to his medical condition, including his cognitive impairments, which Mr. Melchin attributed to the Hong Kong motor vehicle accident.

**506**  I am satisfied that neither Mr. Campbell nor Mr. Melchin ever raised the Three Sisters project with the defendants, or communicated any information to the defendants with respect to a potential lost business opportunity which ought to have led them to investigate or advance the claim relating to the Three Sisters development project first raised in this action. There was no ***negligence*** on the part of the defendants in failing to elicit evidence respecting a non-existent business opportunity for Mr. Campbell with Mr. Melchin's Three Sisters project.

**507**  Mr. Melchin was a close friend and associate of Mr. Campbell's, and tended to shape his testimony to best serve what he perceived to be the plaintiff's interests. For example, Mr. Melchin also gave evidence at the pool trial that Mr. Campbell had time on his hands because he was not working after November 1992, and that during the time between the 1992 and 1994 accidents Mr. Campbell seemed to be well on his way to recovering from his injury, his energy level was still pretty high, and he authored *China's Terror*. Mr. Melchin also said that he had read *China's Terror* several times and quite enjoyed it. That evidence was consistent with the plaintiff's assertion during the pool trial that before October 28, 1994, he was functioning at a level that enabled him to digest large amounts of material, and to write several hundred pages of the novel. However, in the trial within the trial in this action, Mr. Campbell testified that after the Hong Kong MVA he struggled to edit material he had previously written, and that the quality of his work was poor.

**508**  In the witness statement he provided to AHBL for the Hong Kong case, Mr. Melchin said that since the Hong Kong MVA, Mr. Campbell appeared "severely intellectually and psychologically impaired." Even if Mr. Melchin had given evidence about a lost business opportunity in the marketing of the Three Sisters project, the material conflict in his testimony respecting Mr. Campbell's cognitive abilities during the period between the Hong Kong accident and the pool incident would likely have led a Hong Kong court to approach that evidence with extreme caution.

Failure to obtain an orthopaedic assessment

**509**  The plaintiff alleges that the defendants were negligent in failing to have an orthopaedic specialist assess Mr. Campbell. When the defendants received Dr. Piper's report, which indicated that Mr. Campbell had suffered an odontoid fracture, consistent with past trauma to the neck, they determined that rather than obtaining an orthopaedic assessment of their own, they would rely upon Dr. Piper's finding. In Mr. Ragona's judgement, this avoided the risk that a further orthopaedic assessment of Mr. Campbell might not support Dr. Piper's finding of the odontoid fracture. This was an exercise of judgement by counsel in the course of the litigation which the court will not second guess, and which is not actionable. The plaintiff has not shown that the defendants' failure to obtain an orthopaedic report compromised his case, or caused him any loss.

Failure to obtain neuropsychiatric report form Dr. Hurwitz

**510**  The plaintiff contends that the defendants ought to have obtained a report from Dr. Hurwitz, a leading neuro-psychiatrist with whom Dr. Berzen initially practiced when he came to Canada from South Africa. The defendants chose to rely on Dr. Berzen for an expert opinion because he was Mr. Campbell's treating neuro-psychiatrist. They made that decision appreciating that Dr. Berzen would be subject to cross-examination on opinions he gave in the pool litigation that Mr. Campbell had sustained a significant head injury in the pool accident, and that but for the pool accident, the plaintiff could have recovered from his pre-existing 1992 MVA injuries.

**511**  At the trial of this action, plaintiff's counsel asked Dr. Berzen to assume that Mr. Campbell had been swimming slowly, and to then explain if and how that changed his opinion about the role of the pool accident. Had the Hong Kong damages assessment proceeded to trial, competent counsel would have put the same questions to Dr. Berzen. The defendants' decision to rely upon Dr. Berzen, rather than seek an assessment by Dr. Hurwitz, was another exercise of professional judgment in the course of litigation, for which they cannot be faulted.

Failure to investigate Mr. Campbell's delusion about the Chinese agent

**512**  Mr. Campbell said nothing about delusions of pursuit by Chinese agents in either his initial briefing memorandum to Mr. Ragona, or in his memorandum of December 30, 1995, which he provided to assist Mr. Cahan in preparing his first witness statement. The defendants cannot be faulted for failing to include any reference to the delusions in Mr. Campbell's witness statement when the plaintiff failed to provide that information to them.

**513**  In the years following the Hong Kong MVA, Mr. Campbell was interviewed by numerous physicians, including psychiatrists and neuropsychiatrists. Their reports make no reference to the plaintiff complaining of delusions shortly after his return to Vancouver from Hong Kong in March, 1992. The first reference in any medical report to the plaintiff's belief that he was being pursued by a Chinese agent appears in Dr. Hollander's report of September 5, 1999, prepared for the defendant City of Vancouver in the pool case. Dr. Hollander refers to Mr. Campbell's examination for discovery of July 28, 1999, in which the plaintiff described his perception of the encounter with a Chinese agent seated in the back of his car as a "psychosis".

**514**  Qualified medical experts examined Mr. Campbell for a number of years without eliciting from him information that he had suffered from delusions in March 1992. The defendants submit that as solicitors acting for an injured plaintiff under the care and treatment of experienced physicians, they were not required to act as amateur psychiatrists: *Fawell v. Atkins*, [*[1981] B.C.J. No. 2130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2VP-00000-00&context=), at para. 24 (S.C.). I agree. However, that is not the end of the matter.

**515**  The defendants took no steps to interview any collateral witnesses until they were requested to do so by Mr. Ozorio in August, 2002. Had the defendants interviewed Johanna and Jenny Campbell in 1993 or 1994 they would probably have received information concerning Mr. Campbell's aberrant behaviour following the Hong Kong MVA, including the evidence of Jenny Campbell relating to her father's obsession that he was being followed, and his insistence that she carry a $1000 bill concealed on her person in case anything happened to him. If the defendants had then interviewed Mr. Campbell respecting these matters, their client would likely have referred them to Lisa Dewar, and her evidence that in March 1992 Mr. Campbell was so convinced of his encounter with an armed Chinese agent that he insisted on reporting the matter to CSIS. With that information, the defendants would have been in a position to request medical advice on whether Mr. Campbell suffered from a psychiatric disorder connected to the Hong Kong MVA. The early investigation of collateral evidence available from these witnesses would probably have assisted in strengthening the plaintiff's case by revealing some evidence that the plaintiff suffered from a psychiatric disorder within days or weeks of the Hong Kong MVA.

Failure to interview lay collateral witnesses

**516**  The plaintiff also alleged that the defendants were negligent in failing to interview other lay witnesses. One of those witnesses was Mr. Stewart Duncan, a friend of Mr. Campbell who did testify at the trial within the trial. Mr. Duncan gave evidence about an incident which occurred after Mr. Campbell's dismissal by Wellfund, when the plaintiff lost his temper for no apparent reason, and physically ejected Mr. Duncan from his home. The plaintiff relied upon this incident as one example of the outbursts of rage that he said he suffered following the Hong Kong MVA. However, because this unfortunate event occurred after Mr. Campbell had been dismissed by Wellfund, and when he was suffering from the stress of unemployment and the unresolved dispute with his former employer, it is likely that the rage attack witnessed by Mr. Duncan was the product of depression or a mood disorder exacerbated by the Wellfund dispute.

**517**  Mr. Campbell testified that he was vomiting and suffering from severe headaches when he attended the Wellfund factory ground-breaking ceremony on March 23, 1992. Stewart Duncan, who attended the ceremony, described the plaintiff on that occasion as "perfectly normal". Mr. Duncan thought that Mr. Campbell may have been suffering from a cold but said that there was nothing to suggest from the speech that the plaintiff gave that there was something seriously wrong with him at that time.

**518**  I find that collateral evidence from Mr. Duncan is unlikely to have materially assisted the plaintiff, and that the defendants' failure to interview him did not prejudice the plaintiff's case.

**519**  Mr. Belkin had credible evidence to provide concerning Mr. Campbell's complaint of headaches immediately following the Hong Kong accident, and more importantly, his observations of a decline in Mr. Campbell's cognitive functioning before the plaintiff's falling out with Wellfund. That evidence would have provided some additional support for the plaintiff's case that the head injury sustained in Hong Kong caused or contributed to his headaches and loss of cognitive functions. Through the exercise of ordinary diligence, the defendants could have obtained Mr. Belkin's evidence. He was a long time associate of the plaintiff, and remained in contact with Mr. Campbell following the Hong Kong MVA.

**520**  The defendants knew that causation would be the critical issue on the assessment of damages. They knew or ought to have known that collateral evidence from lay witnesses familiar with the plaintiff could assist in proving causation. Their failure to obtain Mr. Belkin's evidence fell below the standard of reasonably competent solicitors practicing in the field of personal injury litigation responsible for the preparation in British Columbia of evidence for use in a trial conducted in a foreign, common law jurisdiction.

**521**  Finally, the plaintiff alleged that the defendants were negligent in failing to interview various other persons who dealt with Mr. Campbell after the Hong Kong MVA. These persons included the plaintiff's second wife, Angela, who Mr. Campbell visited in Taiwan in March 1992, right after his departure from Hong Kong, and Pastor Choi. Neither of these individuals gave evidence at the trial within the trial. Without knowing what evidence these persons would have provided, and whether it would have strengthened the plaintiff's case, I am not prepared to find that the defendants breached their duty of care, or the terms of their retainer by failing to interview or obtain statements from these individuals.

**522**  I have found that the plaintiff has failed to prove some of his allegations of ***negligence***. However, I have also found that the defendants' failure to effectively manage the conduct of their client's case, and to have the damages assessment tried in 1998, 1999, 2000, 2001, 2002, or 2003 was negligent, constituted a breach of their contract with Mr. Campbell, and caused loss to Mr. Campbell when the Hong Kong defendant successfully applied to strike their client's action for want of prosecution.

**J. BREACH OF FIDUCIARY DUTY**

**(a) Fiduciary Relationship between Mr. Campbell and the Defendants**

**523**  There is no dispute that a fiduciary relationship existed between Mr. Campbell and AHBL. The plaintiff relied upon the defendants to conduct his personal injury claim arising from the Hong Kong motor vehicle accident, and AHBL agreed by their retainer to devote their utmost skill, ability and effort to the action on his behalf.

**524**  The remedy for breach of fiduciary duty will vary, depending upon the nature of the particular fiduciary duty that is breached, and the harm suffered as a result of the breach. In *Hodgkinson v. Sims*, [*[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 paras. 80 and 81, La Forest J., referring to *Canson Enterprises Ltd. v. Boughton & Co.*, [*[1991] 3 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6052-00000-00&context=) discussed the Court's flexible approach to fashioning a remedy, depending upon the particular breach of fiduciary duty:

**80** ... Canson does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate; see also *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=), *supra*, at p. 149. Writing extra-judicially, Huband J.A. of the Manitoba Court of Appeal recently remarked upon this idea, in "Remedies and Restitution for Breach of Fiduciary Duties" in The 1993 Isaac Pitblado Lectures, supra, pp. 21-32, at p. 31:

A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning.

Canson is an example of the latter type of fiduciary breach, mentioned by Huband J.A. There, the defendant solicitor failed to warn the plaintiff, his client, that the vendors and other third parties were pocketing a secret profit from a "flip" of the subject real estate such that the property was overpriced. See also *Jacks*, *supra*. In this situation, the principle of full restitution should not entitle a plaintiff to greater compensation than he or she would otherwise be entitled to at common law, wherein the limiting principles of intervening act would come into play.

**81** Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old Judicature Acts; see also *M.(K.) v. M.(H.)*, [*[1992] 3 S.C.R. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-608J-00000-00&context=), *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:

. . . barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.

**525**  In other circumstances, disgorgement of the benefit received by a defendant as the result of breach of fiduciary duty may be the appropriate remedy. Thus, in *Fraser Park South Estates Ltd. v.Lang Michener Lawrence & Shaw*, [*[1999] B.C.J. No. 1414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4P3-00000-00&context=) at para. 20 (S.C.), where the defendant solicitors failed to advise the plaintiff that they had breached the standard of care, and to seek independent legal advice, yet continued to receive fees from the plaintiff, the court ordered them to disgorge those fees.

**THE SETTLEMENT OF THE HONG KONG ACTION AND THE DUTY TO AVOID CONFLICT OF INTEREST**

**526**  On June 23, 2004, Mr. Ragona and Mr. Cahan met with Mr. Campbell and discussed with him the result of the strike-out application. Both Mr. Ragona and Mr. Cahan testified that during this meeting Mr. Ragona informed Mr. Campbell of his potential claims against both Ong & Chung and AHBL.

**527**  Mr. Ragona testified that he explained to Mr. Campbell that in essence his claim in Hong Kong had been extinguished. Mr. Ragona also said that he explained to Mr. Campbell that he had the right to sue Ong & Chung and that he could also sue AHBL. Mr. Ragona testified that he also advised Mr. Campbell that he should obtain independent legal advice regarding AHBL's representation.

**528**  At the meeting of June 23, Mr. Campbell expressed his appreciation of the work that AHBL had done for him. Mr. Cahan recalled that Mr. Ragona spoke about putting AHBL's insurers on notice, and told Mr. Campbell that he could seek advice from other counsel. According to Mr. Cahan, Mr. Campbell was not hostile, or even all that upset. While Mr. Campbell may not have expressed hostility toward AHBL, it is highly unlikely that he was not upset to learn that his action had been struck out as a result of delay in the prosecution of his action. However, it does appear from Mr. Campbell's memorandum of June 24, 2004 to Mr. Ragona (Exhibit 21, P370), that Mr. Campbell was then under the impression that the appeal from the order of Master Wong striking out his action would be successful, and that he would have the opportunity to present his claim for damages arising from the Hong Kong motor vehicle accident in the Hong Kong High Court. The plaintiff's principal concern appears to have been his request for the release of $8,000 which he mistakenly believed AHBL was still holding, from an advance of CDN$20,000 paid to him by the insurer for the Hong Kong first defendant in 2002. Mr. Campbell explained that he was really desperate for these monies and asked that they be released to him.

**529**  In July 2004, Ong & Chung advised that the Hong Kong defendants were offering HK$ 200,000, inclusive of costs, to settle Mr. Campbell's case. Ong & Chung recommended against acceptance of this proposal, which was rejected by Mr. Campbell.

**530**  Mr. Campbell gave instructions to appeal the decision of Master Wong. Mr. Michael Ozorio was retained as senior counsel for the appeal. Mr. Ozorio provided his advice on the appeal on August 6, 2004. He put the likelihood of success of an appeal from the Master's decision striking out Mr. Campbell's action at about 50/50.

**531**  In October 2004, Mr. Campbell underwent surgery for prostate cancer. On October 14, 2004, while suffering from delusions apparently induced by his medication, Mr. Campbell sent a fax to Mr. Cahan and others, that was completely irrational. On October 15, 2004, Mr. Campbell left a telephone message for Mr. Cahan which AHBL transcribed, in which he apologized for his fax of the day before, and stated that he was now lucid. Mr. Campbell went on to explain that he had his prostate cancer surgery, that his cancer had spread, and that he had received medical advice that his condition was terminal, and that he probably had two years to live. In cross-examination, Mr. Cahan testified that he was not aware at the time that Mr. Campbell was addicted to Stadol, a narcotic nasal spray, or that he was taking 180 milligrams of morphine daily, as well as Tylenol 3.

**532**  When this information concerning Mr. Campbell's delusional behaviour in mid-October came to the attention of Ong & Chung, they recommended to AHBL that steps be taken to ensure that Mr. Campbell was capable of instructing his legal advisors. On November 3, 2004, Ong & Chung wrote to AHBL advising that as a result of their telephone conversations with the plaintiff's daughter Johanna, and his ex-wife Donella, they understood that Mr. Campbell's delusional behavior was limited to October 14, 2004, and was probably due to the medications he had received at that time. Ong & Chung did ask that AHBL consult with Mr. Campbell's treating physician, and provide confirmation that Mr. Campbell had the mental capacity to give instructions.

**533**  Mr. Cahan and Mr. Ragona were satisfied, after receiving Mr. Campbell's telephone message of October 15, 2004, that he was lucid and continued to have the capacity to instruct counsel. Accordingly, they did not seek advice respecting Mr. Campbell's mental capacity from his physician.

**534**  On November 3, 2004, counsel for the first Hong Kong defendant contacted Mr. Ozorio and invited the plaintiff to make a proposal for settlement. Mr. Ozorio and Mr. Lau then provided their advice on settlement through Ong & Chung to AHBL. In counsels' opinion, there was a very large risk that the plaintiff would fail to prove that his disabilities were caused or contributed to by the 1992 motor vehicle accident. Mr. Ozorio was concerned that the defendants would establish that any injuries that Mr. Campbell sustained in the motor vehicle accident had resolved by the time of his wrongful dismissal. Hong Kong counsel were also concerned that some of the plaintiff's medical witnesses had changed their opinions on causation of the plaintiff's injuries to suit Mr. Campbell's case in the pool case. These witnesses were now in a difficult position concerning their evidence on the cause of Mr. Campbell's injuries. Mr. Ozorio and Mr. Lau assessed Mr. Campbell's prospects of recovering more than HK$100,000 at less than 50 percent due to the likelihood of the defendant proving *novus actus interveniens*, and the difficulties facing the plaintiff in establishing that his disabilities were caused by the 1992 motor vehicle accident. Hong Kong counsel reported that defendant's counsel had indicated that the defendant would no longer be prepared to settle this case for the sum of HK$1,000,000 previously offered. After noting that the defendant had already made an interim payment to Mr. Campbell of HK$ 100,000, Mr. Ozorio and Mr. Lau recommended that the plaintiff offer to settle for HK$ 850,000 plus costs, and that the offer be made as quickly as possible.

**535**  On November 15, 2004, shortly after the appeal of the dismissal for want of prosecution had been adjourned to a date in December, 2004, Ong & Chung wrote to AHBL stating that counsel strongly advised settling the case with the defendant. Ong & Chung noted a that they were likely in conflict of interest, and therefore advised that Mr. Campbell seek independent legal advice from another Hong Kong law firm.

**536**  On November 15, 2004, after he received the advice on settlement prepared by Mr. Ozorio and Mr. Lau, Mr. Campbell wrote to Mr. Cahan instructing him that he was now looking for a settlement of HK$9,000,000. This was the figure that Ong & Chung had put forward when they wrote to the solicitors for the first Hong Kong defendant requesting the HK$ 400,000 advance, and was the amount that Messrs. Ozorio and Lau had previously advised represented the best case on quantum for Mr. Campbell. In his memorandum to Mr. Cahan, Mr. Campbell gave full vent to his anger and frustration with the delays in prosecution of his case:

I think that Calvin Chung/Alexander Holburn's Hong Kong office has really screwed me by not following the rules of court and getting my case in the current situation.

CALVIN CHUNG has six dam years to get this case into court with the evidence showing that the Hong Kong accident broke my neck and caused two separate areas of bleeding in my brain.

The Defendants owe me for the impact of the brain injury, the broken neck and the bleeding in my brain.

The Calvin Chung/Alexander Holburn lawyers owe me for not following the rules of court. I am well aware of the dozens of written and oral demands that Mr. Ragona made to the CALVIN CHUNG lawyers, the associates of Alexander Holburn in Hong Kong, but it does not excuse CALVIN CHUNG and other partners from the professional liability issue.

If the settlement was for $9 million HONG KONG that would be fair given that the accident was so dam serious that I suffered all the brain injury problems resultant from the broken neck and the two areas of bleeding in my brain that were demonstrated on the MRI in 1996.

So I think that between the Defendants owing me for the brain injury, broken neck and CALVIN CHUNG owing me for the screwing my case up by not following the Hong Kong rules of court that between the two I should have 9 million Hong Kong coming.

Alexander Holburn gets 40% so I end up with $ 5 million Hong Kong or about $850,000 Canadian dollars.

The document prepared by Walter Lau, Michael Ozorio and the CALVIN CHUNG LAWYERS proposes logic that completely ignores the full extent of the brain injury and broken neck and MRI findings caused SOLELY BY THE Hong Kong accident.

**537**  On November 16, 2004, Mr. Campbell e-mailed Mr. Ragona who was then in Hong Kong, and Mr. Cahan. After repeating his assertion that he had suffered very serious injuries in the Hong Kong motor vehicle accident, and referring to the lengthy delay in the conduct of his case, Mr. Campbell said this:

1. The resolution to this case is simple.
2. Either Ong and Chung and Alexander Holburn get the case into court so that I can get the fair settlement of $ 1.6 million Canadian dollars or
3. Ong and Chung and Alexander Holburn's professional liability insurance makes up the difference.
4. I have been so thankful for all the work that Mr. Ragona and Mr. Cahan have done and they have kept me fully aware of the efforts made with their legal partners, Ong and Chung, on my behalf.
5. But I want justice. I want the money for my injuries. I want to try and make my family whole for the destitute lifestyle that they have endured for 14 years.

...

1. I think it is time for Ong and Chung and Alexander Holburn to have it out and get the professional liability monies to me.
2. I really believe that this would be fair.

**538**  On November 18, 2004, Mr. Campbell wrote to Mr. Ragona again. He expressed his deep appreciation for everything that Mr. Ragona had done for the past 12 years. He indicated that he did not want independent legal advice from a Hong Kong lawyer and stated that he wanted Mr. Ragona "to lay out an agreement between Ong & Chung, and their insurers AHBL, and their insurers, the defendants in the case and set out how I get $1.6 million, less the 40 percent owing to AHBL".

**539**  The plaintiff was under the mistaken impression that AHBL's contingency fee was 40 percent, rather than 33 and 1/3 percent.

**540**  Mr. Campbell and Mr. Ragona spoke by telephone on November 18. At that point, he instructed Mr. Ragona to negotiate a settlement in the range of HK$ 1,000,000.

**541**  Mr. Ragona testified that he explained to Mr. Campbell that he had three options. First, if the appeal from Master Wong's order succeeded, then Mr. Campbell's tort action would be revived. Second, if the appeal failed, Mr. Campbell could sue Ong & Chung and AHBL. The third option was to attempt to settle. Mr. Ragona said that he explained to Mr. Campbell that if chose option three it would be necessary to release Ong & Chung, because he intended to have them contribute to the settlement. Mr. Ragona says that during this telephone conversation he repeated his advice that Mr. Campbell should get independent legal advice. He said that at this time he still had a good working relationship with Mr. Campbell and that there was no animosity between himself and the plaintiff.

**542**  According to Mr. Ragona, it was at this stage that Mr. Campbell informed him that he wanted to conclude a settlement that would result in him receiving HK$ 1 million. Mr. Ragona testified that it was Mr. Campbell who came up with the HK$ 1 million figure. Mr. Ragona testified that Mr. Campbell told him during this telephone conversation that he did not want any further protracted litigation; he just wanted it over. According to Mr. Ragona, Mr. Campbell provided these instructions after Mr. Ragona had outlined the three options. Mr. Ragona said that Mr. Campbell was very, very angry with Ong & Chung. Mr. Ragona testified that he explained that Mr. Campbell would have to give a release to Ong & Chung if the Hong Kong solicitors were going to contribute to the settlement. Mr. Ragona estimated that this telephone call lasted 45 minutes. He said that he told Mr. Campbell that he needed strict instructions in writing.

**543**  In the result, on Friday, November 19, 2004, Mr. Campbell sent the following e-mail to Mr. Ragona:

Just so that my final desires are clearly stated in writing, I would very much like to leave the matter with you to negotiate. My desire is to obtain a settlement figure that is something in the area of the one million Hong Kong dollars or perhaps slightly more - plus your costs of $110,000.

I do not under any circumstances feel that there is a case against Alexander Holburn's office and feel that the pursuit of a case against Ong and Chung would just put my family through several more years of hell.

The fact that I would have to forego any current settlement in order to pursue a case against Ong and Chung means that the pursuit of a case against Ong and Chung is not at all an option for me.

Accordingly I fully agree that this has been a very regrettable experience for you and Joe and I and I would like to put it behind me by settling at the earliest possible opportunity.

In my heart, I know that you and Joe Cahan have done all that you could on my behalf and for this I will always be very grateful.

**544**  At trial, Mr. Campbell testified Mr. Ragona had dictated to him the contents of this e-mail, that he was depressed and suicidal at the time of his telephone conversation with Mr. Ragona. I do not accept the plaintiff's evidence that Mr. Ragona dictated to him the contents of the e-mail of November 19, 2004. I am satisfied that Mr. Ragona had a discussion with Mr. Campbell about the alternatives open to him at the time, and that Mr. Campbell gave instructions to settle, relying upon Mr. Ragona's advice that a settlement that resulted in the plaintiff receiving about HK$1,000,000 was the best result that could be obtained in the circumstances.

**545**  Mr. Campbell gave those instructions without the benefit of independent legal advice respecting AHBL's potential liability for ***negligence*** in their management of his case, or any informed understanding of the defendants' conflict of interest.

**546**  Mr. Ragona had requested that Mr. Campbell confirm in writing the instructions he had provided by telephone. Mr. Campbell did so by preparing and sending to Mr. Ragona his e-mail of November 19, 2004.

**547**  Mr. Ragona also gave evidence that during the course of his telephone conversation with Mr. Campbell on November 18, Mr. Campbell raised the subject of AHBL's fees. According to Mr. Ragona, Mr. Campbell said that he wanted to see AHBL paid for their time. The reference in Mr. Campbell's e-mail of November 19, 2004 to costs of $110,000 is based on Mr. Ragona's estimate of AHBL's legal fees and disbursements on the file at that time.

**548**  Mr. Ragona testified that he agreed to Mr. Campbell's suggestion because he had put a lot of time and money into the file. Mr. Ragona had also taken the case on a contingency fee basis without his partner's prior approval. In cross-examination, Mr. Ragona acknowledged that when Mr. Campbell made the offer to pay AHBL a fee based on their time devoted to the file, he could have said no. Mr. Ragona admitted that he told Mr. Campbell his firm was going to "take a bath" on the file. Mr. Ragona knew at the time when he accepted Mr. Campbell's offer to pay for AHBL's time on the file that Mr. Campbell was unemployed and living in poverty.

**549**  Mr. Campbell's desire to see AHBL paid for their time is further proof of his lack of any real sense of the defendants' potential liability for their conduct of his file.

**550**  By accepting Mr. Campbell's offer, Mr. Ragona either failed to fully appreciate, or turned a blind eye to his conflict with the plaintiff. In doing so, Mr. Ragona placed his own interest, and that of his firm, ahead of his client's.

**551**  After receiving Mr. Campbell's instructions, Mr. Ragona arranged a meeting in Hong Kong with Ong & Chung, Mr. Ozorio and Mr. Lau for November 26, 2004.

**552**  On November 25, 2004, Mr. Campbell sent another e-mail to Mr. Ragona. In that e-mail the plaintiff expressed agreement with Mr. Ragona that Ong & Chung were in breach of their professional duties to him. Mr. Campbell also confirmed that the matter should be settled with the defendants' insurer for an amount exceeding HK$1,000,000 plus costs, on the understanding that he would receive the HK$1,000,000 or more and that AHBL would get the costs. Mr. Campbell also stated that he was reserving his right to pursue a professional liability action against Ong & Chung. He went on to state that:

I agree with you that I do not need another Hong Kong counsel to tell me what you have already expressed and I agree is the best course of action.

**553**  Mr. Ragona was concerned that the plaintiff was changing his instructions by reserving his right to sue Ong & Chung. Mr. Ragona spoke by telephone with Mr. Campbell on November 26, 2004, prior to his meeting with Ong & Chung and Hong Kong counsel. He then wrote to Mr. Campbell to confirm that telephone conversation as follows:

You had instructed the writer to resolve this matter in accordance with your email of November 19, 2004 and confirmed in our subsequent email after our telephone conversation of November 19th, 2004 (HKT).

Subsequent to your email of November 26th, 2004, we confirm our telephone conversation of that date that we are to attempt to resolve this matter on the following basis: 2.5 million (HK dollars) of which the breakdown is as follows:

- 1.1 million (HK dollars) - damages to the plaintiff - 1 million (HK dollars) - to AHBL for disbursements - balance to counsel fee owing in Hong Kong

We confirm that if we are able to resolve this matter on the aforesaid basis:

1. Out of the balance owing to you - i.e. 1.1 million (HK dollars), you shall have to pay our fee, which we believe is in the order of $85,000 (Cdn). We shall confirm upon the writer's return to the office.
2. That this settlement involves a release against the defendants, AHBL and Ong & Chung.
3. That you have refused to accept or seek any independent legal advice.

We have instructed counsel Ozorio accordingly.

Michael P. Ragona

**554**  At trial, Mr. Ragona acknowledged that his e-mail did not accurately reflect the terms of settlement he had confirmed by telephone with Mr. Campbell. First, the amount due to AHBL for disbursements was HK$400,000 rather than HK$ 1,000,000. Second, although Mr. Campbell would be required to release the Hong Kong defendants and Ong & Chung, there was no release of AHBL.

**555**  The release of Ong & Chung was required because they were contributing HK$400,000 to the settlement and assuming responsibility for payment of the outstanding fees of Messrs. Lau and Ozorio, which totalled approximately HK$1,000,000.

**556**  On December 2, 2004, pursuant to the terms of settlement, the Hong Kong action was settled by consent order. That order provided for payment by the Hong Kong defendant to the plaintiff of the total sum of HK$ 1,100,000, of which HK$ 100,000 had previously been paid by interim payment. The sum of HK$ 1,100,000 included both interest and costs.

**557**  On February 21, 2005, Ong & Chung sent AHBL a bank draft for HK$ 1,400,000 consisting of the HK$ 1,000,000 received from the defendant's solicitors and Ong & Chung's agreed contribution of HK$ 400,000, on Mr. Ragona's undertaking to return the release and indemnity duly signed by Mr. Campbell within 14 days.

**558**  Mr. Ragona prepared the release in favour of Ong & Chung.

**559**  On March 1, 2005, Mr. Campbell attended at the offices of AHBL, executed the release, and received the settlement funds.

**560**  The net amount of settlement funds paid to Mr. Campbell was $63,478.79.

1. **The Duty to Avoid Conflicting Interest**

**561**  In *R. v. Neil*, [*[2002] 3 S.C.R. 631*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4DM-00000-00&context=) at para. 19, Binnie J., for the Court, identified three aspects to a lawyer's fiduciary duty of loyalty to a client:

1. the duty to avoid conflicting interests:
2. a duty of commitment to the client's cause; and,
3. a duty of candour with the client on all matters relevant to the retainer.

**562**  At para. 31 of his Reasons for Judgment in *R. v. Neil*, Binnie J. adopted the definition of "conflict" from s. 121 of the *Restatement Third*, *The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45 as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

**563**  The rationale for the duty of loyalty, including the duty to avoid conflict, was explained by Wilson J.A. (as she then was) in *Davey v. Woolley*, *Hames, Dale & Dingwall* [*(1982), 35 O.R. (2d) 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-22K2-00000-00&context=) (C.A.) at 602:

The underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between the client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

**564**  The party asserting the breach of the solicitor's duty to avoid conflict of interest must demonstrate the conflict of interest and that the conflict adversely affected the lawyer's performance on behalf of the client: *R. v. Neil* at para. 39; *R. v. Graff* [*(1993), 80 C.C.C. (3d) 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-FC6N-X1WM-00000-00&context=) (Alta. C.A.).

**565**  The codes of conduct published by both the British Columbia Law Society and the Canadian Bar Association contain provisions requiring the withdrawal of a lawyer if the lawyer's continued employment would place the latter in a conflict of interest. The Canadian Bar Association *Code of Professional Conduct* Rule XII Commentary 4(c) provides:

**Obligatory Withdrawal**

1. In some circumstances the lawyer will be under a duty to withdraw ...:
2. if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules such as, for example, a breach of the Rule relating to conflict of interest (Chapter *V*).

**566**  Similarly, the Law Society of British Columbia's *Annotated Professional Conduct Handbook*, Chapter 10, s. 1 states:

**Obligatory withdrawal**

1. A lawyer is required to sever the solicitor-client relationship or withdraw as counsel if:
2. the lawyer's continued involvement will place the lawyer in a conflict of interest, ...

**567**  On June 9, 2004, Ong & Chung informed Mr. Ragona that Mr. Campbell's Hong Kong action had been dismissed for want of prosecution. At this point, Mr. Campbell had a potential claim for damages for professional ***negligence*** against AHBL, Mr. Ragona and Mr. Cahan, as well as AHBL's agent, Ong & Chung. The defendants also received advice from Hong Kong counsel that the prospects for a successful appeal from the order striking the Hong Kong action were no better than 50 percent. There was a conflict between Mr. Campbell's interest in pursuing an action for professional malpractice against both the defendants and Ong & Chung for the full amount he would have received at trial in Hong Kong, and the defendants' interest in avoiding liability for professional ***negligence***.

**568**  Mr. Ragona knew, at the very latest, on June 9, 2004 that there was the potential for a claim for professional ***negligence*** against him and his firm. Mr. Ragona told Mr. Campbell that he could or should get independent legal advice when they met at the offices of AHBL on June 23, 2004. At that time, the plaintiff indicated that he did not wish to obtain independent legal advice, and Mr. Ragona did not insist that he do so.

**569**  On November 16, 2004, when Mr. Ragona was endeavouring to negotiate a settlement of the Hong Kong action, Mr. Campbell wrote that he wanted "justice" and "money for his injuries" and that if he could not receive a fair trial in Hong Kong "Ong & Chung and Alexander Holburn's professional liability insurance makes up the difference". At this point, Mr. Campbell recognized that he had a potential claim against the solicitors who had conducted the Hong Kong proceedings, but had no clear understanding of AHBL's potential liability. As the recipient of Mr. Campbell's correspondence, Mr. Ragona was well aware of his client's conflicting interest.

**570**  In November 2004, Mr. Ragona and Mr. Campbell discussed and exchanged e-mails concerning Ong & Chung's professional liability and that of AHBL. On November 16 and November 18, 2004, Mr. Campbell indicated that he was looking to AHBL's insurers. However, immediately following a telephone conversation with Mr. Ragona on November 19, 2004, Mr. Campbell sent an e-mail to Mr. Ragona in which he stated that he did not "under any circumstances feel that there is a case against Alexander Holburn's office". How Mr. Campbell reached that conclusion is unclear. However, in the absence of any independent legal advice, there is nothing to indicate that the plaintiff made an informed assessment of his legal rights.

**571**  Mr. Campbell accepted Mr. Ragona's advice that a settlement that would result in him receiving an additional HK$1 million from the Hong Kong defendant was the best available result in the circumstances.

**572**  On November 18, 2004 and again on November 25, 2004, Mr. Campbell communicated to Mr. Ragona that he did not want advice from independent legal counsel in Hong Kong. At that time, he was in Vancouver and undergoing radiation treatments for his terminal cancer condition. There is no evidence that after June 2004 Mr. Ragona discussed with Mr. Campbell his right to obtain independent legal advice concerning a potential action in Canada for professional ***negligence*** against AHBL; that Mr. Ragona urged Mr. Campbell to obtain independent legal advice from another firm in Vancouver respecting that claim; or that the defendants offered to pay for Mr. Campbell to obtain such advice. At the very latest, when Mr. Campbell asserted on November 19, 2004 that he did not believe that he had a claim against AHBL, Mr. Ragona, as a fiduciary, ought to have insisted that Mr. Campbell obtain independent legal advice.

**573**  Had Mr. Ragona insisted that the plaintiff take independent legal advice before settling his claim, it would have been necessary to adjourn the hearing of the appeal from the dismissal for want of prosecution to permit time for Mr. Campbell to receive advice from properly briefed Vancouver counsel. There would have been some further delay in the resolution of the plaintiff's claim. However, the plaintiff's decision on whether to proceed with the appeal, settle, or bring a professional ***negligence*** claim against AHBL would have been fully informed.

**574**  Independent legal advice at this point would probably also have ensured that if Mr. Campbell chose to continue with AHBL's representation, he would do so on the basis of an informed waiver of the conflict of interest.

**575**  A client must have a full understanding of the nature of the conflict in order to make an effective waiver. This may require independent legal advice: *Moffat v. Weinstein* [*(1996), 135 D.L.R. (4th) 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B1M6-00000-00&context=) (Ont. Gen. Div.).

**576**  In some cases, nothing short of the lawyer ceasing to act for the client will suffice to avoid subsequent liability for the consequences of breach of fiduciary duty: *Davey v. Woolley, Hames, Dale & Dingwall* [*(1982), 35 O.R. (2d) 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-22K2-00000-00&context=) (C.A.), leave to appeal to SCC refused, 37 O.R. (2d) 499. In my view, given the nature of the conflict, and AHBL's role in the loss of Mr. Campbell's right to maintain his action in Hong Kong, this was a case where AHBL ought either to have informed the plaintiff that they could no longer act, or they should have insisted that that the plaintiff take independent legal advice, at their expense, before they settled his claim. If AHBL did not withdraw, then they were under a duty to insist that Mr. Campbell obtain independent legal advice: *Re A Solicitor* [*(1995), 14 B.C.L.R. (3d) 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B23K-00000-00&context=) (C.A.). Because Mr. Ragona continued to act for Mr. Campbell and did not insist upon the plaintiff obtaining independent legal advice, he and AHBL must bear the consequences of their breach of the fiduciary duty to avoid conflicts of interest.

**577**  The defendants are responsible for the consequences flowing from their breach of fiduciary duty. The plaintiff bears the onus of proving a causal relationship between a breach of fiduciary duty and any loss for which he claims compensation. Here, by the time of the breach of the duty to avoid conflict of interest, which occurred upon dismissal of the Hong Kong action for want of prosecution, Mr. Campbell had already suffered the loss resulting from inordinate delay in the prosecution of his action, for which he claims damages in contract and tort.

**578**  In *Strother v. 3464920 Canada Inc.*, [*[2007] 2 S.C.R. 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B192-00000-00&context=), at paras. 75 and 76, Justice Binnie held that the remedy of disgorgement may be ordered for either prophylactic or restitutionary purposes. The prophylactic purpose is served by appropriating "for the benefit of a person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict, the objective is to preclude the fiduciary from being swayed by considerations of personal interest." *Strother* at para. 75, citing *Chan v. Zacharia* (1984), 154 C.L.R. 178 (Aust H.C.) per Deane J., at p. 108.

**579**  The prophylactic purpose of disgorgement is intended to teach fiduciaries that conflicts of interest do not pay. The plaintiff is not required to prove a loss in order to recover a gain or benefit received by the fiduciary as a result of its breach of duty: *Strother,* at para. 77.

**580**  Subsequent to the dismissal of Mr. Campbell's action for want of prosecution, Mr. Ragona, in breach of the fiduciary duty he owed to avoid conflict of interest, accepted the plaintiff's offer of hourly remuneration for work performed on the file. He did so in order to benefit himself and his firm, at the plaintiff's expense. The plaintiff is entitled to disgorgement of all fees or benefits received by Mr. Ragona and AHBL in consequence of this breach of their fiduciary duty to avoid conflict of interest : *Strother* at para. 83.

**581**  There will be an order that AHBL disgorge and pay to Mr. Campbell's estate the sum of $84,391.86, representing the full amount of the fees charged by AHBL in their account rendered to Mr. Campbell dated December 29, 2004.

**(c) Mr. Campbell's Allegation that AHBL failed to inform him of the strike out application**

**582**  At trial, the plaintiff maintained that the defendants did not tell him about the strike out application until after Master Wong had rendered his decision dismissing Mr. Campbell's action for want of prosecution.

**583**  Mr. Cahan testified that on January 22, 2004 he spoke with Mr. Campbell immediately following AHBL's receipt of the defendant's application to strike. Although Mr. Cahan has no notes of this conversation, I accept his evidence on this point. It is entirely consistent with the probabilities of the situation that Mr. Cahan, as a responsible solicitor, would notify his client of this highly significant, and potentially fatal development in the litigation. Mr. Cahan described as "completely false" any suggestion that Mr. Campbell was not told about the strike-out application. AHBL had to prepare materials in response to the motion. AHBL's account to Mr. Campbell, dated December 29, 2004 and signed by Mr. Ragona, includes entries for telephone calls and meetings between Mr. Cahan and Mr. Campbell relating to the strike out application on January 29, and February 20 and 24, 2004. The entry for February 24, 2004 refers to Mr. Cahan "attending to meeting with client re:defence counsel application" for one hour. Any suggestion that the defendants fabricated their time records is completely unfounded. I find that the defendants informed Mr. Campbell promptly of the application, and kept him informed of their preparation in response to that application.

**584**  I am also satisfied that the defendants informed Mr. Campbell of the settlement of costs of the liability trial and payment to Ong & Chung of HK$ 550,000 for their services. Further, I am also satisfied that Mr. Ragona informed Mr. Campbell of Ong & Chung's contribution to the settlement of his claim. Mr. Campbell's unfounded allegations of deceit against the defendants were an unfortunate manifestation of his tendency to focus obsessively on each of his cases, and, at times, to give evidence which was simply untrue. His memory of the events in question may also have been affected by his depression and his heavy medication at the time of trial.

**(d) Mr. Campbell's Allegation that ABHL induced him to believe they would act for him on a medical malpractice claim, and later reneged**

**585**  On March 30, 2004, Mr. Campbell advised Mr. Cahan of his diagnosis of prostate cancer. Mr. Campbell believed that he had grounds for an action for medical malpractice against the surgeon who had failed to discover and diagnose his prostate cancer the previous fall, and inquired whether AHBL could act on his behalf.

**586**  Mr. Campbell gave evidence that AHBL agreed to take on his medical malpractice claim, and suggested that AHBL led him to believe that they were doing so to compensate him for the disappointing result in the Hong Kong case. The plaintiff said that he only learned that AHBL would not represent him when he attended at the offices of AHBL in March 2005 to sign the settlement documentation for the Hong Kong litigation. Mr. Campbell said that he expected to meet with Mr. Cahan at that time to discuss his medical malpractice claim, and that he was then somewhat abruptly informed by Mr. Ragona that AHBL would not act for him in that matter.

**587**  Mr. Ragona testified that he told Mr. Campbell at their final meeting on March 1, 2005 that AHBL could not act for him on his medical malpractice claim, due to conflict of interest.

**588**  Mr. Cahan in cross-examination did recall Mr. Campbell raising his concern about a possible cause of action against his physicians for medical malpractice arising from the late diagnosis of his cancer. Mr. Cahan had no recollection of any discussions with Mr. Campbell ever getting beyond the point of him providing the plaintiff with a referral to other counsel.

**589**  There are no documents to show either that AHBL agreed to act for Mr. Campbell in the malpractice matter, or that the firm declined to do so. It is highly improbable that after the Hong Kong defendant had brought his strike out application, AHBL would have agreed to act for Mr. Campbell in any new matter, and even more improbable that the defendants would have done so without carefully documenting the terms of their engagement.

**590**  Mr. Cahan had no specific recollection about his discussion with Mr. Campbell when the plaintiff asked him if AHBL could act on his behalf. At trial Mr. Cahan explained that because AHBL acts for hospitals in medical malpractice litigation, it could not act for a plaintiff on a medical malpractice claim, due to conflict of interest. I accept Mr. Cahan's testimony that he would not have informed Mr. Campbell that AHBL could take on his medical malpractice claim. I also accept Mr. Cahan's evidence that he had no discussion with Mr. Campbell about AHBL taking on the plaintiff's medical malpractice claim in order to compensate Mr. Campbell for his limited recovery in the Hong Kong motor vehicle case.

**Effect of the Plaintiff's Death before Judgment on the Assessment of Damages**

**591**  Mr. Campbell passed away on September 28, 2009, while the court's judgment was still under reserve.

**592**  Section 59 of the *Estate Administration Act*, R.B.[*S.C. 1996, c. 8*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB31-JWBS-64YB-00000-00&context=) provides:

1. This section and sections 60 and 61 do not apply
2. in respect to an action of libel or slander, or
3. in respect of loss or damage that occurred before March 29, 1934.
4. Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (6).
5. Recovery in an action under subsection (2) must not extend to the following:

(a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;

1. if death results from the injuries, damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942;

(c) damages in respect of expectancy of earnings after the death of the deceased that might have been sustained if the deceased had not died.

[Emphasis added.]

**593**  Counsel for the plaintiff submits that s. 59(3) does not apply in this case because the plaintiff's claim, although it includes a claim in tort against the defendants, is founded upon the contract for legal services made between Mr. Campbell and the defendants. Mr. Creighton submits that s. 59(3) of the *Estate Administration Act* was enacted to mitigate the common law *maxim* of *actio personalis moritur cum persona*, which provided that a personal cause of action died or abated with the person, and that the *maxim* applied to actions in tort rather than contract: *Monahan Estate v. Nelson*, [*2000 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61F8-00000-00&context=), at para. 5. Therefore, counsel for the plaintiff submits that Mr. Campbell's death before judgment should have no effect upon the assessment of the damages flowing from the defendant's breach of contract, even though those damages are to be assessed based on the plaintiff's pain and suffering and future wage loss at the notional Hong Kong trial date.

**594**  The defendants submit that evidence of Mr. Campbell's death is a relevant fact which the court should weigh in the assessment of both non-pecuniary damages and future loss, and that to do otherwise would result in a windfall to Mr. Campbell's estate.

**595**  Plaintiff's counsel is correct in his submission that Mr. Campbell did not claim that the defendants' acts or omissions directly caused his injuries. However, the damages which the plaintiff claimed for breach of contract, ***negligence*** and breach of fiduciary duty are measured, in large part, by the difference between the amount of the settlement negotiated by Mr. Ragona, and the amount the Hong Kong court would have awarded in Mr. Campbell's tort action, including amounts for pain and suffering and future loss. In these circumstances, Mr. Campbell's death is a relevant fact which the court cannot ignore.

**596**  *Monahan Estate v. Nelson* was a personal injury action where the plaintiff died after the conclusion of his trial but before judgment was delivered. The trial judge, [*[1997] B.C.J. No. 870*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0WV-00000-00&context=), ordered that the judgment was to be dated and to take effect *nunc pro tunc* as of the last day of trial, and then declined to consider the fact of the plaintiff's death in the assessment of damages. The Court of Appeal allowed the defendant's appeal in part, holding that evidence of the death of the plaintiff was a relevant fact to be considered in the assessment of damages. Hall J.A. held at para. 61:

[61] Although the case of *Turner v. London and South-Western Railway Co.* (1874) 17 L.R. Eq. 561, an 1874 case cited by my colleague, was a property case, which class of case was traditionally treated as an exception to the *actio personalis* rule, I conceive that the rationale expressed by Hall, V.-C. in that case for backdating a judgment, namely to do justice between the parties, is on the facts of this case properly applicable here. This plaintiff was injured and had endured pain and suffering for several years prior to the time of the trial. In this case the defendants, (assuming liability), could never have rationally expected to escape liability for some damages under this head of the relief sought in the action. An award for pain and suffering via an award of non-pecuniary damages seems to me in principle not much removed from recovery on account of a debt due to a plaintiff or recovery of damages for waste occasioned to real property of a deceased plaintiff. These sorts of relief would be properly recoverable as damages or debt by a personal representative of a deceased plaintiff because of the non-applicability to such situations of the ancient actio personalis rule. But to go further and to allow future damages or losses to attract awards, (arising from a personal injury case), in a suit like this would affront common sense as was observed by Lord Denning M.R. in the case of *McCann v. Sheppard* [1973] 2 All E.R. 881 (C.A.), referred to by my colleague in her reasons. ... The evidence of the death of the plaintiff is a relevant fact to be considered and weighed in the assessment of a proper award of damages. I too consider that the trial judge erred in failing to take that very relevant circumstance into account in fixing an award of damages in this case. The *maxim actus curiae neminem gravabit*, expressing the concept that what the court does ought not to prejudice a litigant, does not mean that the court is to ignore relevant and material circumstances. I view the death of the plaintiff as a highly relevant circumstance worthy of consideration in fixing an amount for future loss and damages in the case at bar.

**597**  In *Monahan Estate v. Nelson* at para. 62, Hall J.A., with Cumming J.A. concurring, held that the plaintiff was entitled to an award for non-pecuniary damages recoverable up to the date of death.

**598**  The applicable principles are that a party should not be prejudiced by the court's delay in delivering judgment, and that Mr. Campbell's death is a relevant factor to be taken into account in the assessment of damages for both pain and suffering, and for future loss of earnings.

**599**  There will be an order that this judgment is to have legal force and effect *nunc pro tunc* as at September 28, 2009, the date of Mr. Campbell's death.

**600**  It is necessary to adjust the awards for PSLA and future income loss to take into account Mr. Campbell's death. The plaintiff was 46 years old and the notional trial date, which was six years after the date of the accident. The Hong Kong court would have assumed that more of the plaintiff's life lay ahead of him after the trial than during the period between the date of the accident and the trial. Following the reasoning of Hall J.A. in *Monahan Estate v. Nelson*, it is also reasonable to infer that with the passage of time there would have been some improvement in the management of the severe and disabling headaches that afflicted Mr. Campbell. However, I also bear in mind that during the six years between the date of the accident and the notional trial date and the 11 years preceding the plaintiff's death, Mr. Campbell suffered a very substantial loss of enjoyment of his life. In my view, a fair way to take into account Mr. Campbell's death is to attribute 60 percent of the award to the period prior to his death. That produces a reduction in the PSLA award from $68,651.96 to $41,191.18.

**601**  The award for future loss of earnings was intended to compensate the plaintiff to his retirement at age 65. The time-span between the notional trial date and Mr. Campbell's anticipated retirement date was 18 years. The plaintiff died at age 58, 11 years after the notional trial date and seven years before the retirement date.

**602**  I would adjust the award for future loss of income by reducing it by 7/18ths, or 39 percent. The result is $425,000 minus $165,750 equals $259,250.

**603**  To summarize, the damages which the Hong Kong court would have awarded to Mr. Campbell on the notional trial date of January 31, 1998, after the adjustments to take into account the plaintiff's death, are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | PSLA | $41,191.18 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Wage Loss | $167,180 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Wage Loss | $259,250 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $467,621.18 |  |

**604**  In accordance with the practice in Hong Kong for the calculation of interest for each head of damage, the plaintiff is entitled to interest at the rate of two percent per annum on the PSLA award from the date of issue of the writ on June 14, 1994 until the notional judgment date of January 31, 1998.

**605**  Interest is payable on the past wage loss at half the Hong Kong judgment rate from the date of the Hong Kong MVA, March 5, 1992 to the notional date of judgment. The judgment interest rate prescribed by the Chief Justice of the High Court of Hong Kong on January 1, 1998 was 12.060 percent. Accordingly, the plaintiff will have simple interest on the past wage loss at 6.030 percent.

**606**  No interest is payable with respect to future wage loss.

**607**  I decline to order interest on the notional Hong Kong judgment from January 31, 1998 to the date of commencement of this action. To impose post-judgment interest on the notional Hong Kong award would result in a windfall for the plaintiff's estate and would be unfair to the defendants as liability would continue to increase up to the date when the plaintiff brought this action. In effect, the defendants would bear the burden of any delay on the part of the plaintiff in bringing this action.

**608**  For their breach of contract and ***negligence*** in the conduct of Mr. Campbell's personal injury action, the defendants are liable for the difference between the notional Hong Kong judgment and the settlement obtained by AHBL on behalf of the plaintiff. The amount of that settlement was HK$1,500,000, inclusive of interest and costs. Of that amount, HK$1.4 million was received February 24, 2005. The conversion rate from Hong Kong dollars to Canadian dollars at that time was 0.1580, which equals CDN $221,200. The remaining HK $100,000 was an earlier advance, to which I have applied the conversion rate from Hong Kong dollars to Canadian dollars of 0.15230, which equals CDN $15,230. Accordingly, the value of the Hong Kong settlement, expressed in Canadian dollars totals $236,430.

**609**  Accordingly, the sum of $236,430 must be deducted from the notional Hong Kong damage award.

**610**  I will leave it to counsel to calculate the interest payable on the Hong Kong damage award.

**K. THE PLAINTIFF'S CLAIM FOR NON-PECUNIARY DAMAGES ATTRIBUTABLE TO THE DEFENDANTS' *NEGLIGENCE* AND BREACH OF FIDUCIARY DUTY**

**611**  Counsel for the plaintiff submits that in addition to the non-pecuniary losses that Mr. Campbell suffered as a result of the Hong Kong MVA, which would have been compensated by the Hong Kong court at the notional trial date, the plaintiff was also entitled to non-pecuniary damages for additional anxiety, loss of family affection, depression and mental distress caused by the dismissal of his Hong Kong action, and the 10-year delay from the notional Hong Kong trial date to a trial of this action.

**612**  The defendants submit that this claim should be dismissed as an attempt to achieve double recovery.

**613**  Because the PSLA award in the trial within the trial was intended to provide the plaintiff with reasonable solace for loss of enjoyment of life and pain and suffering to be endured by the plaintiff for the balance of his life, the potential for double recovery is real.

**614**  On occasion, courts in this country have awarded damages for mental distress or disappointment caused by a lawyer's ***negligence*** or breach of fiduciary duty. Where mental suffering is a foreseeable result of a solicitor's ***negligence***, consequential damages are generally sufficient: *Dorey v. Romney* [*(1982), 51 N.S.R. (2d) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPT1-JKHB-63MB-00000-00&context=); *LeBlanc v. Dewitt* [*(1984), 57 N.B.R. (2d) 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW81-JW5H-X0P9-00000-00&context=) (Q.B.). In *Szarfer v. Chodls* [*[1986] O.J. No. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23YJ-00000-00&context=), [*54 O.R. (2d) 663*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M32B-00000-00&context=) (Ont. H.C.J.), the defendant lawyer, in breach of his fiduciary duty to his client, used confidential information concerning his client's marital problems to engage in a sexual relationship with his client's wife. The court found that the plaintiff suffered reactive depression and anxiety, nervous shock, mental anguish and loss of memory as a result of the defendant's conduct. The court assessed general damages for pain and suffering and loss of enjoyment of life in the amount of $30,000.

**615**  Here, the plaintiff suffered some mental distress as a result of the dismissal of the Hong Kong action and its aftermath. However, it is difficult to quantify the distress, anxiety and depression attributable to the defendants' ***negligence*** in the conduct of the Hong Kong action when the plaintiff was also suffering from mental distress resulting from the Hong Kong MVA itself, from Wellfund, and more recently from his terminal cancer. In these circumstances, I would assess Mr. Campbell's damages for non-pecuniary losses attributable to the defendants' ***negligence*** or breach of fiduciary duty at $20,000.

**616**  The plaintiff also advanced a claim for punitive damages against the defendants. Punitive damages are only awarded in exceptional cases where a defendant's wrongful acts are so malicious and outrageous that they are deserving of the court's punishment: *Honda Canada Inc. v. Keays*, [*2008 SCC 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1CN-00000-00&context=) at para. 62. There was no conduct on the part of the defendants that would attract an award of punitive damages.

**L. CONCLUSION**

**617**  In addition to the award of damages for the difference between the notional Hong Kong judgment and the settlement of the Hong Kong action, I have found that the plaintiff is entitled to damages of $20,000 for mental distress.

**618**  I have also ordered that the defendant AHBL disgorge and pay it to Mr. Campbell's estate the sum of $84,391.86. The plaintiff is entitled to interest on the judgment of this court at the rates set out in the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*.

**M. COSTS**

**619**  Counsel have requested that the court defer an award of costs until the parties have had an opportunity to make submissions on costs following the release of this judgment. Counsel may contact the Registry to fix a date for submissions on costs.

P.J. PEARLMAN J.

\* \* \* \* \*

**CORRIGENDUM**

Released: October 6, 2010

[1] P.J. PEARLMAN J.:-- In my Reasons for Judgment released September 23, 2010, at page 93, paragraph 353 should be amended to read as follows:

[353] In the professional ***negligence*** action, it will be necessary to determine what effect, if any, the plaintiff's death before the delivery of this judgment has on the assessment of damages.

P.J. PEARLMAN J.

\* \* \* \* \*

Corrigendum

Released: February 11, 2011

[1] In my Reasons for Judgment released September 23, 2010, the following paragraphs are amended as follows:

[2] At page 5 in paragraph 9, the second to last sentence should read:

After AHBL deducted their fees and disbursements from the settlement funds they paid to Mr. Campbell, or to third parties on his direction, the net amount of CDN $105,665.95.

[3] At page 87 in paragraph 330, the second sentence should read:

Accordingly, I find that the award for PSLA, adjusted for inflation to January 1998 would have been HK $650,000 x 1.060 x 1.060 = HK $730,340, less 50 percent apportionment to Wellfund = HK $344,500.

|  |  |  |  |
| --- | --- | --- | --- |
| [4] read: |  | At page 87 in paragraph 331, the second sentence should |  |

The PSLA award converted to Canadian dollars at the notional trial date was $68,651.96.

|  |  |  |  |
| --- | --- | --- | --- |
| [5] read: |  | At page 159 in paragraph 600, the last sentence should |  |

... a reduction in the PSLA award from $68,651.96 to $41,191.18.

[6] At page 160 in paragraph 603, the correct amount for past wage loss is $167,180.

[7] In paragraph 603, after the adjustment is made at paragraph 600, the entry for PSLA in paragraph 603 of the reasons should also be $41,191.18, and the total should be adjusted from $465,290 to $467,621.18.

|  |  |  |  |
| --- | --- | --- | --- |
| [8] read: |  | At page 160 in paragraph 605, the last line should |  |

Accordingly, the plaintiff will have simple interest on the past wage loss at 6.030 percent.

[9] Paragraph 608, beginning at the top of page 161 and continuing to the end of that paragraph, should be amended to read:

The amount of that settlement was HK$1,500,000, inclusive of interest and costs. Of that amount, HK $1.4 million was received February 24, 2005. The conversion rate from Hong Kong dollars to Canadian dollars at that time was 0.1580, which equals CDN $221,200. The remaining HK $100,000 was an earlier advance, to which I have applied the conversion rate from Hong Kong dollars to Canadian dollars of 0.15230, which equals CDN $15,230. Accordingly, the value of the Hong Kong settlement, expressed in Canadian dollars totals $236,430.

[10] At page 161 in paragraph 609, the figure of $167,530 is amended to read $236,430.

P.J. PEARLMAN J.

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[***Chand v. Martin, [2017] B.C.J. No. 772***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NFC-YTC1-JPP5-2070-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: February 6-10 and 14-17, 2017.

Judgment: April 24, 2017.

Docket: M091858

Registry: Vancouver

**[2017] B.C.J. No. 772** | [*2017 BCSC 660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PCD-P5K1-F8KH-X133-00000-00&context=)

Between Treves Rylendra Chand, Plaintiff, and Morey Norman Martin, Southern Railway of British Columbia Limited, City of Surrey, The Minister of Public Safety and Solicitor General of the Province of British Columbia, Her Majesty the Queen in Right of Canada, The Attorney General of Canada, Defendants

(95 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Causation — Action by Chand in *negligence* allowed — Chand was involved in a motor vehicle accident with a train at a railway crossing — Chand and his two passengers sustained serious injuries which were fatal for one passenger — Neither the signal lights south of the crossing nor the bells functioned properly at the time of the collision — There was no evidence that the signal lights were inadequately maintained — However, the train's conductor failed to meet the standard of care incumbent upon him and the defendant Southern Railway of British Columbia Limited was vicariously liable for the conductor's *negligence*.**

**Tort law — Vicarious liability — Liability of employer for acts of employee — Action by Chand in *negligence* allowed — Chand was involved in a motor vehicle accident with a train at a railway crossing — Chand and his two passengers sustained serious injuries which were fatal for one passenger — Neither the signal lights south of the crossing nor the bells functioned properly at the time of the collision — There was no evidence that the signal lights were inadequately maintained — However, the train's conductor failed to meet the standard of care incumbent upon him and the defendant Southern Railway of British Columbia Limited was vicariously liable for the conductor's *negligence*.**

**Transportation law — Railways — Crossings — Safety at road and rail crossings — Action by Chand in *negligence* allowed — Chand was involved in a motor vehicle accident with a train at a railway crossing — Chand and his two passengers sustained serious injuries which were fatal for one passenger — Neither the signal lights south of the crossing nor the bells functioned properly at the time of the collision — There was no evidence that the signal lights were inadequately maintained — However, the train's conductor failed to meet the standard of care incumbent upon him and the defendant Southern Railway of British Columbia Limited was vicariously liable for the conductor's *negligence*.**

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| Action by Chand in ***negligence***. On April 16, 2007, Chand was involved in a motor vehicle accident with a train owned and operated by the defendant Southern Railway of British Columbia Limited. The accident occurred at a railway crossing in Surrey, BC. Chand and the vehicle's two passengers sustained serious injuries. One passenger's injuries were fatal. Chand had no recollection of the accident. The issue of liability was severed from the issue of damages. Chand took the position that the railway crossing lights did not activate to warn those travelling northbound that a train was about to cross. He therefore submitted that Southern was negligent in maintaining the lights. Chand further submitted that at least one of the train's crew members was negligently carrying out their duties, raising the issue of vicarious liability.  HELD: Action allowed.  Neither the signal lights south of the crossing nor the bells functioned properly at the time of the collision. That was confirmed by multiple independent eyewitnesses. Chand was not speeding or otherwise driving erratically when approaching the crossing. Train companies owed a duty of care to motorists who would be crossing their tracks to make certain that appropriate safety precautions existed to warn of a train's approach. The train's crew members had nothing to do with the signal lights failing to engage and there was no evidence that the signal lights were inadequately or improperly maintained. However, the train's conductor, Cohen, either saw that the signal lights were not working and failed to tell the engineer to break in a timely way, or he failed to notice that the lights were inoperative because he did not maintain his duty to keep a proper lookout. Cohen therefore failed to meet the standard of care incumbent upon him as the train's conductor. But for Cohen's failure to meet the requisite standard of care, the accident would not have occurred and Chand would not have suffered his injuries. Southern was vicariously liable for Cohen's ***negligence***. There was no contributory ***negligence*** on Chand's part. |

**Statutes, Regulations and Rules Cited:**

Canadian Rail Operating Rules (TC-O-0-53), s. 103

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 144*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0FY-00000-00&context=), s. 185(6)

**Counsel**

Counsel for the Plaintiff: J.U. Buckley, N.M. Kelly.

Counsel for the Defendants, Morey Norman Martin and Southern Railway of British Columbia Limited: J. Bromley, A. Stainer, E. Grant, A/S.

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

**Introduction**

**1**  On April 16, 2007, the plaintiff, Mr. Treves Chand ("Mr. Chand"), was involved in a motor vehicle accident with a train owned and operated by Southern Railway of British Columbia Limited ("Southern"). The accident occurred at a railway crossing just north of the intersection of Scott Road and Larson Road (the "Scott Road Crossing" or the "Crossing") in Surrey, BC. As a result of the accident, Mr. Chand and the vehicle's two passengers, Mr. Kamaljit Kalyan and Mr. Rick Kumar, sustained serious injuries, with the latter's injuries being fatal.

**2**  Mr. Chand brings this action on the basis of ***negligence***. It is his contention that the railway crossing lights did not activate to warn those travelling northbound towards the intersection that a train was about to cross. Consequently, he maintains that Southern was negligent in maintaining the lights. In addition, he submits that, at the time of the collision, at least one of the train's crew members was negligently carrying out their duties, raising the issue of vicarious liability.

**3**  Companion actions were filed by both the vehicle's passengers. In accordance with Master Taylor's order of October 8, 2013, the issue of liability was severed from the issue of damages, both in those actions, as well as in the case at bar.

**4**  Originally, this action involved a larger number of defendants. However, the claim against the City of Surrey was discontinued on October 30, 2013. Similarly, the claims against the Minister of Public Safety and Solicitor General of the Province of British Columbia, Her Majesty the Queen in right of the Province of British Columbia, Her Majesty the Queen in right of Canada, and the Attorney General of Canada, were dismissed by way of a consent dismissal order in January 2017.

**5**  Southern and its employees Martin and Cohen are the remaining defendants.

**6**  For the reasons that follow, I find Southern liable in ***negligence***.

**Facts**

**7**  Scott Road is a major roadway in Surrey with three lanes of traffic in each direction. It generally runs north-south, and experiences heavy traffic. The Scott Road Crossing is located at the foot of the Patullo Bridge near the waterfront, approximately one block away from the Scott Road Skytrain Station.

**8**  The collision occurred at approximately 10:00 p.m. Mr. Chand was driving a 1992 blue Ford Taurus, with Mr. Kalyan in the front passenger seat, and Mr. Kumar in the back. The vehicle was driving northbound on Scott Road in the middle lane when it struck the front left wheel area of the train's locomotive as the train was moving through the Crossing.

**9**  Mr. Chand has no recollection of the accident.

**10**  Given that the accident occurred during the evening, it was dark. However, there was no rain, and visibility was generally good. The road surface was dry.

**11**  As noted above, the question of whether the lights at the Scott Road Crossing were working is a key contention in this matter. The evidence on this matter is split between that of independent eye witnesses testifying that the warning lights on the south side of the Scott Road Crossing did not initiate, versus expert evidence tendered on behalf of Southern, as well as the testimony of Southern employees, maintaining the opposite.

**12**  One of the independent witnesses in this matter was Mr. William Harkness, an experienced transit bus driver. At the time of the collision, he was in the left hand lane on Scott Road, driving the 640 Coast Mountain bus from Ladner Exchange northbound towards the Scott Road Skytrain Station. He maintains that, before the collision, the signal lights were not activated, nor did he hear the crossing bells or the train's whistle. However, he testified that, shortly after the collision, he witnessed the signal lights and bells activate. Moreover, he maintained that the plaintiff was not speeding or driving erratically immediately before the collision.

**13**  Mr. Harkness also testified that he had driven the night shift for the 640 bus for a long period of time, and was generally cautious when approaching the Crossing. He recalled at least one incident where he arrived at the Scott Road Crossing only to find a train crossing without any signals or bells operating to warn traffic of the train's presence.

**14**  I found Mr. Harkness to be an honest, forthright, and reliable witness.

**15**  Another independent witness to the accident was Bruce Angus, an assessment officer with WorkSafeBC. When the collision occurred, Mr. Angus was driving in the middle lane heading northbound on Scott Road, directly behind Mr. Chand. Like Mr. Harkness, he testified that the warning lights and bells at the Crossing did not come on before the collision, but only immediately after. Given his position relative to Mr. Chand, Mr. Angus testified that he thought that he could easily have been the one who collided with the train. He also testified that Mr. Chand was not speeding or driving erratically.

**16**  Like Mr. Harkness, I found Mr. Angus to be an honest and forthright witness.

**17**  Ms. Jennifer Palmer, a passenger on Mr. Harkness's bus also testified. While she maintains that she witnessed the collision, evidence given by Mr. Harkness suggested that she was not able to do so from her vantage point in the bus. Given my findings regarding Mr. Harkness as a witness, and some inherent flaws in Ms. Palmer's testimony, I am unable to give weight to Ms. Palmer's evidence about her observation of the impact.

**18**  Finally, independent eyewitness testimony was provided by Ms. Bonnie Venables. Unlike the other independent eyewitnesses, she was travelling southbound on Scott Road, and was north of the crossway when the collision occurred. According to her, on her side of the Crossing, the signal lights did in fact activate. However, she also testified that she could not recall hearing any bells or whistles as the train approached.

**19**  Members of the train crew also testified, including Mr. Martin, one of the defendants in this action. Mr. Martin is an experienced train engineer who was operating the train on the evening in question. As the train's engineer, he controls its acceleration, braking, and whistle.

**20**  He made it clear that as engineer, he operates the train from the front right of the cabin, and so he cannot see out of its left side. Given that the train was moving westbound, this means that he was only able to see what was outside the train on the north side of the tracks, whereas Mr. Chand entered the Crossing from south of the tracks. Consequently, while he was not able to testify as to whether the crossing lights were operating for northbound traffic, he did testify that the lights on the opposite side of the tracks were in fact operating.

**21**  In addition, Mr. Martin testified that he sounded his horn at the whistle board prior to entering the Crossing. However, he was not sure how many seconds before entering the Crossing he did this.

**22**  I found Mr. Martin was forthright in his testimony.

**23**  Mr. Steve Cohen, the train's conductor, also testified. The conductor's role includes, among other things, maintaining a lookout for hazards on or near the train tracks, and communicating any potential hazards to the engineer. At the time of the accident, he was located at the front left of the cabin, meaning he was able to see northbound traffic from the window nearest him.

**24**  Mr. Cohen testified that he observed the signal lights on the south side of the tracks operating normally in the moments leading up to the crash. However, I found Mr. Cohen to be an unreliable witness. He was combative, and changed his testimony on a number of key issues, including when he saw Mr. Chand's vehicle approaching the Crossing. As a result, I find that he did not observe the signal lights flashing in the moments before the collision, nor was he keeping a regular lookout.

**25**  The final member of the train crew to testify was Mr. Aaron Cruickshank. He was riding in the second locomotive at the time of the collision, facing eastbound. He testified that Mr. Martin always sounded the horn properly, though could not recall each crossing whistle. Moreover, he has no memory of the signal lights on the night in question. Finally, at odds with Mr. Cohen's evidence, he testified that there was poor visibility out of the left hand, conductor side of the cabin.

**26**  I found Mr. Cruickshank to be honest and forthright.

**27**  The defence also called Mr. Kevin Tobin as a witness. He is a long-serving employee of Southern, and the designated signal maintainer for the Crossing. At the time of the accident, he was a signal maintenance foreman for Southern's rail lines. His responsibility was to maintain, repair and build railway crossing signals for Southern.

**28**  Mr. Tobin was not called as an expert witness. Instead, he was called to provide evidence regarding his observations and practices in servicing and maintaining the signal lights.

**29**  Mr. Tobin regularly inspected the Scott Road Crossing. According to his Inspection Log, he had inspected the Crossing on April 12, 2007, four days before the collision, and found nothing wrong. In general, it seems that, at least in the month before the accident, he usually inspected the Crossing once per week.

**30**  Mr. Tobin arrived at the scene of the crash approximately one hour after the collision. He maintains that he inspected the signal system, and found that the system's relays were in their proper position. Specifically, he maintains that he tested the batteries, individual track circuits, and individual relays. In testimony, he also detailed the process by which he went through the signal box, examining each wire and connector on each terminal for corrosion or loose connections. Overall, he examined the signal system for approximately four hours that evening.

**31**  However, his testimony also revealed that the signal system's circuitry is complex. In addition, he admitted that any machine can fail, including the fail-safe crossing lights. Moreover, he conceded that this could include intermittent failure. He also noted that the lights facing southbound traffic are on a separate circuit from those facing northbound traffic, meaning that it is possible for lights on one side to fail but not the other.

**32**  I found Mr. Tobin to be a forthright witness, though at times he had to be pushed in cross-examination to admit key points favouring the plaintiff.

**33**  Testimony was also heard from Mr. Henry Pootsik and Mr. Maurice Jessiman-Phair. Both were Southern employees who attended at the collision site and who were asked by Mr. Tobin to observe the position of the relays in the signal box. However, neither witness had training in signal maintenance, and both admitted that they simply did what Mr. Tobin told them to do, that is to observe the circuits within the signal box.

**34**  I accept the plaintiff's submission that the testimony of these two witnesses constitutes oath-helping. On this subject, the Supreme Court of Canada stated as follows in *R. v. Burns*, [*[1994] 1 S.C.R. 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CT-00000-00&context=) at 667-668:

The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard*, [*[1993] 4 S.C.R. 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3B3-00000-00&context=) *supra*. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators to swear to the truth of his oath: see *R. v. Béland*, [*[1987] 2 S.C.R. 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23FN-00000-00&context=) *supra*, *per* Wilson J. at pp. 419-20. In modern times, it is defended on the ground that determinations of credibility are for the trier of fact, and that the judge or jurors are in as good a position to determine credibility as another witness. Therefore the fundamental requirement for expert evidence -- that it assist the judge or jury on a technical or scientific matter which might otherwise not be apparent -- is not met. The rule, as Iacobucci J. noted in *R. v. B. (F.F.)*, [*[1993] 1 S.C.R. 697*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60B2-00000-00&context=), at p. 729, goes to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements".

**35**  Given that Mr. Pootsik and Mr. Jessiman-Phair had no means to judge whether the relays were in proper working order, accepting their evidence on this point would simply serve to prove Mr. Tobin's honesty. Given this, and the witnesses' lack of expertise, I have disregarded their testimony.

**36**  Mr. Glenn Mullally also gave evidence. He was qualified as an expert witness on signal maintenance. He provided extensive expert testimony regarding how the signal system works, and maintained there had been no failure. However, he also confirmed that it was possible for the lights on the south side of the tracks to fail when the ones on the north side were still working, and that a partial failure of the signal system was possible.

**37**  In addition, Mr. Mullally testified regarding a data recorder on the train which noted when the train's whistle was blown. This data seemed to indicate that the whistle had been blown, though not at the correct time, or in the correct manner. However, Mr. Mullally explained to the Court how the data recorder could make false readings depending on how the whistle was being handled.

**38**  I found him to be an honest and forthright witness.

**39**  Finally, testimony was provided by Corporal Chu, the RCMP officer who performed an accident reconstruction following the collision. His report was tendered by the defence for the purpose of proving that Mr. Chand was not wearing a seatbelt during the time of the collision. I will return to this testimony at the end of my decision in the section entitled 'Contributory ***Negligence***.' However, for now, I note that I also found him to be an honest and forthright witness.

**40**  Overall, I find that neither the signal lights south of the Scott Road Crossing nor the bells functioned properly at the time of the collision. Multiple independent eyewitnesses confirmed this, with the only eyewitness testifying otherwise being Mr. Cohen who, as I noted above, I found to be an unreliable witness. In addition, as outlined above, the technical evidence regarding the signal system provided by both Mr. Tobin and Mr. Mullally confirmed that such a failure, though highly improbable, was possible. Coupled with the independent eyewitness testimony, I believe that, on a balance of probabilities, the signal system's malfunction on the night in question has been established.

**41**  Moreover, as confirmed by both Mr. Harkness and Mr. Angus, I find that Mr. Chand was not speeding or otherwise driving erratically when entering the Crossing.

**42**  In regard to the train whistle, none of the independent witnesses seems to have heard any whistle. However, given the evidence of Mr. Martin, and the technical evidence regarding the whistle, I find that it was sounded before the train entered the Crossing. I cannot find that, on a balance of probabilities, the plaintiff has established that the sounding of that whistle was inconsistent with the requisite regulations so as to ground a claim in ***negligence***.

***Negligence***

**43**  Recently, in *Agar v. Weber*, [*2014 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B196-00000-00&context=), the British Columbia Court of Appeal outlined the elements of ***negligence*** as follows at para. 29:

In ***negligence***, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [*[1999] 1 S.C.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41J-00000-00&context=) at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *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=); *Hussack v. Chilliwack School District No. 33*, [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=) at para. 54.

**44**  In other words, the elements of ***negligence*** are (1) duty of care; (2) standard of care; and (3) causation. I have followed this structure in my reasons.

1. **Duty of Care**

**45**  In this matter, surprisingly, Southern has not conceded that it owed a duty of care to members of the public entering the Scott Road Crossing. Given this, it is appropriate to outline why Southern owed a duty of care to Mr. Chand.

**46**  Recently, this Court stated the following regarding duty of care in *Mineault v. Kamloops (City)*, [*2017 BCSC 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N1F-TXX1-DXPM-S4BG-00000-00&context=) at para. 66:

The duty of care analysis begins by considering whether the relationship between the parties falls into a category which the law already recognizes as giving rise to a duty of care. If it does, then the court need not consider the two-stage analysis set out in *Cooper v. Hobart*, [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=) and refined in subsequent cases: *Douglas v. Kinger (Litigation Guardian of)*, [*2008 ONCA 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64H8-00000-00&context=), leave to appeal refused [*[2008] SCCA No. 363*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F22N-X2V7-00000-00&context=) at paras. 13-14.

**47**  In regard to railway crossings, courts have long held that railway companies owe motorists a duty 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=), the Supreme Court of Canada found the following at para. 41:

The first question is whether the Railways owed the appellant a duty of care. The Store Street tracks ran down the centre of an urban street, in direct proximity to the public. It was plainly foreseeable that carelessness by the Railways with respect to those tracks could cause injury to users of the street. Accordingly, a *prima facie* duty of care arose under the first step of the *Anns/Kamloops*, [1978] A.C. 728/[1984] 2 S.C.R. 2, test. See *Harris*, [*59 D.L.R. (4th) 151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1XS-00000-00&context=) *supra*, at p. 155. Turning to the second step of the test, the Railways have not identified any legislative or judicial policies which would negate that duty or limit it. As noted, the authorities relied upon by the Railways concern the manner of carrying out a specific activity, and do not purport to limit civil liability. Those regulations do not affect the existence of a duty of care.

**48**  While *Ryan* concerned railway tracks, rather than signal lights, in my view its findings apply to the case at bar. Clearly, train companies owe a duty of care to motorists who will be crossing their tracks to make certain that appropriate safety precautions exist to warn of a train's approach. It is not my understanding that the defendants contest that malfunctioning signal lights would constitute an unreasonable risk, and they did not make that submission. Consequently, Southern and, by implication, its employees, owed Mr. Chand a duty of care, something long established in the case law.

1. **Standard of Care**

***(i)* Mr. Martin**

**49**  The evidence is clear that neither Mr. Martin nor anyone else on the train crew had anything to do with the signal lights. While they are able to manually turn those lights off, the process for doing so is quite complex, and the plaintiff does not claim that they had done so. Based on the evidence before me, I find that the crew members had nothing to do with the south-facing signal lights at the Crossing failing to engage. Consequently, given that my decision is premised on the failure of the signal lights, and my findings that Mr. Martin had no means to observe the south-facing signal lights, nor that he initiated the manual process for turning those lights off, I cannot find that he violated any standard of care.

***(ii)* Southern**

**50**  It is first important to note that, historically, there was a common law rule that the standard of care owed by railway companies to members of the public was limited to the discharge of statutory obligations. However, the Supreme Court of Canada overruled that rule in *Ryan* at para. 33:

The calls for reform expressed 24 years ago in *Paskivski*, [*[1976] 1 S.C.R. 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24KD-00000-00&context=) are more compelling today. The special status enjoyed by railway companies under the law of ***negligence*** can no longer be justified in principle and the time has come for that rule to be set aside. Although a doctrine of such long standing should not lightly be discarded, there is little to be gained from maintaining for its own sake a line of jurisprudence which has lost its relevance.

**51**  Instead, the Court outlined the relevant standard of care analysis to be applied to railway companies as follows at paras. 28-29:

[28] 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.

[29] Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of 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=). Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of ***negligence***. See, e.g., *Stewart v. Pettie*, [*[1995] 1 S.C.R. 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GV-00000-00&context=), at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See *Linden*, *supra*, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

**52**  The defendants' submission on this point is that, even if this Court finds that the signal lights failed, the risk to the public was not foreseeable, as there was nothing to warn Southern that the lights at the Scott Road Crossing were faulty. Submissions were not provided on the other elements of the standard of care analysis.

**53**  The defence evidence regarding the signal lights at the Crossing indicated that they were operational in the few weeks before the incident in question. The only major exception to this is an incident that occurred on March 15, 2007, approximately one month before the accident. On that date, some person or persons stole hundreds of bonds at the Crossing. The bonds are metal pieces on the rails that when the train's wheels make contact with them, the signal lights and bells are triggered by the now-completed circuit. In the absence of the bonds, the lights and bells signal continuously. When they were stolen, repair crews were unable to return the Crossing to working order until March 20, 2007. In the interim period of time, the lights were shut off, and train crews were required to manually protect all trains travelling through the Crossing.

**54**  At trial, the defendants adamantly denied that the stealing of the bonds, or the subsequent repair process, may have seriously damaged the signal lights. Their expert evidence on this issue was that the signal lights were on a fail-safe system: if bonds were removed, the result was that the signal lights and crossing bells would constantly be active until manually shut down.

**55**  In light of the defendants' expert evidence, I cannot find any violation of the standard of care in regard to the maintenance of the signal lights. There was no evidence, expert or otherwise, indicating that the signal lights in question were inadequately or improperly maintained.

**56**  However, this does not end the standard of care analysis. As discussed above, even the witnesses called by Southern to defend the safety of the signal system conceded that a failure of the signal lights to engage was still a possibility, including intermittent failure. Consequently, in order to determine if Southern violated the requisite standard of care, it is necessary to look at what safety precautions were in place to deal with sudden failures of signal lights at railway crossings.

**57**  Mr. Cohen testified that, when approaching a railway crossing, it was his responsibility to maintain a look out from his side of the cabin to see if any vehicles were approaching the train. This would include checking to see if the signal lights at a crossing were properly working. Mr. Tobin testified that holes in the side of the signal lights, called "wigwags," show a white flashing light that train crews can see straight ahead of them when approaching a crossing to indicate that the signals have engaged. In regard to the signal lights on the south side of the Scott Road Crossing, Mr. Cohen testified that on approach, he saw these flashing wigwags, and so, according to him, there was no signal failure. Of course, he had no ability to see whether the actual signals that should appear to a north-bound driver were functioning. He further testified that he was keeping a lookout on the approach to the Scott Road Crossing and did not see the plaintiff's car until it was too late to warn Mr. Martin in time for the train to stop. However, as discussed above, I determined that his testimony was unreliable.

**58**  In essence, this evidence indicates that, in addition to the signal lights, Southern has implemented a system in which the train crew is supposed to maintain a lookout for hazards when approaching an intersection.

**59**  Southern conceded that the east side of the Crossing, the side from which the train approached, has an obstructed view from the street to the railway and vice versa. On this point, Corporal Chu testified to the trees and a house that block the view, testimony that was mirrored by Mr. Martin and Mr. Cruickshank. Mr. Cruickshank maintained that northbound traffic did not come into view until a train was 50 feet from the crossing. Similarly, though he was inconsistent on this point, Mr. Cohen maintained that he did not see Mr. Chand's vehicle until he was 40 feet from the Crossing.

**60**  In terms of the train's speed at the time of the collision, the evidence indicates that the train was either travelling the limit of 15 miles per hour or, at the most, 16 miles per hour. Southern's position on this limit was that there was no evidence that it was inappropriate, and that it was a limit of long standing.

**61**  Mr. Cohen also testified that, upon seeing Mr. Chand's vehicle, he immediately yelled to Mr. Martin to apply the train's brakes, and Mr. Martin quickly complied. The fact that Mr. Cohen yelled to Mr. Martin to apply the train's brakes is corroborated by Mr. Martin's testimony. In addition, Southern maintains that, at the distance of approximately 40 feet, there is nothing the train crew could have done to prevent the collision.

**62**  As was conceded by the defendants, a mechanical failure is always a possibility in even the best protected fail-safe system. While asking the train crew to keep a lookout when they approach railway crossings may usually be enough to deal with this contingency, at the Scott Road Crossing, it seems that this fail-safe is largely pointless: by the time a member of the train crew is able to see approaching northbound traffic, it is too late to prevent any collision, even when the train is travelling at the requisite speed limit. As noted above, I also found that Mr. Chand was travelling the requisite speed limit for motorists when entering the Crossing. Consequently, a means by which it could be found that Southern failed to fulfill the requisite standard of care would be the following: the obstructed view at the Scott Road Crossing, coupled with even a remote possibility that a signal light there would fail, constitute an objectively unreasonable risk of harm which was foreseeable.

**63**  One concern I have which prevents me from making this finding is that there was no testimony regarding at what point Mr. Cohen would have had the ability to see the wigwags flashing from the south-facing signal lights. Presumably, it was only possible for him to see Mr. Chand approaching the Crossing from 40 to 50 feet away, but he may have been able to see the wigwags from a greater distance. If it were possible to see the wigwags from a distance that allowed the train to brake in time to avoid a collision, then there would be no objectively unreasonable risk of harm that Southern could have foreseen. Instead, the expectation would be that, upon seeing that the signal light was not operating, the conductor would immediately ask the engineer to stop the train at a safe distance that it could stop before it entered the Crossing.

**64**  Given this contingency, I find that the plaintiff has not proven, on a balance of probabilities, that Southern in any way violated the standard of care placed upon it to reasonably maintain the signal lights at the Crossing.

***(iii)* Mr. Cohen**

**65**  Southern's internal regulation, *Time Table No. 6*, makes it clear at s. 6.3.1 that Mr. Cohen was not permitted to allow the train to enter the Scott Road Crossing unless the signal lights had been flashing for at least 20 seconds. In addition, the plaintiff submits that, given that the south-facing signal lights at the Crossing were not operating, s. 103 of the *Canadian Rail Operating Rules* (TC-O-0-53) applied to him. This rule deals with public crossings which are not equipped with automatic warning devices, such as signal lights. The plaintiff maintains that, as required by s. 103(g), in that circumstance, Mr. Cohen was under a duty to stop the train and manually guide it through.

**66**  As I have found the signal lights were not operating on the south side of the Scott Road Crossing, I find that this is an appropriate reading of the statute. In these circumstances, practically speaking, a crossing with malfunctioning signal lights is not a crossing with automatic signal lights.

**67**  As noted earlier in this decision, I found Mr. Cohen's testimony unreliable, and so I reject his claim that he saw the signal lights, as well as his claim that he was keeping a regular lookout. Consequently, my finding is that, Mr. Cohen either saw the signal lights were not working at the Crossing and failed to tell Mr. Martin to brake in a timely way, or he failed to notice that the lights were inoperative because he did not maintain his duty to keep a proper lookout.

**68**  In this context, as discussed above, the Supreme Court of Canada made it clear in *Ryan* that the old common law rule relating to railway companies and liability in ***negligence*** actions no longer applies. However, that rule was premised on the assumption that the railway company in question had not violated any statutory or regulatory requirements: *Ryan* at para. 30. Thus, even under this now-defunct rule, it was clear that any violation of the regulations would open a railway company to liability in ***negligence***. In addition, the Court in *Ryan* made it clear that "[l]egislative standards are relevant to the common law standard of care...": *Ryan* at para. 29.

**69**  In my view, it is self-evident that a failure to either ensure a train stops before entering a crossing where the signal lights are off, or a failure to keep a lookout, constitutes an unreasonable risk of harm which violates the requisite standard of care. Either way, I find that Mr. Cohen failed to meet the standard of care which was incumbent on him as the train's conductor. He was the employee charged with ensuring the safety of the public by both watching for the signal lights, via the wigwags, (on his side of the train) and for observing the intersection (from his side of the train) through which the train was about to proceed. I am supported in this finding by the fact that both internal and general regulations required him to ensure that the train would not enter the Crossing in the event the signal lights that only he could observe from his side were not functioning. He failed in this regard.

**Causation**

**70**  The defendants did not contest that the collision caused the plaintiff's injuries. Instead, they merely denied that the plaintiff's damages were as severe as he claimed. As noted at the beginning of this decision, the issue of damages has been severed from this action, and so I will not deal with that aspect of the defendants' submissions. Given the parties' agreement on the issue of causation, I will only briefly outline the relevant law.

**71**  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 Supreme Court of Canada outlined the basic rule on causation in ***negligence*** cases as follows at paras. 6-10:

[6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's ***negligence*** (breach of the standard of care) *caused* the injury. That link is causation.

[7] Recovery in ***negligence*** presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care -- a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E.J. Weinrib, *The Idea of Private Law* (1995), at p. 156.

[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.

**72**  In the case at bar, I find that, but for Mr. Cohen's failure to meet the requisite standard of care, the accident would not have occurred, and the plaintiff would not have suffered his injuries. Therefore, the plaintiff has established causation.

**Vicarious Liability**

**73**  When it comes to Mr. Martin, it is not necessary to discuss vicarious liability, as I found that he did nothing negligent in his role as the train's engineer. In contrast, as I have found Mr. Cohen was acting negligently, it is necessary to discuss vicarious liability.

**74**  On this point, Southern submits that, in the plaintiff's pleadings, there is no mention of Mr. Cohen doing anything wrong, and no allegation is made against Southern concerning his actions so as to make them vicariously liable. In support of this argument, the defendants cited the following passages from *Canadian Bar Assn. v. British Columbia*, [*2008 BCCA 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1R8-00000-00&context=) at paras. 59-60:

[59] The purpose of pleadings was described by Smith J. in *Homalco Indian Band v. British Columbia* [*(1998), 25 C.P.C. (4th) 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M15W-00000-00&context=) (B.C.S.C.):

[5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39.

[60] ... Pleadings prevent expansion of the issues, give notice of the case required to be met, and provide certainty of the issues for purposes of appeal. Complexity and confusion that can be created by a moving target is avoided by pleadings correctly drawn, as are subsequent quarrels in this Court as to the issues before the trial court. Pleadings are an elegant solution to issue definition and notice and are well-serving of the ultimate purpose of efficient resolution of a dispute on its merits (Rule 1(5) of the *Rules of Court*). Ideally, they avoid the "loose thinking" decried by Lord Denning in his foreward to I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975).

**75**  I am not persuaded by this authority. The defendants have known from the beginning of these proceedings that this matter concerned the collision, including the actions of each of the train's crew members. Extensive written and oral submissions were provided regarding Mr. Cohen's actions, and he gave oral testimony. In addition, an Amended Statement of Claim was filed by the plaintiff on February 23, 2017, with the following changes (made by consent) made to focus attention on Mr. Cohen's actions:

11.1 At all material times, the defendant Martin was working with the conductor of the Train, Steve Chad Cohen. Steve Chad Cohen was in the course and scope of his employment with the defendant Southern Railway.

...

1. Particulars of the ***negligence*** of defendant Southern Railway and its employees, including Steve Chad Cohen, singly or in combination, and/or the defendant City of Surrey are:

...

1. Failing to keep a proper, or any, lookout;
2. Failing to alert, or reasonably alert, the defendant Martin that the railway crossing lights and/or signals were not functioning;

...

17.1 The defendant Martin, and the defendant Southern Railway, and its employees, including Steve Chad Cohen, singly or in combination, breached the following statutory duties required by the *Railway Safety Act*, [SBC 2004] c 8, and the Statutes, Regulations, Standards and Rules adopted thereby:

1. Sections 14 and 103(g) of the *Canadian Rail Operating Rules* (TC-O-0-53); and

(b) Section 12(1) of the *Highway Crossings*

*Protective Devices Regulations*, *CRC c 1183*.

**76**  In keeping with the concerns outlined in the case cited by the defendants, there was no moving target or other fairness issue that would make it inappropriate to find Southern vicariously liable for Mr. Cohen's actions.

**77**  In addition, the case law on vicarious liability supports my finding on this point. Recently, in *Genesis Fertility Centre Inc. v. Yuzpe*, [*2017 BCSC 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MTP-GH21-JX8W-M4TG-00000-00&context=), this Court found the following at para. 22:

There is no question that a claim can be advanced for vicarious liability without having the employee or agent named as a party. Counsel for the defendant shareholders referred to *Powell Estate v. British Columbia (Workers' Compensation Board),* [*[2011] B.C.J. No. 1459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RY-00000-00&context=) (S.C.). In that case, Mr. Justice Johnston refused an application to join an employee of the Workers' Compensation Board on the basis that any damages flowing from his actions, which were alleged to constitute misfeasance in public office, would be recoverable against the Worker's Compensation Board.

**78**  In regard to vicarious liability itself, a useful summary of the appropriate legal test was recently provided by this Court in *Ari v. Insurance Corporation of British Columbia*, [*2013 BCSC 1308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B221-00000-00&context=) at para. 68 and 70:

[68] An employer is vicariously liable for (1) employee acts authorized by the employer or (2) unauthorized acts so connected with the authorized acts that they may be regarded as modes of doing an authorized act. This is referred to as the "Salmond test" (referring to the Salmond and Heuston text, *The Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987)) and was upheld 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=) at para. 10 (*Bazley*). In other words, vicarious liability is a strict form of liability for employers.

...

[70] The Supreme Court of Canada in *Bazley* outlined a two-part approach for determining whether vicarious liability should be imposed in circumstances of an unauthorized act (para. 15). First, a court should determine whether there are precedents that "unambiguously" determine whether the facts give rise to vicarious liability. If no precedents exist, the court must then determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

**79**  In the case at bar, I find that the plaintiff's actions fall under the first branch of the *Bazley* test. Though Mr. Cohen failed to maintain his lookout duties, clearly he was in the course of his employment. The case at bar thus qualifies as one where vicarious liability typically applies, that is, one where an employee acts negligently in the course of his duties and thereby injures a member of the public.

**80**  If I am incorrect on this point, and the case at bar falls under the second branch of the *Bazley* test, vicarious liability has still been made out. Given my finding that Mr. Cohen violated the internal safety protocols imposed on him by Southern, he was not performing acts authorized by the employer but was performing acts "so connected with the authorized acts that they may be regarded as modes of doing an authorized act". In keeping with the test outlined above, there are a large number of precedents that unambiguously determine that the facts here give rise to vicarious liability.

**81**  For example, in *MacEachern v. Rennie*, [*2010 BCSC 625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-631C-00000-00&context=), the plaintiff was either walking or riding her bicycle along King George Highway in Surrey, BC when her head was struck by a passing tractor-trailer owned by Canadian National Transportation Limited ("CN"). The driver of the trailer was found to have been negligent by failing to keep a proper lookout, and CN was found vicariously liable for the accident: paras. 580 and 588.

**82**  Similarly, in *Aiken v. Van Dyk*, [*2001 BCSC 1217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-242F-00000-00&context=), it was found that a truck driver was not directly negligent for striking and killing a young child. However, one of his casual employees, in his role as a 'swamper,' was required to keep a lookout, but failed to do so. Consequently, the Court ruled that the employer was vicariously liable for the child's death: para. 48.

**83**  Regardless of which branch of the *Bazley* test applies to the case at bar, Southern was clearly susceptible to a claim in vicarious liability. Given my determinations regarding Mr. Cohen's actions, I find Southern vicariously liable for his ***negligence***.

**Effect of the Guilty Plea**

**84**  On June 22, 2009, Mr. Chand pleaded guilty to a charge under s. 144 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*MVA*] for driving a vehicle without due care and attention. As a result, a $1,500.00 fine was imposed on him.

**85**  It is the defendants' position that, even if the signal lights at the Crossing were not operating at the material time, Mr. Chand was required by statute to approach the signals with caution. For this point, they cite s. 185(6) of the *MVA*. In addition, they argue that Mr. Chand's guilty plea constitutes proof that he was driving erratically.

**86**  The key decision regarding the effect of a guilty plea in a subsequent proceeding involving the same facts is *Toronto (City) v. CUPE Local 79*, [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=). In that case, the Supreme Court of Canada was considering whether the grievance of a dismissal following a conviction for sexual assault amounted to an abuse of process. The Court provided the following comments at paras. 51-53:

[51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

[53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. ***There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail.*** An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

[Emphasis added]

**87**  I find that the case at bar fits within the exception emphasized above in *CUPE Local 79* at para. 53. Mr. Chand had no memory of the collision, and so he could not offer a full and robust defence. In addition, the fine was quite minor, with the stakes of this subsequent proceeding being much higher. In those circumstances, it is not surprising that Mr. Chand chose to enter a guilty plea.

**88**  Consequently, I find that in these circumstances, Mr. Chand's guilty plea does not constitute proof in these proceedings that he was driving without due care or attention on the night in question. In keeping with the independent eyewitness testimony of Mr. Harkness and Mr. Angus, I find that Mr. Chand was not speeding or driving erratically.

**Contributory *Negligence***

**89**  Despite finding that Mr. Chand was not speeding or driving erratically, it has long been recognized that a plaintiff can be found to be contributorily ***negligence*** due to their failure to wear a seatbelt. For example, in *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=), the Supreme Court of Canada noted the following at para. 19:

The courts in this country have consistently deducted from 5 to 25 percent from claims for damages for personal injury on the grounds that the victims were contributorily negligent for not wearing their seat belts. This has been done whenever it has been demonstrated that the injuries would have been reduced if the belts had in fact been worn.

**90**  As outlined by this Court recently in *Van v. Howlett*, [*2014 BCSC 1404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B1CJ-00000-00&context=) at para. 128, to establish contributory ***negligence*** on the basis of a plaintiff's failure to wear a seatbelt, the defendant must demonstrate the following:

... For the defence to succeed, I must be satisfied on a balance of probabilities not just that the plaintiff failed to wear her seatbelt, but also that her seatbelt was in good working order and that its use would have avoided or minimized the injuries she suffered: see, for instance, *Harrison v Brown*, [*[1987] 1 WWR 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21KW-00000-00&context=) (BCSC), and *Ford v Henderson*, [*2005 BCSC 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P7-00000-00&context=) at para 69...

**91**  In the case at bar, Corporal Chu testified that, given the deformity of the steering wheel post-collision, he concluded that Mr. Chand was not wearing a seatbelt at the time of the collision. However, he admitted that he did not test the seatbelt to see if it functioned properly. In addition, in regard to Mr. Chand's seatbelt being severed, which the pictorial exhibit indicates, he was not able to advise whether emergency responders had cut the belt off Mr. Chand after the collision, leading to the inference that he was still wearing it at the time of the collision, thus necessitating its removal.

**92**  Though I found Corporal Chu to be an honest witness, in light of these weaknesses in his testimony, I cannot find that, on a balance of probabilities, it has been established that Mr. Chand was not wearing a seatbelt. Consequently, I find that there was no contributory ***negligence*** on Mr. Chand's part.

**Conclusion**

**93**  I find that, due to Mr. Cohen's conduct on the night in question, Southern is vicariously liable in ***negligence*** to Mr. Chand.

**94**  The plaintiff's case is granted, with costs.

**95**  If the parties require speaking to costs, they may notify the Registry within 10 days of the date of this decision to set down a date to appear before me.

L.D. RUSSELL J.

**End of Document**

[***Economical Mutual Insurance Co. v. Doherty, [2009] B.C.J. No. 1425***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0GY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.M. Myers J.

Heard: June 18, 2009; written submissions, June 30,

2009.

Judgment: July 15, 2009.

Dockets: S076963 and S077006

Registry: Vancouver

**[2009] B.C.J. No. 1425** | [*2009 BCSC 959*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GD-00000-00&context=) | [*76 C.C.L.I. (4th) 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GD-00000-00&context=) | [*2009 CarswellBC 1866*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GD-00000-00&context=) | [*[2009] I.L.R. I-4868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GD-00000-00&context=)

Between Economical Mutual Insurance Company, Petitioner, and Mark Doherty, Respondent And between Aviva Canada Inc., Petitioner, and Mark Doherty, Respondent

(45 paras.)

**Case Summary**

**Insurance law — Insurers — Duties — Duty to defend — Petitions by two insurers for a declaration that they did not have a duty to defend a tort action allowed — Respondent insured was sued for allegedly kicking another player in the head during a soccer match, with an alternative pleading of *negligence* — One petitioner issued respondent's homeowner's policy, and the other petitioner insured the British Columbia Soccer Association — Despite the wording of the pleading, the claim against the respondent was for an intentional act, which was specifically excluded by both policies.**

**Insurance law — Risk — Exclusions — Criminal or intentional act by insured — Petitions by two insurers for a declaration that they did not have a duty to defend a tort action allowed — Respondent insured was sued for allegedly kicking another player in the head during a soccer match, with an alternative pleading of *negligence* — One petitioner issued respondent's homeowner's policy, and the other petitioner insured the British Columbia Soccer Association — Despite the wording of the pleading, the claim against the respondent was for an intentional act, which was specifically excluded by both policies.**

**Insurance law — Liability insurance — Exclusions — Household or homeowner's policies — Petitions by two insurers for a declaration that they did not have a duty to defend a tort action allowed — Respondent insured was sued for allegedly kicking another player in the head during a soccer match, with an alternative pleading of *negligence* — One petitioner issued respondent's homeowner's policy, and the other petitioner insured the British Columbia Soccer Association — Despite the wording of the pleading, the claim against the respondent was for an intentional act, which was specifically excluded by both policies.**

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(3)(b)

**Counsel**

Counsel for the Petitioner, Aviva Canada Inc.: R.N. Beckmann.

Counsel for the Petitioner, Economical Mutual Insurance Company: A.R. Nelson.

Counsel for the Respondent: J. Doyle.

**Reasons for Judgment**

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| **E.M. MYERS J.** |

**BACKGROUND AND ISSUES**

**1**  This involves two separate petitions by insurers seeking a declaration that they do not have a duty to defend a tort action brought against the respondent, Mr. Doherty. The basis for the applications is that the action alleges an intentional tort, a risk not covered by the insurance policies.

**2**  In the underlying tort action the plaintiff, Clark Brolly, claims damages for injuries sustained in a March 16, 2005 soccer game in which he says he was kicked in the head by the respondent, Mr. Doherty.

**3**  Economical issued a homeowners policy to Mr. Doherty. Aviva issued a policy to the British Columbia Soccer Association. Both were in force at the time of the soccer game.

**4**  Economical's policy provided coverage for legal liability arising out of an occurrence, defined as:

An accident, happening or event including continuous or repeated exposure to conditions, neither intended nor expected from the standpoint of the Insured which results, during the period of this Insurance, in Bodily Injury or Property Damage; or an act or series of acts which results in Personal Injury.

**5**  The policy contained the following exclusion clause:

This Insurance does not apply under Coverages E, F and G to claims arising from:

...

1. Bodily Injury, Property Damage or Personal Injury arising from any intentional or criminal act or failure to act by:
2. any person insured by Section II of this Insurance; or ...

**6**  Aviva's policy provided coverage for:

... those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" ... to which this insurance applies ... The "bodily injury" ... must be caused by an "occurrence" ...

**7**  Occurrence is defined in Aviva's policy as follows:

"Occurrence" means accident including continuous or repeated exposure to substantially the same general harmful condition.

**8**  The policy excluded coverage for:

1. "Bodily injury" ... expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect person or property.

**9**  The original version of the statement of claim contained the following allegations against Mr. Doherty:

1. In or about the 16th day of March, 2005 the Plaintiff and the Defendant were on opposing soccer teams competing in an organized soccer game at William Griffin sports complex located at 851 West Queens Road, North Vancouver, British Columbia.
2. In the course of the game, the Plaintiff fell to the ground after attempting a tackle on the Defendant.
3. The Defendant intentionally, maliciously, and without provocation kicked the Plaintiff in the head while he was laying on the ground in a vulnerable position.
4. The Plaintiff says that the kick administered by the Defendant to the Plaintiff's head referred to in paragraph 5 above constituted an assault to which the Plaintiff did not expressly or impliedly consent to as being a normal part of an organized soccer game.
5. As a result of the assault referred to in paragraph 5 above, the Plaintiff sustained the following injuries ...

**10**  There is no dispute that the original statement of claim pleaded an intentional tort only. (I note that although the statement of claim refers to assault, the proper legal characterisation of the alleged facts is the tort of battery. However, that mischaracterisation has no significance to this ruling.)

**11**  The statement of claim was amended to add the following:

1. In the alternative, the Plaintiff says that the Defendant was negligent in striking the Plaintiff and as a result he has suffered damages.
2. The particulars of the ***negligence*** of the Defendant are as follows:
3. failed to control his emotions and/or his temper so as to avoid striking the Plaintiff;
4. participated in the game in a reckless manner or by the use of excessive force;
5. responded in an excessive or irrational manner to the tackle on him by the Plaintiff.

**12**  In *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [*2000 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=), the Supreme Court of Canada made it clear that an insurer's duty to defend was limited to claims for which coverage is provided by the policy. That determination is to be based on the insurance policy and the pleadings in the action against an insured and not on evidence with respect to that underlying action. At para. 80 of *Scalera*, Iacobucci J. cited the following passage with approval from *Bacon v. McBride* [*(1984), 6 D.L.R. (4th) 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2MW-00000-00&context=) (B.C.S.C.) in which Wallace J. stated at 99:

The pleadings govern the duty to defend -- not the insurer's view of the validity or nature of the claim or by the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

**13**  When examining the statement of claim the Court is to look at the true nature of the claim and not the labels used by the plaintiff: *Scalera* at para. 79. I will return to this later in these reasons.

**14**  In the case at bar the insurers argue that the statement of claim, when properly construed, alleges only an intentional tort. Even if that is not the case, the insurers argue that any claim for ***negligence*** is derivative of the claim for assault and pursuant to *Scalera* is subsumed by the intentional tort claim, resulting in there being no duty to defend.

**15**  Although initially each party wanted to adduce evidence beyond the scope of the policies and the statement of claim in the underlying tort action, those positions have been formally abandoned. All parties agree - correctly, in my view - that this case is to be determined by the statement of claim and policies alone.

**16**  The parties agree that the differences in the wording between Economical's and Aviva's policies are not germane to the two issues before me.

**ANALYSIS**

**17**  The insurers say that although para. 7 of the amended statement of claim pleads ***negligence*** the particulars which follow in para. 8 are not particulars of ***negligence***. Rather, they are particulars of intentional acts. Therefore the statement of claim should be read so as to refer to intentional acts only.

**18**  In response, the first argument of Mr. Doherty is that the broad claim of ***negligence*** in para. 7 is sufficient to invoke the duty to defend. He points to the principal that policies of insurance are to be read *contra proferentem*.

**19**  While it is correct that, as the Supreme Court affirmed in *Scalera* at para. 70, "coverage provisions should be construed broadly and exclusion clauses narrowly", it is also the case that, as pointed out above, the true nature of the cause of action must be looked at. In the case at bar, particulars of ***negligence*** have been set out in the statement of claim. There is no reservation of the right to provide further particulars as counsel may advise, nor did the paragraph state that the particulars included the ones listed.

**20**  Turning to the particulars listed, it appears to me that sub-paras. (a) and (c) of para. 8 (quoted above) are intentional acts. That leaves the allegation of recklessness or use of excessive force in sub-para. (c) to be considered.

**21**  The plea of the use of excessive force does not add to the allegations of the intentional act set out in paras. 5 to 6 which are allegations of the use of excessive force.

**22**  Turning to recklessness, the insurers argue that recklessness is not a particular of negligent conduct. That is correct. Nevertheless, there is an allegation of reckless conduct and I do not think it makes a difference whether it is considered as a particular of ***negligence*** or a stand-alone allegation of recklessness (without particulars of the reckless conduct). The real question is whether the pleading of recklessness in the context of this statement of claim alleges intentional conduct.

**23**  Recklessness is not a tort in itself. Recklessness, or its root word, is a word used in various sections of the *Criminal Code*. It is a term employed in various statutes. An example of the latter is s. 3(3)(b) of the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337*, which uses the term "reckless disregard" to define an occupier's duty of care to a trespasser.

**24**  In a classic English case dealing with occupier's liability, Cross L.J. observed at 137:

"Reckless" is an ambiguous word which may bear different meanings in different contexts.

*Herrington v. British Railway Board,* [1971] 2 Q.B. 107 (C.A.); affirmed [1972] A.C. 877 (H.L.)

**25**  No case was cited to me in which insurance coverage or the duty to defend hinged on the interpretation of a plea of recklessness. Mr. Doherty places heavy reliance on *Unruh (Guardian ad litem of) v. Webber* [*(1994), 112 D.L.R. (4th) 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0RP-00000-00&context=) (B.C.C.A.). In that case the plaintiff was playing recreational hockey when he was checked from behind by the defendant. He was rendered a quadriplegic. Checking from behind was a penalty introduced several years before out of concern over the incidence of spinal injuries.

**26**  At 85-86, the Court of Appeal quoted the trial judge, where he said:

I conclude that the defendant Webber intentionally pushed or checked the plaintiff Unruh from behind, that Unruh was propelled head first into the end boards of the hockey rink and thus broke his neck. I do not suggest for an instant that Webber meant to inflict any injury. The push or check was thoughtless, not vicious. But Webber was, by his own admission, well aware firstly, that the push or check from the rear was banned under the rules and secondly, that a player employing the tactic might well cause a devastating spinal cord injury of the sort suffered by Unruh.

I hold therefore, that Webber was duty bound to avoid contacting Unruh from the rear, especially in the proximity of the boards, as he could foresee that disastrous results might well ensue. *Webber was negligent and is liable accordingly in damages for the injury suffered by Unruh*.

(emphasis added)

**27**  At 87-88, the Court of Appeal also quoted the following passage from the trial judgment:

In this case the fact is that the defendant realized the substantial risk of injury and ran the risk. *He was reckless*.

Obviously, Unruh did not accept the risk of an illegal check from behind. The rule infraction was intentional not unintentional as paragraph 5 alleges. *As I have said, the check was intentional although the consequences doubtless were not. Under these circumstances the legal principles of* ***negligence*** *must apply*.

(emphasis added)

**28**  The Court of Appeal in *Unruh* quoted from the English decision of *Condon v. Basi*, [1985] 2 All E.R. 453 (C.A.). In that case the plaintiff was injured while participating in a football [soccer] match. A player received the ball and, realizing he was about to be challenged, passed the ball on. The defendant, sliding in from 3-4 yards, came in late "in a *reckless* and dangerous manner, by lunging with his boot studs showing about a foot-18 inches from the ground" (emphasis added). The tackle broke the plaintiff's leg. The referee stated that the tackle constituted "serious foul play" and the defendant was ejected from the game. Though the tackle was made in a "reckless and dangerous manner," it was done without malicious intent but, rather, in an "excitable manner without thought of the consequences" (cited in *Unruh* 93-94).

**29**  The English Court of Appeal upheld the trial decision, noting:

He was clearly guilty, as I find the facts, of serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game.

For my part I cannot see how that conclusion can be faulted on its facts, and on the law *I do not see how it can possibly be said that the defendant was not negligent*.

(emphasis added) (cited in *Unruh* at 94)

**30**  The Court in *Unruh* concluded its decision stating at 94:

The trial judge's finding of liability did not turn upon the breach of the rule alone. The learned trial judge specifically found that Weber was "*reckless*". We are not persuaded that he was wrong. On the contrary, his finding was amply supported by the evidence.

For these reasons the appeal on liability must be dismissed.

(emphasis added)

**31**  Based on the above, Mr. Doherty argues that in the action brought against him the plaintiff alleges that Mr. Doherty was negligent by participating in the game in a reckless manner. Even if the kick was intentional, Mr. Doherty's conduct is alleged to have been reckless. Mr. Doherty points out that nowhere in paras. 7 or 8 of the amended statement of claim (or for that matter the entire pleading) is it alleged that the respondent intended to cause the injuries pleaded in para. 9.

**32**  Neither *Unruh* nor *Condon* involved the issue of whether alleged conduct was intentional for the purposes of an insurance policy. (The trial judge found as a fact that the defendant knew the risk of checking the plaintiff and intentionally took that risk.) I agree with Economical Mutual's submissions that neither case stands for the proposition that reckless conduct and negligent conduct are the same juridical concepts. The finding of liability in both these cases was on the basis that the defendants' conduct fell below the requisite standard of care and that the conduct was not a risk which the participants in the games accepted.

**33**  Mr. Doherty also relies on the decision of Oppal J. (as he then was) in *Hartup v. BCAA Insurance Corp.*, [*2002 BCSC 972*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G31T-00000-00&context=). In that case the plaintiff in the underlying claim was shot in the eye by the 21-year old son of the insureds. The insureds sought a declaration that the insurer was obligated to defend them in that action. The insurer denied coverage on the grounds that the son, also an insured, was convicted of a criminal offence and that the act was an intentional tort.

**34**  Oppal J. stated, at para. 21:

The real claim against the defendants is based upon ***negligence***. It has been argued that since para. 7 of the statement of claim alleges intentional torts of pointing a firearm and assault with a weapon that the exclusion clause is triggered and the insurer is no longer obliged to defend. However, a closer examination of para. 7 reveals that the paragraph in question alleges ***negligence*** and that the two aforementioned intentional torts are mere particulars of the ***negligence***. However, even if I am incorrect in that conclusion, then surely the reasoning in *Bacon, supra*, is applicable in that where different causes of action are alleged, one of which is within the coverage and the other is not, the insurer must defend the action. Furthermore, if there is any ambiguity, it must be resolved in favour of the insureds.

**35**  Mr. Doherty argues that in *Hartup*, as in the case at bar, a pleading of ***negligence*** was followed by particulars of an intentional tort and notes that this did not frustrate or foreclose the possibility of ***negligence*** being found. Further, where multiple causes of action are alleged and one falls within coverage, the insurer must defend the action.

**36**  The pleadings in *Hartup* were not set out in the judgment. However, it was clear that Oppal J. was satisfied that ***negligence*** was pleaded. That begs the issue in the case at bar.

**37**  Finally, Mr. Doherty says that in the law of tort, recklessness is synonymous with gross ***negligence*** and gross ***negligence*** is synonymous with ***negligence***. That is a broad proposition, which would involve a lengthy excursion into the law of tort. I do not think it is necessary to approach the matter that broadly. It must be borne in mind here that the wording of both policies only covers accidents. In this regard the following passage from the Newfoundland Supreme Court's decision in *Avalon Consolidated School Board v. McNamara Industries Ltd.* [*(1974), 6 Nfld. & P.E.I.R. 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8S1-FGCG-S40Y-00000-00&context=) is appropriate:

97 There is no doubt, in my opinion, that according to the authorities "accident" includes ***negligence***, and it was not the intention of the parties to an insurance policy which covered an insured for loss caused by accident that the Courts would have to consider the degree of that ***negligence***, as expressed in such words as "ordinary ***negligence***", "gross ***negligence***", "slight ***negligence***", and "great ***negligence***". Careless conduct that causes "any unintended and unexpected occurrence that produces hurt or loss" is an "accident" regardless of the degree of ***negligence*** involved. But if it is clear that the actions of the insured were so reckless that they amounted to a deliberate courting of the risk with knowledge of that risk it cannot be said that the damage resulting from these actions was caused by "accident". At this stage, in my view, the ***negligence*** of the insured becomes clothed with the characteristic of willfullness amounting to intentional ***negligence*** and such ***negligence*** cannot be called "accident".

**38**  I now return to the statement of claim in the action against Mr. Doherty. In interpreting it, the following passages from *Scalera* need to be noted:

82 In my view, the correct approach in the circumstances of this case is to ask if the allegations, properly construed, sound in intentional tort. If they do, the plaintiff's use of the word "***negligence***" will not be controlling. The Rhode Island Supreme Court, in *Peerless Insurance Co. v. Viegas*, 667 A.2d 785 (1995), cleverly expressed the point as follows at p. 789:

In civil actions for damages that result from an act of child sexual molestation, an insurer will be relieved from its duty to defend and to indemnify its insured if the perpetrator is insured under a policy in which there is contained an intentional act exclusion provision. ... The fact that the allegations in that complaint are described in terms of "***negligence***" is of no consequence. A plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive designation cause the cat to bark.

83 To be somewhat more prosaic, when determining the scope of the duty to defend, courts must take the factual allegations as pleaded, but then ask which of the plaintiff's legal claims could potentially be supported by those factual allegations. This is clear from *Bacon, supra*, at p. 99, where the court limited the duty to defend to cases where the "claim alleges a *state of facts* which, if proven, would fall within ... coverage" (emphasis added). Similarly, in *Nichols, supra*, [*[1990] 1 S.C.R. 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6545-00000-00&context=) at p. 810, McLachlin J. cited with approval O'Sullivan J.A.'s direction to look at "the nature of the claim made".

**39**  Paragraphs 3-7 of the statement of claim allege that Mr. Doherty intentionally kicked the plaintiff when he was on the ground. Paragraph 8 claims ***negligence*** but the particulars set out do not speak to ***negligence***.

**40**  As I have said above, recklessness is not a term with a fixed meaning in the law of tort. The claim of recklessness - one made without particulars - must be read in the context of the statement of claim as a whole.

**41**  Within that context, the recklessness allegation must be construed to mean that Mr. Doherty intentionally kicked the plaintiff in the head, knowing of the risk of injury but not caring about it. I do not accept Mr. Doherty's submission that one possible interpretation of the statement of claim is that he kicked Mr. Brolly in the head by accident or not knowing that he was lying in a vulnerable position. In my view, that would require an amendment.

**42**  *Scalera* involved an insurance policy with an intentional act exclusion. At para. 92 Iacobucci J. stated:

At the outset, the wording of this clause presents a threshold issue. The respondent argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of ***negligence*** could be excluded under this clause. After all, most every act of ***negligence*** can be traced back to an "intentional ... act or failure to act". As this Court made clear in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [*[1976] 1 S.C.R. 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0FY-00000-00&context=), "***negligence*** is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to ***negligence*** could not properly be called 'comprehensive'" (pp. 316-17). Consistent with this decision, the purpose of insurance, and the doctrines of reasonable expectations and *contra proferentem* referred to above, I believe the exclusion clause must be read to require that *the injuries be intentionally caused, in that they are the product of an intentional tort and not of* ***negligence***.

(emphasis added)

**43**  Iacobucci J. went on to analyse the tort of intentional battery noting, at para. 98, that it "generally requires only the intent to cause the physical consequences, namely, an offensive touching". At para. 99 he added:

Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen.

**44**  The claim is therefore one with respect to an intentional act and that act is not an accident or occurrence under either of the insurers' policies. It is also a risk which is specifically excluded in the policies. Given that conclusion, it is not necessary for me to deal with the argument of the insurers with respect to the derivative nature of any ***negligence*** claim.

**45**  Accordingly, the insurers are entitled to their declaration that they do not have to defend the claim. The insurers are entitled to their costs.

E.M. MYERS J.

**End of Document**

[***Kahlon (Litigation guardian of) v. Vancouver Coastal Health Authority (c.o.b. Vancouver Hospital and Health Sciences Centre), [2009] B.C.J. No. 1368***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0DV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.S. Sigurdson J.

Heard: September 3-5, 8-10, 12, 15-16, 18-19, 22-23 and 26,

October 2-3, 2008; February 10-13, 2009.

Judgment: July 7, 2009.

Docket: S062228

Registry: Vancouver

**[2009] B.C.J. No. 1368** | [*2009 BCSC 922*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GB-00000-00&context=) | [*179 A.C.W.S. (3d) 461*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23GB-00000-00&context=)

Between Shawn Kahlon, by his Committee and Litigation Guardian, Michelle Kahlon, Plaintiff, and Vancouver Coastal Health Authority, operating Public Hospitals under the name and style of Vancouver Hospital and Health Sciences Centre, U.B.C. Site, and Richmond Hospital, and the said Vancouver Hospital and Health Sciences Centre, U.B.C. Site and Richmond Hospital, University of British Columbia, operating the Allan McGavin Sports Medicine Centre and the said Allan McGavin Sports Medicine Centre, Karim Khan, Borys Flak, David Li, Gerald Bermann, Graham Reid, Dr. John Doe #1, Dr. John Doe #2, Dr. Jane Doe #1, Dr. Jane Doe #2, Radiologist Joe Doe, Radiological Technician Joe Floe, Defendants

(480 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Third party claims — Persons entitled to claim — Spouse — Parent — Recoverable losses — Action for *negligence* allowed in part — Plaintiff suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff required 24-hour care — Cost of independently providing care services provided by plaintiff's wife substantially exceeded the opportunity cost — She provided care beyond that expected of a spouse — Wife entitled to in trust award of $350,000 — Plaintiff's parents awarded $75,000 and $171,408 as special damages for renovation costs to make their home accessible for plaintiff.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Expenses and expenditures — Therapy or rehabilitation — Action for *negligence* allowed in part — Plaintiff suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff required 24-hour care , but not 24- hour awake care — Reasonable future cost was $210,000 per annum plus rehabilitation aide at a cost of $27,500 per annum — Swallowing therapy was reasonable and allowed at $5,000 per annum — Considering the plaintiff's cognitive impairment, speech therapy was not reasonable.**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Failure to follow up — Standard of care — Action for *negligence* allowed in part — Plaintiff suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff failed to attend to have contrast scan done as requested by radiologist — Plaintiff was 30 per cent negligent — Claims against doctors dismissed — Their system of following up with patient and test results was reasonable.**

**Health law — Hospitals and health care facilities — Liability — Duty of care — *Negligence* — Vicarious liability — Action for *negligence* allowed in part — Plaintiff suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff failed to attend to have contrast scan done as requested by radiologist — Hospital was 70 per cent negligent for its failure to have in place a system to monitor whether reports had been generated for all the films that were taken and was vicariously liable for the *negligence* of its employees in failing to follow the hospital's established protocol.**

**Professional responsibility — Self-governing professions — Professions — Health care — Doctors — Action for *negligence* allowed in part — Plaintiff suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff failed to attend to have contrast scan done as requested by radiologist — Plaintiff was 30 per cent negligent — Claims against doctors dismissed — Their system of following up with patient and test results was reasonable.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Standard of care — Contributory *negligence* — Apportionment of liability — — Action for *negligence* allowed in part — Plain suffered permanent catastrophic impairment when he was not diagnosed with TB meningitis in time because hospital employees misfiled his CT scan before it was interpreted by radiologist — Plaintiff failed to attend for contrast scan as requested by radiologist — Hospital 70 per cent negligent for failure to have system in place to monitor whether reports had been generated for all films taken and vicariously liable for *negligence* of its employees in failing to follow hospital's established protocol — Claims against doctors dismissed — Their system of following up with patient and test results was reasonable.**

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| --- |
| Action for ***negligence***. The plaintiff, now 42, suffered back pain and was referred by his family doctor to a sports medicine specialist. The specialist ordered a CT scan. The radiologist's preliminary review of the films revealed obvious lytic holes and soft tissue change which were unexpected and potentially very significant to the plaintiff's health. The radiologist ordered a contrast scan. The plaintiff did not attend for the contrast scan which would have likely revealed that infection was the most probable diagnosis. The CT scan film was misfiled by hospital employees and the radiologist did not report on them for over one year. Had the films been interpreted on time, further inquiries would have led to a diagnosis of spinal TB meningitis. Due to the delayed diagnosis, the plaintiff was completely incapacitated and required constant care. The plaintiff sued the doctors for failing to follow up with the CT scan and the hospital misfiling the CT films. The parties agreed on many heads of damages except the wife's in trust claim, the care aid award, therapy costs and the parents' special damages.  HELD: Action allowed in part.  The action was dismissed against the doctors. The hospital was liable for misfiling the films and for failing to advise the radiologist that the plaintiff had not returned for his follow up scan. The hospital's established protocol was not followed in these respects. The hospital was vicariously liable for the ***negligence*** of its employees. The hospital was also liable for its failure to have in place a system to monitor whether reports had been generated for all the films that were taken. Given the radiologist's long experience with his hospital's system and his belief that the risk of the films going unreported was very, very small, he was reasonably entitled to rely on the system in place within the department to recall patients and to bring to the attention of radiologists films that had yet to be reported. It was not negligent for the radiologist not to have followed up with the specialist before receiving the contrast scan results. The system that the specialist used depended on patients attending for their imaging tests and then returning to obtain the results was a reasonably effective follow up system. The standard practice followed by the specialist was not negligent. The family physician was not negligent in failing to book a follow up appointment to see the plaintiff or to follow up on his referral. He was entitled to assume that the specialist had assumed primary responsibility for the plaintiff with respect to his lower back pain. The plaintiff was 30 per cent negligent in not taking reasonable care for his own health when he failed to return for the contrast CT scan after being requested to do so and when he failed to return to see the specialist to discuss the results of his CT scan. The plaintiff would require 24-hour care but not 24-hour awake care, although such care might be required in the future. A reasonable future cost was $210,000 per annum. One of the caregivers for 20 hours per week was to be a rehabilitation aide at a cost of $27,500 per annum. Swallowing therapy was reasonable and allowed at $5,000 per annum. Considering the plaintiff's cognitive impairment, speech therapy was not reasonable. The cost of independently providing the care services provided by the wife substantially exceeded the opportunity cost. She provided care beyond that expected of a spouse. A total in trust award in her favour of $350,000 was made. An in trust award of $75,000 was granted for the parents. The parents were awarded $171,408 as special damages for renovation costs to make their home accessible for the plaintiff and for travel expenses. |

**Counsel**

Counsel for the Plaintiff: R.B. Webster, Q.C., D.F. Corrin, P.T. McGivern, L.A. Wong.

Counsel for the Defendant Doctors: C.L. Khanna, K.J. Jakeman.

Counsel for the Defendant Hospital: C.L. Woods, Q.C., D.J. Bell.

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1. Discussion of Contested Damage Claims
2. Life Expectancy

Discussion of Life Expectancy

1. Care to be Provided (24-hour care)
2. Attendant Care Evidence

Maureen Butterworth

Deborah Sicker

Andrea Warren

Rosemary Watson

Linda Waitham

Kathy Phillips

1. Discussion
2. Rehabilitation Aid Worker
3. Swallowing Therapy
4. Speech Therapy

Discussion

1. In-Trust Claims

Discussion

1. Special Damages
2. Contingency Factors

C. SUMMARY

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| **J.S. SIGURDSON J.** |

**A. LIABILITY**

**1. Introduction**

**1**  The plaintiff, Shawn Kahlon, suffered back pain. His family physician referred him to a sports medicine specialist who, in turn, referred him for a CT scan of his lumbar spine. The CT scan was conducted but Mr. Kahlon did not return for an enhanced scan as requested by the radiologist who had done a preliminary review of the films from the scan. Those films were misfiled and were not reported on until over a year later. Had the films been reported on at the time of the CT scan or within the several months following, it would have led to a chain of inquiry which would have resulted in a diagnosis of spinal TB meningitis. Treatment would have been given and Mr. Kahlon would have recovered without consequence. However, the diagnosis was delayed, and as a result of complications from the TB meningitis, Mr. Kahlon is now completely incapacitated and requires constant care. He is unemployable and incapable of managing his own affairs.

**2**  The plaintiff claims damages from the doctor defendants, Karim Khan, David Li and Gerald Bermann (together, Drs. Khan, Li and Bermann) for alleged ***negligence*** for failure to follow up on the CT scan he had in September 1999. Dr. Khan is a physician who specializes in sports medicine and practices at the Allan McGavin Sports Medicine Centre at the University of British Columbia (the "Sports Medicine Centre"). Dr. Li is a radiologist who practices at UBC Radiology. Dr. Bermann was a general practitioner prior to his death in June 2008.

**3**  The plaintiff also claims damages against the defendant Vancouver Coastal Health Authority, which operates the Vancouver Hospital and Health Sciences Centre, U.B.C. Site (the "UBC Hospital") and is vicariously responsible for the ***negligence*** of any of its employees. The plaintiff says that the liability of the UBC Hospital was in simply re-shelving his CT films with other films that had already been reported, when in the circumstances it was obvious that no interpretation had been done by a radiologist. That there was a serious breakdown in hospital procedures in connection with the handling of Mr. Kahlon's CT scan is not disputed.

**4**  In general terms, the issues before me are the liability of each of the defendants, contributory ***negligence*** on the part of the plaintiff, and the assessment of damages. While many of the damage amounts are agreed, the key remaining issues are the plaintiff's life expectancy, the appropriate manner in which to provide 24-hour care for the plaintiff, the in trust claims of Mr. Kahlon's wife and his parents, the appropriateness of the provision of a rehabilitation support aide and speech and swallowing therapy, as well as certain special damages.

**2. Facts**

**5**  An extensive agreed statement of facts was prepared for the purposes of these proceedings, for which I wish to commend counsel. I have referenced below which paragraphs I have taken from that agreed statement of facts.

**6**  Shawn Kahlon met Michelle in 1995 at UBC where they were both in the faculty of education. He was born in 1967 and she was born in 1972.

**7**  They married in May 2000. He was then 33 years old and she was 28.

**8**  Mr. Kahlon is now 42 years old.

**9**  Prior to his marriage, Mr. Kahlon apparently injured his back lifting his dog.

**10**  On August 27, 1998, Mr. Kahlon presented to Dr. Bermann with the following three complaints:

1. A sprained back which arose after carrying a heavy dog and helping his friend move. He took Robaxacet (a muscle relaxant) and later Voltaren SR 100 (an anti-inflammatory). He reported to Dr. Bermann that he felt much better;
2. Weight gain; and
3. He had sprained his right ankle two months before and it was still not quite stable.

[Agreed Statement of Facts, para. 9]

**11**  The defendant Dr. Bermann was Mr. Kahlon's family physician between June 1986 and October 2001. He died in June 2008 as a result of pancreatic cancer [Agreed Statement of Facts, para. 5].

**12**  Dr. Bermann did a physical examination of Mr. Kahlon. His chest and cardiovascular system (including blood pressure and abdomen) were normal. The cardiac APEX was regular. His straight leg raising was 80E bilaterally on both sides. He had good trunk flexion and he had good reflexes. It was Dr. Bermann's view that Mr. Kahlon's back problems were due to muscular back sprain. Dr. Bermann advised Mr. Kahlon to increase his exercise as tolerated with both his back and his ankle [Agreed Statement of Facts, para. 10].

**13**  On October 8, 1998, Mr. Kahlon's back had improved but he had some nerve root irritation with aching into the buttock to the mid-thigh. Dr. Bermann advised Mr. Kahlon to continue exercising and attend for massage therapy. Dr. Bermann's conclusion on this visit was that Mr. Kahlon's problems with his back were relatively insignificant in terms of his overall health [Agreed Statement of Facts, para. 11].

**14**  Mr. Kahlon next saw Dr. Bermann on February 4, 1999. At that time, he presented with pain since January 31 in his lower back radiating into the left buttock which was essentially no better on February 4. Lying was the most comfortable position. The pain was worse at the end of the day and it possibly improved with rest. There had been previous radiation to the right buttock. Straight leg raising was 90E on the right and 75E on the left, with some pain on the left. Reflexes were brisk and equal. Lateral traction testing showed no pain. Front flexion showed pain and straightening up showed no pain. There was no real tenderness. Dr. Bermann's view was that Mr. Kahlon probably had a muscular back sprain or a sacroiliac sprain or possibly a mild lumbar disc syndrome. He counselled Mr. Kahlon regarding being careful about lifting and about getting appropriate rest. Dr. Bermann also prescribed an anti-inflammatory and asked Mr. Kahlon to come again ("TCA") in one week [Agreed Statement of Facts, para. 12].

**15**  Mr. Kahlon next saw Dr. Bermann on July 19, 1999. On that date, he was still complaining of pain down the right thigh if he had been sitting for a while. He was okay when he was active, which suggested to Dr. Bermann that the problem was muscular. He also had pain in the left buttock area, which suggested to Dr. Bermann that he might have some nerve root irritation. Mr. Kahlon told Dr. Bermann that the physiotherapist had said he did not have a right ankle reflex. Dr. Bermann's assessment found that he had good mobility, good straight leg raising and good power. On checking Mr. Kahlon's reflexes, he found that the ankle jerk was elicited with reinforcement and his knee jerks were good [Agreed Statement of Facts, para. 13].

**16**  Dr. Bermann referred Mr. Kahlon to the Sports Medicine Centre. In addition, he suggested to Mr. Kahlon that he return about a possible food allergy to shellfish and he was to avoid it in the meantime [Agreed Statement of Facts, para. 13].

**17**  Mr. Kahlon was seen by Dr. Khan at the Sports Medicine Centre on July 28, 1999 for complaints of back pain [Agreed Statement of Facts, para. 14].

**18**  The defendant Dr. Khan is a physician specializing in sports medicine and in July 1999 had a clinical practice out of the Sports Medicine Centre approximately two days per week. In addition, he was completing a research fellowship at UBC [Agreed Statement of Facts, para. 7].

**19**  Dr. Khan sent Dr. Bermann a consultation report dated July 28, 1999. In the letter, he advised Dr. Bermann that he had referred Mr. Kahlon for an x-ray and CT scan of his lumbar spine to evaluate any cause of radiculopathy. Dr. Khan's working diagnosis was that Mr. Kahlon has an L5-S1 disc injury and that the prognosis was favourable. Dr. Khan advised Mr. Kahlon to continue with an abdominal strengthening program he had started earlier and to gradually increase his activities. Dr. Khan advised Dr. Bermann that he would review Mr. Kahlon after his imaging results and would assess his progress at that time [Agreed Statement of Facts, para. 14].

**20**  While he has no recollection of his appointment with Mr. Kahlon, Dr. Khan's usual routine is to advise patients who have been told to have tests such as CT scans done to make a follow-up appointment with him after the CT scan had been completed [Agreed Statement of Facts, para. 15].

**21**  Mr. Kahlon underwent an X-ray and CT scan in the Radiology Department at Vancouver Hospital & Health Sciences Centre, U.B.C. Site ("UBC Radiology Department") on September 10, 1999 [Agreed Statement of Facts, para. 20].

**22**  Dr. Li looked at the CT scan and x-rays of the lumbar spine on September 10, 1999 [Agreed Statement of Facts, para. 21].

**23**  The defendant Dr. Li is a physician specializing in radiology who practices out of the UBC radiology department at UBC Hospital [Agreed Statement of Facts, para. 8].

**24**  Dr. Li did not dictate a report regarding Mr. Kahlon's CT scan [Agreed Statement of Facts, para. 22].

**25**  It appears that Dr. Li made a note for the UBC Radiology Department technician to arrange for Mr. Kahlon to return for a repeat CT scan with contrast. Dr. Li understood that this task would be delegated to the booking clerk [Agreed Statement of Facts, para. 23].

**26**  It is not known what happened when he was called, but Mr. Kahlon did not return. He did not make a follow up appointment with Dr. Khan [Agreed Statement of Facts, para. 24].

**27**  Dr. Li was not advised that Mr. Kahlon had not returned for a follow-up CT scan with contrast. The requisition and films were also not returned to him to report on. The responsibility for advising the radiologist and bringing the films back lay with the hospital employees. It is not known what happened to the films. The most likely explanation for the failure to advise Dr. Li that Mr. Kahlon did not come back is that the films were misfiled in the general area of the film library with the other films that had already been reported on rather than being brought back [Agreed Statement of Facts, para. 25].

**28**  Seven months passed. After the CT scan, Mr. Kahlon did not see another physician until April 14, 2000, when he attended Dr. Bermann's office complaining of a sore throat. Dr. Bermann took a swab for culture. When he received the lab result showing that Mr. Kahlon had a strep throat, he called Mr. Kahlon and advised him of the result and the fact that he was ordering an antibiotic for him [Agreed Statement of Facts, para. 26].

**29**  Dr. Bermann next saw Mr. Kahlon on September 8, 2000, with complaints of a new ache in the left groin and hip. He was unable to straighten out his knee, but there was no history of trauma or strain. He had recently visited Comox and had done some minor hill climbing. He was walking with a limp. On examination, it was noted that when he lay down, the hip was slightly flexed and the knee was also slightly flexed. The hip joint area was in spasm and the range of movement of the right hip joint was difficult and restricted. Dr. Bermann ordered an x-ray of the hip joint and he also ordered a blood count and a sedimentation rate and instructed Mr. Kahlon to come again on September 11, 2000 [Agreed Statement of Facts, para. 27].

**30**  Mr. Kahlon did return on September 13, 2000, and Dr. Bermann advised him that his x-ray (reported as showing a "definite narrowing involving the most medial aspect of the outer half of the hip joint, but no underlying bony change is noted. The regional bones are normal") and blood results were abnormal (his sedimentation rate was raised and his hemoglobin was marginally down). Based on the abnormal test results, Dr. Bermann referred Mr. Kahlon to Dr. Reid, a rheumatologist [Agreed Statement of Facts, para. 28].

**31**  Dr. Reid saw Mr. Kahlon on September 23, 2000. Mr. Kahlon understood that he had a disc problem or an abnormal disc, and that he used words to that effect in his discussion with Dr. Reid [Agreed Statement of Facts, para. 29].

**32**  Following this appointment, Dr. Reid sent Dr. Bermann a consultation letter dated September 26, 2000. In the consultation letter, Dr. Reid reported that Mr. Kahlon "had a CT scan which apparently showed an abnormal disc". Under the discussion part of the consultation letter, Dr. Reid said "I would be pleased to receive reports of his previous lumbar spine radiographs and CT reports" [Agreed Statement of Facts, para. 30].

**33**  After receiving Dr. Reid's request for a copy of the CT scan report, Dr. Bermann realized he had not received a copy of the film results. Dr. Bermann or someone in his office then contacted the UBC Radiology Department to request a copy of the CT scan reports. It was only at that point that it was realized that the films had never been reported on [Agreed Statement of Facts, para. 31].

**34**  Once the films were located, Dr. Flak was asked to interpret them, which he did [Agreed Statement of Facts, para. 32].

**35**  On October 2, 2000, Mr. Kahlon was seen by Dr. Bermann to review Dr. Reid's report and the CT scan report. Mr. Kahlon told Dr. Bermann that he did not return to the UBC Radiology Department for a follow-up CT scan with contrast "because he did not want dye injected into his body". Following this appointment, arrangements were made by Dr. Bermann for Mr. Kahlon to attend for a follow-up MRI scan which was scheduled to be done on October 22, 2000 [Agreed Statement of Facts, para. 33].

**36**  After Dr. Bermann provided Dr. Reid with a copy of the CT scan report, Dr. Reid called Dr. Flak (on October 4, 2000). Dr. Reid was aware that Mr. Kahlon was scheduled to have an MRI of his lumbar spine on October 22, 2000, and Dr. Reid requested that Dr. Flak also arrange for Mr. Kahlon's hips to be scanned at the same time [Agreed Statement of Facts, para. 34].

**37**  In October 2000, before the follow-up MRI scan was performed, Mr. Kahlon was admitted to hospital and eventually diagnosed with TB meningitis [Agreed Statement of Facts, para. 35].

**38**  As a result of complications from the TB meningitis, Mr. Kahlon is now completely incapacitated and requires constant care. He is unemployable and incapable of managing his own affairs [Agreed Statement of Facts, para. 36].

**39**  If the CT scan done in September 1999 had been reported at that time or within the several months afterwards, it would have led to a chain of inquiry which would have resulted in a diagnosis of spinal TB. Treatment would have been given and Mr. Kahlon would have recovered without sequela [Agreed Statement of Facts, para. 37].

**40**  The evidence shows that between September 1999 and October 2000, while Mr. Kahlon continued to have back pain, he did not miss work, family or social occasions because of it and he continued to participate to some degree in sports.

**41**  I will set out the facts about Mr. Kahlon's precise physical condition and his care needs in more detail in the damages section of these Reasons. However, I provide a general outline here.

**42**  Mr. Kahlon was admitted on October 12, 2000 to Vancouver General Hospital ("VGH"). He remained in intensive care and was transferred back to Richmond General Hospital ("RGH") where he remained for a year or so until October 2001. He went to the Purdy Extended Care Pavilion at UBC for about a month. He was then transferred to the rehabilitation hospital in Ponoka, Alberta ("Ponoka") where he stayed for over 700 days. Ms. Kahlon stayed with her husband there and spent 15 - 16 hours a day with him during the week and about 21 hours a day during the weekends.

**43**  There was initially an issue between Mr. Kahlon's parents and his wife as to who should be his committee, presumably because the marriage was so recent and it was unclear whether Ms. Kahlon would remain around and care for her husband.

**44**  On November 11, 2003, Mr. Kahlon returned home to his apartment where he has resided with his wife ever since.

**45**  Mr. Kahlon's condition at the time of trial and its early progression is summarized in a report filed by Dr. Chambers, an expert witness called by the plaintiff:

... He presented to the Richmond Hospital with headaches and fever in October of 2000 and was admitted on Nov 6, 2001 (sic). Mr. Kahlon was eventually diagnosed with tuberculosis meningitis as well as spinal tuberculosis. Unfortunately, Mr. Kahlon went to develop a pan vasvulits and hydrocephalus. Scanning at the time showed lacunar infarcts of various areas of the brain including basal ganglia. Treatment included a prolonged and complicated hospitalization course, surgical drainage of two abscesses, anti-tuberculosis drugs and the insertion of a shunt to deal with the hydrocephalus. ...

Clinically, as a result of the brain damage, Mr. Kahlon went on to develop severe cognitive impairment as well as hypoarousal and visual communication dysfunction. In terms of motor function, he had become severely impaired with weakness that included a left hemi-paresis.

The records reviewed indicate that Mr. Kahlon has suffered diffuse brain injury involving multiple structures and the development of hydrocephalus. He has spasticity and weakness of all four extremities and no movement of the left side. Mr Kahlon has become similar to someone with a severe traumatic brain injury and loss of mobility. Associated with this brain injury are various neurological conditions including a neurogenic bladder and neurogenic bowel. As well, he has a visual defect, decreased respiratory function and dysphagia.

...

In summary, Mr. Shawn Kahlon has suffered severe brain damage as a result of the pan vasculitis and has been left unable to effectively mobilize without a wheelchair or person assist. He is also severely cognitively impaired. His swallowing difficulties are managed with tube feeding and he has not had any significant problems with aspiration in several years. Similarly, his respiratory function at night is treated with Bi-PAP. He has not been plagued with any serous chest infections or pneumonias in recent years.

**46**  The care regime for Mr. Kahlon has been in place now for over five years. His care needs were summarized by Janice Landy, a rehabilitation nurse consultant, in this way:

[Mr. Kahlon] is totally reliant upon others 24 hours/day for all of his care. ... He is dependent upon his family or primary care providers for bathing, grooming, dressing, undressing, toileting, diapering, maintenance of bowel and bladder program, maintenance of skin integrity, administration and monitoring of prescription medication, maintenance of nutritional feeding program, maintenance of range of motion and stretching program, application of positioning splints as well as set-up of assistive devices (i.e.: standing frame), transferring, lifting, positioning, interior home maintenance, laundry tasks, ordering of supplies, shopping for clothes, shoes, personal care items, transportation and accompaniment to medical, dental and rehabilitation intervention appointments as well as exterior home maintenance and handyman services. Mr. Kahlon is dependent upon others to facilitate his participation in activities of community inclusion, recreation and socialization. (page 20)

**47**  Mr. Kahlon requires 24-hour care, and Mrs. Kahlon has been providing that care with some home care assistance provided by Vancouver Coastal Health Authority and the Richmond Kinsmen Adult Day Centre ("the Kinsmen Centre") day program. Mr. Kahlon also spends a period of time on weekends at his parents' home where his mother provides his care.

**3. Positions of the Parties on Liability**

**48**  The plaintiff's position is that the UBC Hospital is vicariously liable for its employee misfiling his CT scan without it being reported on, and directly liable for having an inadequate tracking or monitoring system to ensure films are reported. The plaintiff also argues that Dr. Li failed to report on the CT scan, or ensure that it was reported on, given the unexpected findings he saw on a preliminary review; that Dr Khan failed to have a proper follow-up system in place to ensure that CT scans he ordered were reported and received; and that Dr. Bermann failed to follow up on tests that were ordered or to review the status of the CT scan when he saw Mr. Kahlon at an appointment in April 2000.

**49**  The defendant UBC Hospital, while not admitting liability, did not advance a liability defence. However, it says that the loss was entirely the fault of the plaintiff in failing to following the directions of his physicians. In the event liability is apportioned, the loss is largely the fault of the plaintiff, with the balance to the defendant physicians, who it says were negligent, and its own fault in the more minor range.

**50**  The defendant physicians dispute any liability. They say that the plaintiff is largely at fault and that liability should be apportioned between the plaintiff and UBC Hospital.

**4. Claim against the Hospital**

**51**  Before discussing the liability of the UBC Hospital, let me set out the facts from the Agreed Statement of Facts concerning the manner in which CT scans were taken and handled in the radiology department.

**52**  In 1999, the following protocol was in place for obtaining a CT scan of the lumbar spine at the UBC Hospital radiology department:

1. A requisition for radiological examination is typically faxed from the referring physician's office to the main reception area of UBC Radiology. The requisition is in a prescribed form and is generated by UBC Radiology.
2. A clerk takes the requisition and staples a scheduling protocol onto the requisition. The form lists and records items pertaining to scheduling of the examination which is used by the booking clerk as well as specific protocol instructions for the examination including pre-examination patient preparation, whether it should be performed with or without contrast and scheduling priority which is protocolled by the radiologist. This form becomes a permanent part of the requisition.
3. All requisitions for CT scans are given to the CT radiologist of the day for "protocolling". The radiologist then makes the following decisions:
4. Which levels of the spine needed to be examined
5. Whether the scan needs to be performed without contrast and or with contrast
6. What the priority is for having the scan done.
7. The requisition is then given to the booking clerk who contacts the patient to arrange an appointment date for the CT scan.
8. All the requisitions for a particular date are kept in one folder. When the patient arrives on the scheduled date, the requisition is removed from the folder and, at the appropriate time, the technologist picks up the requisition and calls the patient in for the CT scan to be performed.
9. The technologist performs the exam and processes the films. The technician also enters information into the Meditech system, which was the radiology information system being used in 1999. The information that would be entered included the fact that the exam had been completed, the name of the technologist involved, the number of films done, and the size of the films. The technologist does this before the films are taken to the radiologist for reporting.
10. Once the technician had completed his her tasks, he she attaches the requisition and the films to the outside of the film bag and takes the whole package to the CT viewing room to the designated "inbox" for the radiologist to report. The whole package would be put at the bottom of the pile of film bags.
11. The radiologist assigned to CT for the day would take one film package at a time to review, interpret and report. The radiologist would generally review between 16 to 20 or more CT films per day.
12. The radiologist puts the films on the viewing box to review the films. He she then dictates a report onto a cassette tape. The dictation tape and the requisition would be placed in the designated area adjacent to the dictation machine for the clerk or transcriptionist to pick up periodically at designated times throughout the day. After the transcriptionist has typed the report, it is printed and returned to the radiologist for approval and signature. If required, the radiologist edits the report with corrections to be made. If corrections are needed, the transcriptionist corrects the report, re-prints it and returns it to radiologist for signature. Once signed, the report is considered finalized in the Meditech system and the final report is sent back to the referring physician(s) and a copy of the finalized report filed in the film bag.
13. After dictating a report, the radiologist would put the films into an inner film bag. The inner film bag would be placed in a large yellow film bag with all the other films that had been done on that patient. The radiologist then signs his/her initial on the sticker which is on the outer yellow master bag listing the exam that had been performed (i.e. "CT spine W /0").
14. The radiologist would then place the whole film bag into the designated "outbox" and someone from the film library would collect the film bags periodically at designated times throughout the day and take them to the film library area.
15. The film library is divided into three discreet sections as follows:
16. Area for "hot files"
17. Temporary holding area for films that had not been reported on
18. Main film holding area
19. The main film holding area held approximately one year's worth of films. Films were not supposed to be filed in the main film holding area until a finalized report had been placed in the film bag.
20. The films of studies that had been recently completed and dictated were placed in slots on a long counter designated as an area for "hot files". Films would be kept in the hot film area for approximately two weeks so that a copy of the finalized report could be filed in the master bag and to allow referring physicians access to the films to review themselves or with a radiologist.
21. After approximately two weeks, the films would be taken out of the "hot file" area and incorporated into the main film holding area which is in the same room. A visual check was supposed to be made by a clerical person to ensure that the report was in the bag before it would be filed in the main film library area.
22. In cases where a report was not dictated because the radiologist wanted to review outside films or requested the patient to come back for additional images (including a contrast enhanced study), the films were placed in a slot in the temporary holding area in the film library that was set aside for this purpose. The film bag and requisition would be placed in a clear plastic bag so that the requisition could be seen. These films were kept separate and apart from the other films in the film library.
23. In cases where a report was delayed pending comparison with outside films, when the outside films arrived, the clerk in the film library would put the outside films with the original film bag and take them both to the radiologist so that the new film could be reported on.
24. In cases where the patient was returning for additional studies, the clerk in the film library would take the original film bag into the CT room for the technician when the patient did return.
25. The films that were in the temporary holding area, while waiting for the patient to return or for outside films to arrive, would be checked by a clerk in the film library at least once a month. If it was apparent that the patient was not going to return, or there was no indication that he was going to return, the clerk was supposed to inform the radiologist and request that the radiologist dictate a report.
26. Meditech had the ability to track patients through the system from scheduling to final reporting.
27. A report would be run off the Meditech system every four weeks. The reasons the reports were run included providing the provincial government with statistics of the number of exams that had been completed so that payment for the Hospital services could be received from the Medical Services Plan. Payment would not occur unless a report was generated.
28. The Meditech system in place in September 1999 at UBC Radiology had the ability to check that reports were being generated for each film that was done. That capability was not being used by the staff of the hospital.

[Agreed Statement of Facts, para. 18]

**53**  With respect to the UBC Hospital and the radiology services it provides, the parties agree:

1. The hospital provides radiology services such as CT scans for patients on referral from their physicians;
2. The hospital receives a fee paid on behalf of the patient when these services are finalized (i.e. - when a final report interpreting the films has been sent);
3. The hospital understands that the radiology services are considered by physicians and the patients as an integral part of the investigation and diagnostic process of the patients;
4. The hospital understands the patients and physicians alike rely upon accurate and timely reports for all radiology services provided;
5. The hospital understands that a failure to provide accurate and timely reports may result in a delayed diagnosis of illness which could have potentially disastrous consequences for the patient;
6. In order to provide these radiology services, the hospital understands that it has to provide part of the process. In other words, they have to provide, for example,
7. good equipment;
8. properly trained personnel;
9. They also have to set up an appropriate system to verify that the films are taken properly and that each film taken is reported as quickly as possible;
10. The hospital had undertaken the task of setting up a system set up to verify the accurate and timely reporting of X-rays;
11. The hospital understands that physicians and patients alike rely upon the system to verify that reports are done and sent to referring physicians in a timely way.

[Agreed Statement of Facts, para. 19]

**54**  The liability of the UBC Hospital, while not admitted, was not seriously disputed. Paragraph 25 of the Agreed Statement of Facts reads:

Dr. Li was not advised that Mr. Kahlon had not returned for a follow-up CT scan with contrast. The requisition and films were also not returned to him to report on. The responsibility for advising the radiologist and bringing the films back lay with the hospital employees. It is not known what happened to the films. The most likely explanation for the failure to advise Dr. Li that Mr. Kahlon did not come back is that the films were misfiled in the general area of the film library with the other films that had already been reported on rather than being brought back.

**55**  While these facts are sufficient to establish liability against the UBC Hospital, it will be helpful for the purposes of the apportionment analysis that follows later in these Reasons to explore in some further detail the breakdown in its procedures with respect to the handling of Mr. Kahlon's CT scan.

**56**  The Agreed Statement of Facts describes the UBC Hospital's protocol in a general way. Maggie Stewart, the UBC Hospital's representative, added further detail in her discovery evidence that was introduced. She explained that where a radiologist wished a patient to return for further examination, generally a booking clerk would contact the patient to arrange an appointment. If arrangements could not be made (for instance, contact could not be made with the patient), then the requisition would stay with the booking clerk until such time as the patient was reached. At that point, the appointment would be entered into the Meditech computer system. If the patient declined to return, then the requisition would be returned to the radiologist to advise him or her of the fact that the patient had declined to return. The hospital's expectation was that the radiologist would then interpret whatever films had been done to that point. The booking clerk would either take the requisition directly to the radiologist or take it to other employees who would explain the situation to the radiologist. It was Ms. Stewart's evidence that in 1999, there was no system in place in the department for tracking these outstanding requests for further examinations.

**57**  As I discuss later in these Reasons, I find that the booking clerk did contact Mr. Kahlon about returning for a contrast enhanced CT scan. I also find that it is likely that Mr. Kahlon procrastinated in making the appointment. In those circumstances, the booking clerk or other departmental employees should have at some point advised Dr. Li that arrangements to recall Mr. Kahlon had not been made and the requisition returned to him so that he could issue a report on the initial non-contrast scan. That did not occur.

**58**  The system broke down again when Mr. Kahlon's CT scan films were not returned to Dr. Li (or any other radiologist for that matter) when it became apparent that he had not returned for the contrast scan. As set out in the Agreed Statement of Facts, in cases where a report was not dictated because the radiologist wished to review outside films or had requested the patient to return for additional images, the films were placed in a slot in the temporary holding area in the film library that was set aside for this purpose. The films that were in this particular area would be checked by a library clerk at least once a month to ascertain whether the necessary follow-up had occurred. If it was apparent that the patient was not going to return or there was no indication that he or she was going to return, the clerk was supposed to inform the radiologist and request that the radiologist dictate a report.

**59**  Ms. Stewart offered two possible explanations why this did not occur in this case. She was asked what happened to the films in the temporary area if the patient did not return or the films from an outside source never arrived. She replied:

1. The slot that holds that - those exams normally would be gone through at least once a month to try to figure out what was happening. If it was apparent the patient wasn't going to return, we would inform a radiologist and request that they report the exam.

In the case of films not arriving, we'd call back to the other site, the other hospital to say we still haven't got these yet. In October of '99, we were in the transition of finishing Meditech and starting IDX Rad, so there may have been delays because of the change in process of actually going through that, that slot.

And there is another possibility, that in going through the slot, someone who didn't know better decided to file the film bag in with the other completed examinations.

1. In other words, just put it back in the film library?
2. Yes, which that's a possibility.
3. It shouldn't happen.
4. It shouldn't ever happen, but I'm not going to tell you it never happened. But it shouldn't. It shouldn't ever happen.

**60**  It is not known what happened to the films, but the parties are agreed that the latter of these explanations is the most likely.

**61**  Films were only to be filed in the main film holding area after a finalized report had been placed in the film bag. A visual check of the film bag was supposed to be made to ensure that the report was in the bag before it was filed in the main library. An additional check existed in the fact that radiologists initialized the sticker on the outer yellow master bag listing the exams that had been performed.

**62**  Mr. Kahlon's films obviously should not have been filed in the main film holding area. The filing clerk should have observed that the sticker on the outer master bag had not been initialled by Dr. Li. Moreover, had the clerk checked the bag, it would have been apparent that it did not contain a finalized report.

**63**  Accordingly, I find that the UBC Hospital's established protocol was not followed in at least two respects: (1) department employees failed to advise Dr. Li or any other radiologist that arrangements had not been made to have Mr. Kahlon return for a contrast enhanced CT scan; and (2) they failed to return Mr. Kahlon's CT scan films to Dr. Li or any other radiologist so that they could be reported on, and, instead, likely misfiled those films. The UBC Hospital is vicariously liable for the ***negligence*** of its employees, and in this regard I find UBC Hospital liable.

**64**  I additionally find the UBC Hospital liable for its failure to have in place a system to monitor whether reports had been generated for all the films that were taken. As set out in the Agreed Statement of Facts, the hospital recognized that it had undertaken the task of having a system set up to ensure the accurate and timely reporting of films, that the failure to provide accurate and timely reports might result in a delayed diagnosis that could potentially have disastrous consequences for the patient, and that patients and physicians relied on the system to ensure that reports were done in timely way. Ms. Stewart agreed that the hospital also understood that the radiologists did not keep track of follow-up requests, and instead relied on the hospital to ensure that the necessary follow-up occurred; if films were misplaced or misfiled in the general film library without the radiologists being notified that follow-up had not occurred, the films would likely be lost to interpretation.

**65**  I note, as well, Ms. Stewart's evidence that "it has happened" in the past that films in the temporary holding area were filed in the main library area instead of being sent to a radiologist with the information that the requested follow-up had not taken place. The number of times this occurred is not apparent from her evidence. The first audit of the radiology department to ascertain whether other reports had gone unreported, as had happened in the present case, took place in 2007.

**66**  Despite the UBC Hospital's acknowledgement of its heavy responsibilities and its knowledge of past failings, it relied exclusively on a manual system with no back-up system in place to manage virtually inevitable employee error. The absence of such a system is particularly unfortunate given that in September 1999, the hospital possessed that capability through the Meditech computer system which it was using to track films for billing purposes. The system had the ability to monitor whether reports were being generated for all the films that had been done. Had the Meditech system been used even once per month, it would have been apparent by sometime in October that Mr. Kahlon's films had not been reported on.

**67**  Taking into account (a) the reasonable foreseeability of human error in the application of the hospital's CT scan protocol and, in fact, the knowledge of such error having occurred in the past, (b) the potential for disastrous consequences for patients in the event the system broke down, and (c) the minimal cost of avoiding that harm since the Meditech system it was using for other purposes had that capability, I find the hospital liable for its failure to have in place a back-up system to ensure that all films taken were duly reported upon.

**68**  I find that ***negligence*** has been established against UBC Hospital.

**5. Claims against the Doctors**

1. *Dr. Li*

Introduction

**69**  Dr. Li was the radiologist designated to do CT scan interpretation at the UBC Department of Radiology on the day Mr. Kahlon attended for his scan. His preliminary review of Mr. Kahlon's scan revealed lytic holes and obvious soft tissue changes. He determined that Mr. Kahlon should have a contrast enhanced CT scan to sort out the differential diagnosis, which included a number of potentially very serious conditions. As Dr. Li's review of the scan occurred late in the afternoon on a Friday and Mr. Kahlon was apparently no longer present at the hospital for an immediate scan, Dr. Li followed his normal procedure and left a note for the technologist to make arrangements for the follow-up scan.

**70**  The plaintiff submits that Dr. Li took an unreasonable and unnecessary risk in failing to report on his scan, having regard to his knowledge that there had been problems with unreported films in the past, the serious implications of the findings on the scan, and the minimal effort necessary to take precautionary measures. Options available to Dr. Li included a telephone call to either Mr. Kahlon or the referring physician, Dr. Khan; a note to himself or to one of his associates to ensure follow-up; or, preparation of an interim report. The hospital similarly asserts that Dr. Li was negligent in failing to contact Dr. Khan or leave himself a note in light of the unexpected and potentially serious findings and his knowledge of previous breakdowns in the system.

**71**  Dr. Li responds that it was reasonable for him to rely on the hospital's system that, to his knowledge, was effective and had not failed in the past. He was entitled to reasonably expect that Mr. Kahlon would return, and that the films would be brought to him for reporting in the event Mr. Kahlon did not. Moreover, it was reasonable to report on the CT scan within the following few days when he expected Mr. Kahlon to return for his contrast enhanced scan.

**72**  The plaintiff and the defendant doctors each called expert witnesses, Dr. Perry Cooper and Dr. Douglas Connell respectively.

**73**  Dr. Cooper was tendered as an expert in the field of radiology, including the interpretation of CT scans and the standard of care to be met by a reasonably competent radiologist in the circumstances of the case. He is licensed in Ontario and has been practicing full-time in neuro-radiology since 1970.

**74**  Dr. Connell was qualified to give opinion evidence in the field of radiology. He obtained his MD from the University of Western Ontario in 1973, following which he worked as an emergency room physician for five years. He took a four year residency in radiology at UBC in the early 1980s, and has since practiced as a radiologist.

Dr. Li's Evidence

**75**  Dr. Li obtained his medical degree at UBC in 1975 and did a four year residency in radiology, including a year at Harvard. He has practiced as a radiologist since 1979, and has practiced at the UBC Department of Radiology in that capacity since 1982. He has been a professor in the Department of Radiology in the Faculty of Medicine at UBC since 1990. He is also an associate member in the Faculty of Medicine at the Department of Medicine in Neurology as a result of his research into muscular sclerosis and his role as director of the UBC Multiple Sclerosis MRI Research Group.

**76**  Dr. Li did not have any actual recollection of the present case and testified based on his standard practice and his review of documents, including films.

**77**  In 1999, four radiologists worked at the UBC Radiology Department on any given day. One radiologist did CT scans, another ultrasound, another MRI, and the fourth, angiography and thorascopy. Dr. Li was the designated CT radiologist twice or three times per week. The CT radiologist generally reviewed 16 to 20 cases per day.

**78**  As set out in the Agreed Statement of Facts, Dr. Li described how the CT radiologist of the day protocolled each of the CT requisitions received that day. The requisitions contained the patient's clinical condition and the information the referring physician was seeking from the examination. From that, the CT radiologist decided, for example, the level of the lumbar spine to be examined. The radiologist also determined whether the CT scan would be conducted without contrast (the usual case when looking for routine disc pathology), with contrast or both.

**79**  As Dr. Li explained, after the technician performed the examination and they were completed, they then processed the films. The films were gathered and placed in bags with the requisition and then put in a slot like a designated in-box. As radiologist of the day, Dr. Li would work through the cases during the day, and as each one was brought from that box, he would put it down and then put up the films on multiple viewing panels. After reviewing and interpreting them, he would go through a differential diagnosis and then prepare a report by dictating it into a cassette tape machine. He then would take the requisition, the films, and put them in the package bag, and then set it aside in the out box. The requisition would be put on the dictating machine for pick-up by the transcriptionist. Once Dr. Li had dictated on a particular film, there was an inner bag which the film for the particular examination was put in, and an outer bag, called the master bag, which contained a list of all examinations the patient has had. The radiologist signed that bag on the label to indicate the examination was dictated and completed.

**80**  Dr. Li testified that it takes between 30 to 50 minutes to report on a case, depending upon its complexity. While cases are generally reported the same day, there are circumstances in which this is not possible, such as where the radiologist is awaiting previous films for comparison or where further scans are necessary in order to prepare a more definitive report.

**81**  Dr. Li gave evidence about his normal practice when a preliminary review of a film led him to believe that a contrast scan was needed. He would inquire of the technologist whether the patient was still in the department. If so, the patient would immediately be brought back for the scan, with the films prepared and reported the same day. If the patient had left the department, Dr. Li would have the technologist or clerical staff contact the patient and try to have him or her return the same day.

**82**  Dr. Li's normal practice where an examination occurred towards the end of the day and a contrast scan was necessary would be to ask the technologist whether the patient was still there. If not, he would write a clearly labelled note indicating that he required the patient recalled for a contrast scan. Dr. Li's expectation would be that the technologist would then take the film and the requisition and pass it on to the clerical staff, who would then make the arrangement for the patient to come back, which Dr. Li testified usually occurred the following day or the day after that at the very latest. In his view, it would have been a "no-brainer" for the patient to come back.

**83**  If the technical and clerical staff had already left for the day, Dr. Li's practice was to leave a note together with films and requisitions in the CT control area where the technical staff, he said, would not fail to see it. They would then make arrangements with the booking clerks to have the patient return.

**84**  If arrangements could not be made for the patient to return, then the booking clerk would have the films and the requisition given back to either the radiologist who had requested the follow-up examination or that day's designated CT radiologist for interpretation and report.

**85**  Dr. Li, when asked about this case, could not recall another case in which films had gone unreported for over one year, and described as "totally unbelievable" the fact that that had happened here. Prior to September 1999, there had been occasional instances when clerical staff would bring to the attention of the radiologists cases where reports had not been generated, such as where outside films necessary for a comparison could not be secured or the patient had been asked to return and had either failed or delayed in doing so. In these situations, there might be a delay in reporting of a week or two. Dr. Li also referred to being asked to report on cases that had been brought to his attention where a report had not been transcribed because the tape was deficient, otherwise could not be heard or had been lost.

**86**  Dr. Li was not aware of any audits having been conducted prior to the events in question. After Mr. Kahlon's situation came to light, an audit of the radiology department was conducted and revealed other cases which had not been reported, though Dr. Li did not know the number of such cases and how long they had gone unreported.

**87**  Dr. Li was shown the films from Mr. Kahlon's September 1999 CT scan that Dr. Flak had reported on in September 2000. Dr. Flak had referred to the fact that Dr. Li had attached a note to the films indicating that he wanted the patient to come back for a CT scan with contrast. Dr. Li described Dr. Flak's report as saying the T5 vertebral body demonstrated the presence of multiple lytic defects with a fairly geographic appearance. Dr. Li explained that lytic defects are areas of abnormal bone, and that the term "geographic" is used in radiology to describe abnormalities in the bone with fairly distinct margins between the abnormality and the adjacent bone. Dr. Flak's report also described soft tissue changes extending into the spinal canal.

**88**  Dr. Li testified that he would have seen the lytic defects and soft tissue changes when he did the preliminary review of the films as they were fairly obvious. The question that would have come to mind was whether these reflected one or two processes. Given that the changes in the bone would have implied conditions such as an infection, tumour, vascular malformation or hemangioma, a contrast enhanced scan would be important in sorting out a differential diagnosis between these possibilities. Dr. Li testified that the contrast scan would also have been important in determining whether there was a second diagnosis, that is, whether any of these possible conditions were incidental to a problem with the disc.

**89**  Ultimately, the contrast scan would have clarified and distinguished between the various possibilities and permitted a much clearer diagnosis so that the investigation could be more properly directed. Dr. Li testified that while it would not have ruled out any particular diagnosis, it would have helped to make a particular diagnosis more likely. What the contrast scan would have done in the present case would have been to indicate that an infection was a much more likely possibility than a vascular tumour.

**90**  Dr. Li testified that even with the benefit of hindsight, he would still have waited for the contrast scan. That scan could have been conducted within a day or two, as there were always slots to accommodate in-patients who needed to return for scans. Had he communicated the findings on Mr. Kahlon's films to Dr. Khan by telephone on the Friday afternoon or later by means of a written report, all he would have been able to provide would have been a list of possible diagnoses, and the latter's response would have been that a contrast scan needed to be done.

**91**  Dr. Li testified that the results of routine tests are usually communicated by means of written reports. Where particular matters need to be highlighted because of their urgency or unexpected nature, he telephones the referring physician. Dr. Li agreed that Mr. Kahlon's situation fell within this latter category, as the lytic findings that were obvious on his films were unexpected and had potentially significant consequences for his health. Had his review of those films occurred earlier in the day and had the contrast scan been conducted that day, he testified that there is no question but that he would have contacted the referring physician that same day. However, Dr. Li testified, having made the assessment that it was not an emergent matter such that it was necessary at 5 or 6 o'clock on a Friday afternoon to either try to contact the physician or advise the patient himself to seek emergency attention, his view was that a delay of three or four days, or even a week, in terms of the contrast scan would not have made a difference in terms of the overall outcome for the patient. Once that scan was complete, either Dr. Li or one of his colleagues (if he was not the radiologist on duty that day) would very likely have directly contacted the referring physician about the findings.

**92**  Dr. Li agreed that this case was no longer a routine examination but had become an examination of a patient he knew to potentially have a very significant medical problem that needed investigation. He agreed that Mr. Kahlon had been protocolled as non-contrast CT patient since everyone had thought that he had a routine L5-S1 disc problem. Dr. Li also agreed that when he saw the lytic lesions on the film, he was at that point the only person in the world who knew that Mr. Kahlon had a condition much more significant than a L5-S1 disc problem.

**93**  Dr. Li further agreed that he was relying on the hospital staff and system to ensure that Mr. Kahlon did return for the contrast scan and that the resulting films were actually reported on. He considered the risk that the information regarding the CT scan findings might get lost due to a breakdown along the chain of communication to be extremely small. While he conceded that the risk would have been eliminated had he telephoned Dr. Khan, as someone else would then have been aware of the information, he also said that the information would have been insufficient for Dr. Khan or any other treating physician since a contrast scan was still necessary. In Dr. Li's words, what occurred in this case was a "very very very very very very unlikely scenario."

**94**  With respect to making a note to himself to ensure follow-up, Dr. Li testified that it is not his practice, even today, to keep notes of the cases he has asked the clerical staff to bring back. His opinion was that Dr. Cooper, the expert witness who testified about making notes, has a practice that is unique, as he does not know of any other radiologist who keeps a record of cases simply to ensure the clerical staff brings them back. He said the business of making a note is not a standard practice as far as he is aware. It would not have occurred to him to make a note since booking clerks contact patients where there is a need for them to be recalled. Dr. Li said that given the number of cases, making a note is not something he would have thought of doing or that occurs at his hospital.

Expert Evidence of Dr. Perry Cooper

**95**  Dr. Cooper, a radiologist, was called as an expert witness by the plaintiff. In the course of his career, he has reviewed imaging studies of the spine, including cases with tumour, infection and haemangioma.

**96**  Dr. Cooper reviewed the findings from Mr. Kahlon's September 1999 CT scans. He noted that the L5 vertebral body was abnormal with lytic defects (holes) present in the body of the L5 vertebrae. The lytic process involved mainly the central and posterior half of the L5 vertebral body and there was disruption of the posterior cortex in the lower L5 body almost to the L5-S1 disc level. He said in his report that:

In general the differential diagnosis of a destructive lesion of the vertebral body includes neoplasm and infection at the top of the list as in the case of Mr. Kahlon. Soft tissue extension beyond the bone can occur with both. A vertebral haemangioma is a common lesion which may be present in one or more vertebral bodies in otherwise normal people ...

**97**  Dr. Cooper testified that infection and tumour were at the top of the list to exclude because both "can lead to compression of the spinal canal and compression of the nerve roots or the spinal cord higher up and cause neurological damage and paralysis". If the lesion was a haemangioma, it was not within the realm of normal haemangiomas and was of an aggressive type. On cross-examination, Dr. Cooper agreed that spinal tuberculosis is an uncommon form of tuberculosis infection occurring in less than one percent of patients with tuberculosis.

**98**  Dr. Cooper described a protocol at his hospital much like that followed at the UBC Hospital. When a requisition comes in, a radiologist looks to see what level of the spine needs to be examined. If the problem referred to sounded like either a tumour or an infection, the examination would likely be done both with and without contrast. Dr. Cooper said that he had no problem with Dr. Li having the patient recalled for a contrast scan, although in his view it would not provide much more information in terms of a specific answer. He acknowledged a number of separate diagnoses in this case: the disc, the destructive lesion, a cyst or a double nerve root. While some are of no consequence, others are significant.

**99**  Dr. Cooper agreed that in a case such as this, the delay of a few days that Dr. Li anticipated in reporting on the original scan so that the contrast enhanced scan could be performed was reasonable. It did not appear that the vertebra was "suddenly going to collapse", and the situation was not emergent in the sense of having to be dealt with in the following few days.

**100**  Dr. Cooper gave evidence with respect to how what happened in the present case could have been avoided. He wrote as follows in his report:

I am unaware of any written standards with regard to the action to take when an unexpected and potentially serious finding is made, as in Mr. Kahlon's case. However a situation,as occurred in the case of Mr. Kahlon, can be avoided both now and in 1999 if a phone call or other follow-up mechanism is used e.g. the radiologist made a note for himself/herself with the name and MRN number of the patient of concern, with the possible diagnosis, and that the patient is being recalled for contrast.

**101**  In terms of a telephone call, he said:

In deciding whether a direct phone call to a referring physician is necessary one should consider the physician and the seriousness of the finding.

**102**  Dr. Cooper expressed his view that when requesting that a patient return for further examination, keeping notes is a reasonable and prudent thing to do as it allows the radiologist to ensure that what was requested has been done. He testified that in cases involving serious findings about which he had concerns, he has called the referring physicians or made himself notes. It was suggested to Dr. Cooper that "the more reasonable thing to do would be to rely on the patient and the system in place in the hospital instead of having the radiologist wandering around trying to determine whether a follow-up examination had been done". Dr. Cooper responded that unfortunately bad things sometime happen.

**103**  Dr. Cooper was asked whether, assuming that in Dr. Li's experience there had not been a problem with delayed reporting of more than one or two weeks, it would be reasonable for him to rely on the system in place at the hospital to ensure that reports were generated on films that had been taken. He replied that unless there was a way of tracing films, one would not be able to know whether a film had gone missing or was unreported. He did, however, agree with the proposition that it is reasonable for a radiologist to rely on the process or system in place at the hospital. He also agreed that it was the radiologist's role to review, interpret, and report on the films and not the radiologist's role to make sure that everyone else in the process did their jobs. He further agreed that a reasonable patient certainly would take part in his own care.

Expert Evidence of Dr. Douglas Connell

**104**  The defendants called Dr. Connell, a radiologist and former head of the Musculoskeletal and General Radiology at the VGH and present head of Musculoskeletal Radiology and MRI at the Greater Victoria Capital Health Region.

**105**  Dr. Connell reviewed the CT scan of Mr. Kahlon's lumbar spine. His impression was as follows:

Well defined bony lesions involving the body of L5 as well as soft tissue contiguous with the L5-S1 disc narrowing with AP diameter of the spinal canal and exiting left neural foramina.

Differential diagnosis is wide and would include developmental abnormality of L5 or vascular abnormality involving the body of L5 with disc herniation at the L5-S1 level.

Vascular lesions involving the body of L5 with extension of vascular material into the disc space would be a consideration. Infectious disease would also be a consideration. No definitive diagnosis can be made on the basis of the noncontrast CT scan and I would recommend additional imaging with either contrast enhanced CT scan or MRI.

**106**  Dr. Connell also noted that the lytic defect was well-defined and well-marginated, which meant that it was likely a slow process and the bone was responding to it by trying to either repair or limit it in some way.

**107**  Dr. Connell was asked whether he agreed with Dr. Cooper's opinion that the destructive process of the L5 vertebral body meant that tumour and infection should be considered at the top of the differential diagnosis list. He replied that they would have to be considered because one would want to exclude the worrisome or potentially bad lesions, and they would therefore have to be at the top of the list to exclude.

**108**  Dr. Connell agreed with Dr. Flak's report that a specific diagnosis could not be established from review of the CT images and that further imaging should be obtained to help establish the diagnosis.

**109**  Dr. Connell testified that in his experience at VGH and in Victoria, a radiologist wishing additional imaging of a patient instructed his or her clerical staff of this request. It was then left to the staff to arrange for the repeat evaluation. Radiologists did not engage in secondary follow-up to determine whether such arrangements had been made as this simply would not be practically feasible.

**110**  Dr. Connell opined that it was not necessary for Dr. Li to contact the referring physician given his determination that additional imaging with contrast was required for proper interpretation of Mr. Kahlon's CT scan.

**111**  Dr. Connell was asked to comment on Dr. Cooper's evidence that the situation as occurred in the case of Mr. Kahlon could be avoided, both presently and back in 1999, if a phone call or other follow-up mechanism, such as note, was used. Dr. Connell indicated that he thought Dr. Cooper had been referring to occasions when the radiologist saw something of sufficient concern to warrant a telephone call. He did not regard the findings in the present case to raise that level of alarm, as there was a wide range of possible conditions, from relatively benign to worrisome. (The plaintiff and the UBC Hospital submit that this evidence should be given no weight as Dr. Li saw the films as being potentially more serious than Dr. Connell considered them to be.)

**112**  As far as a note is concerned, Dr. Connell said that is something that is not done for the reason that, from a practical point of view, it is not how the system functions. A radiologist would virtually be making notes every second case, and hospitals have systems in place that radiologists rely on instead, he said. Dr. Connell testified that he has practiced with two of the largest groups in the province and is unaware of any radiologist who makes notes in that fashion.

**113**  Dr. Connell agreed that the differential diagnosis in this case included potentially very worrisome conditions, but he disagreed that the starting point was that the patient or the referring physician had to be made aware of the findings at that stage. In his view, the examination was still incomplete, and the patient required further evaluation to determine whether there was any urgency, to make a diagnosis and to understand the appropriate treatment. Dr. Connell expressed his view that Dr. Li was making proper arrangements to evaluate whether or not the abnormality was worrisome before contacting the physician. To his mind, nothing on the film had any undue urgency about it.

**114**  Dr. Connell agreed that a CT scan with contrast would not give a definite diagnosis, but would limit the diagnoses. Asked whether Mr. Kahlon's lytic lesions fell into the category of findings that were both unexpected and potentially lethal, he disagreed. He did agree that they were unexpected but said that it was more probable that they would not be lethal.

**115**  Dr. Connell agreed that when Dr. Li wrote a note on the file asking for the patient to be brought back, Dr. Li was the only person in the world who would have known about the problem that Mr. Kahlon potentially faced, and that every step along the sequence of events that had to happen before he was recalled for a contrast scan and the results processed added to the risk that the information would fall between the cracks and the patient "would be lost to follow-up". He agreed that a call from Dr. Li advising Dr. Khan of the findings would have essentially eliminated the risk inherent in the process.

**116**  On cross-examination, Dr. Connell was asked "if a radiologist sees an unexpected and serious finding which in his view requires urgent follow-up, do you agree he should advise the referring physician of that?" To that, he answered "yes". He was asked of a letter from Dr. Reid to Dr. Flak where Dr. Reid, in reference to this CT scan, said "He has a very abnormal-sounding CT scan of his lumbar spine September 1999 ...". Dr. Connell agreed that as between those two doctors, their interpretation of the CT scan was "abnormal, unusual".

Discussion of Liability of Dr. Li

**117**  Dr. Li was the designated CT scan radiologist at the UBC Department of Radiology the day that Mr. Kahlon attended for his CT scan in September 1999. His preliminary review of Mr. Kahlon's films revealed obvious lytic holes and soft tissue changes. In his view, those findings were both unexpected and potentially very significant to Mr. Kahlon's health. Dr. Li considered the range of possible differential diagnoses to be broad and to include infection (such as tuberculosis), tumour, vascular malformation or haemangioma. It was common ground amongst the witnesses that the most serious of the differential diagnoses revealed by the CT scan were tumour and infection. It was also common ground that it was important to rule out such conditions as soon as possible.

**118**  Dr. Li determined that a contrast enhanced scan was needed to sort out the differential diagnosis, and to enable him to provide a more definitive and useful diagnosis to the referring physician, Dr. Khan. While the scan would not have ruled out any particular diagnosis, it likely would have revealed that infection was the most probable diagnosis. There is no suggestion in the evidence that it was inappropriate for Dr. Li to have requested the contrast scan. Dr. Connell shared the view that a contrast scan was appropriate to further evaluate the nature of the abnormality. While Dr. Cooper initially testified that a contrast enhanced scan would not have distinguished between different entities on the differential diagnosis, he conceded in cross-examination that it might have permitted some ability to distinguish between the two most serious of the differential diagnoses. His testimony, in any event, was that it was not unreasonable for Dr. Li to have sought it.

**119**  It was approximately 4:30pm on a Friday afternoon when Dr. Li completed his preliminary review of Mr. Kahlon's CT scan. Although he was of the view that a contrast enhanced scan was necessary, he had also determined that the situation was not an urgent one that required immediate attention and that a delay of a few days for the scan would not affect the overall outcome for Mr. Kahlon. The witnesses are agreed that the findings revealed by the initial scan were not urgent in the sense of requiring immediate attention. Dr. Cooper, for instance, agreed that the delay of a few days that Dr. Li anticipated in reporting so that the contrast scan could be completed was reasonable.

**120**  As department staff had already left for the day, Dr. Li followed his usual practice in such circumstances of attaching a note to the films and requisition requesting that Mr. Kahlon be recalled for a contrast scan, and leaving the bundle in the CT control area where the technologist would see it the next working day. We know that Mr. Kahlon was contacted by the hospital because of the note that appears many months later in Dr. Bermann's records. At least to this point, the system in place at the hospital appears to have functioned as Dr. Li expected.

**121**  Dr. Li did not telephone Dr. Khan that Friday afternoon to advise him of the unexpected findings. His explanation for not having done so was, simply put, that his examination of Mr. Kahlon was not yet complete. He considered the contrast scan to be key because the different possible conditions revealed on the initial scan had very different management processes and outcomes. In his view, to have simply informed Dr. Khan of the range of differential diagnoses based only on the CT scan would not have been helpful to him, and it was therefore important to first narrow the possibilities being before contacting him.

**122**  Dr. Connell similarly testified to a practice of not reporting on scans until he had all the information to complete the examination. In the case of a CT scan showing lytic lesions, his evidence was that it would not be useful to advise a referring physician of the fact of the lesions; what would be relevant to the physician would be the cause of the lesions and the appropriate course of treatment for the patient.

**123**  Dr. Li testified that had he reviewed Mr. Kahlon's films earlier and been able to have the contrast scan conducted that same day, he would unquestionably have contacted Dr. Khan to advise him of the findings that day. Dr. Cooper agreed that had Mr. Kahlon returned the following week for a contrast scan as Dr. Li had expected, it would have been reasonable for Dr. Li to have contacted Dr. Khan then.

**124**  The standard of care owed by a physician is summarized in *Crits v. Sylvester*, [*[1956] O.R. 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3M8-00000-00&context=) at 143 (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=), [*5 D.L.R. (2d) 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M131-00000-00&context=):

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 ...

See also *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=), [*5 D.L.R. (2d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=).

**125**  Each witness testified that if a radiologist identifies an unexpected and potentially serious finding, timely communication of that finding to the referring physician is warranted. There is no dispute in the evidence that Dr. Li had a duty to report on Mr. Kahlon's CT scan and to communicate the unexpected findings to Dr. Khan. There is also no dispute that it would have been reasonable for Dr. Li to communicate those findings to Dr. Khan after seeing the results of the contrast enhanced scan, which he expected would take place within a few days. The issue, in my view, is the reasonableness of Dr. Li's exclusive reliance on the system in place at UBC Hospital to ensure that Mr. Kahlon would be recalled, that scan conducted and the report processed. That assessment must take into account Dr. Li's knowledge of the potentially serious medical conditions Mr. Kahlon's CT scan had revealed.

**126**  As far as Dr. Li had anticipated, the results of the CT scan would be communicated to Dr. Khan after Mr. Kahlon returned for the contrast scan or, if he did not return, in short order, in any event. Had the system worked as it should have, when Mr. Kahlon did not return for the contrast scan, the original CT scan would have been presented to a radiologist in the ordinary course for review and a report, and the findings would have been brought to Dr. Khan's attention. Whether that radiologist was Dr. Li or someone else, the potentially serious findings would have been obvious to whoever read the films. Ultimately, that is not what happened, as the system broke down. Nevertheless, knowing that he was the only person aware of the potential seriousness of the findings from Mr. Kahlon's CT scan, was it reasonable for Dr. Li to have relied on that system or should he have anticipated the possibility that it might fail and thereby have his own back-up system in place?

**127**  In his many years of practice as of the time in question, Dr. Li, the evidence shows, was not aware of delays in reporting on CT scans of more than one or two weeks. He was certainly not aware of films having gone unreported for any extended period, such as occurred here. Part of his testimony in this regard was as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | Now, in all of the time that you have been - sorry, all of the time that you were at UBC working in radiology up to the time of Mr. Kahlon's film, there were no audits ever done in your department to determine if films were taken and not recorded; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | As far as I know there had not been. But I ... |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | So when you indicated to His Lordship that this had never happened in the past, you actually have no idea whether it has ever happened in the past because there may well be films that were never recorded, but you wouldn't know about them because there has been on audits; isn't that fair? |  |
|  | A: |  | As I said earlier, what would happen is that in the usual course of our activity there would be occasional instances where the clerical staff would bring to our attention cases for which a report had not been issued and then we would be asked to report on them. And as I said earlier, this could either be cases where outside films were waiting to come and they never showed up, and the clerical staff discovered that they needed to be reported. And it would be brought to our attention. |  |

Or in cases where the patient was asked to come back and for various reasons either the patient did not come back or there was a delay, that was brought to our attention.

So from that perspective, yes, because there is no audits you never know the things that you don't know. But based on my experience of having these brought to us on occasions I was fairly aware that there would not - I wouldn't expect that there would that because it would - for various reasons - I mean, if they are waiting there to be reported, they would be brought back to us.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | All you do know is that from time to time patients would slip between the cracks and sometimes those slippages, if I can call them that, would be picked up by your staff and they would bring the films to you late for report; is that fair? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | If "slippage" is the word for it. |  |

**128**  There is no evidence that films had gone unreported prior to 1999. While an audit of the radiology department conducted after Mr. Kahlon's situation came to light disclosed other unreported films, Dr. Li was not aware of any previous audits.

**129**  A radiologist's role is to review, interpret and report on films. As a matter of practical necessity given the volume of cases they review, they must rely on the systems in place in their hospitals to ensure that whatever follow-up needs to take place does. On this point, Ms. Stewart, a representative of the defendant UBC Hospital, gave the following evidence on discovery that was read in by the plaintiff:

Questions 161 - 163:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q161: |  | Just to follow up on this topic a little bit, if, for example, a radiologist didn't dictate a final report but said I want some more information and so the films got shunted into this holding area, I take it that the hospital understood that the radiologists didn't try to make any follow-up plans themselves. They relied on what the hospital was doing in order to ensure that the follow-up happened; correct? |  |
|  | A: |  | The follow-up would happen within the radiology department. |  |
|  | Q162: |  | Okay. But is the follow-up happening through the efforts of the hospital staff, or is the radiologist expected to make sure that - |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | The hospital staff. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q163: |  | Okay. And I take it that the point I'm trying to make is that the radiologists are very busy, and they rely on the hospital system to make sure that whatever follow-up is supposed to happen does happen; is that fair? |  |

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

**130**  It is not the radiologist's task to ensure that other players in the process are fulfilling their roles, unless he or she is aware of problems with the process.

**131**  Given Dr. Li's long experience with his hospital's system and his belief that the risk of the films going unreported was "very very very very very very small", I conclude that he was reasonably entitled to rely on the system in place within the department to recall patients and to bring to the attention of radiologists films that had yet to be reported. While he was certainly aware that there had been occasional delays of one to two weeks in the reporting of films, he was not aware of there having been any breakdown in the system of the magnitude at issue here. Accordingly, the risk that he should have reasonably had in mind in relying on the system was a delay in reporting of one to two weeks. Dr. Li was clearly cognizant of the potential seriousness of the lytic findings from Mr. Kahlon's scan. Nevertheless, even if his had become one of the occasional cases that were delayed, the consequences to Mr. Kahlon's overall health likely would not have been significant in those circumstances. While it was not unheard of for patients to fail to return for further examinations, the system that Dr. Li relied on brought back films for reporting when that occurred. In the circumstances, I do not consider that the combination of Mr. Kahlon's not returning and the CT films being misplaced was an occurrence that Dr. Li could reasonably have anticipated.

**132**  The measures that the plaintiff contends Dr. Li ought to have taken are not in themselves particularly onerous. However, it would only have been unreasonable for Dr. Li not to have taken them if he had been aware of inadequacies or breakdowns in the hospital's system, which, as I have discussed, he was not. Thus, while telephoning Dr. Khan to advise him of the unexpected findings would have eliminated the risk that that information would become lost, as both Dr. Li and Dr. Connell agreed, it was not unreasonable for Dr. Li not to have made that call in the circumstances. I would apply the same reasoning to whether he ought to have reasonably made himself a note. Moreover, Dr. Cooper's approach, though sound, appears to be unique and I do not find it to be the standard of care. Both Dr. Li and Dr. Connell testified to being unaware of any radiologists who make notes in that regard. Accordingly, I am satisfied that it was not negligent for Dr. Li not to have telephoned Dr. Khan or to have made himself a note to follow-up in the circumstances.

**133**  However tempting given the tragic consequences that befell Mr. Kahlon, the standard of care must not be assessed through the lens of hindsight. As Sopinka J. observed 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=), [*127 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-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.

**134**  I find that ***negligence*** has not been established against Dr. Li.

*(b) Dr. Khan and the Sports Medicine Centre*

**135**  Dr. Khan saw Mr. Kahlon at the Sports Medicine Centre on a referral from Dr. Bermann. He examined Mr. Kahlon on July 28, 1999 and requisitioned a CT scan. Although Dr. Khan has no memory of seeing Mr. Kahlon, his usual routine (and that of his clinic) is to advise patients who have been told to have tests, such as CT scans, to make a follow-up appointment with him following the test. Dr. Kahn did not see Mr. Kahlon again after the July 28 appointment. Dr. Khan said that he has no recollection as to whether or not Mr. Kahlon ever did call his office to book a follow-up appointment. He and the Sports Medicine Centre also do not have any records that would indicate whether or not Mr. Kahlon made such a call.

**136**  The system that was relied on by Dr. Khan and the other physicians at Sports Medicine Centre to follow up on tests that were ordered was as follows:

1. patients would be advised to make a follow-up appointment after their CT scans were complete and clinic staff would ensure the test result had returned before the patient attended for the follow-up; and
2. when test results were received by the clinic, they were stamped by a clerk. The stamp provided three options for the doctor to select upon reviewing the results:

chart please

recall

complete. O.K. to file

**137**  Follow up was thus based on the patient making an appointment or the clinic calling the client if it had received the results and the patient had not made a follow-up appointment. However, in the event the patient did not make the appointment and the test results did not come back to the clinic, there was no follow up mechanism in place.

**138**  The UBC Hospital and the plaintiff say that Dr. Khan was negligent because the standard practice upon which he relied was fraught with risk, he was capable of having a bring forward system for test results, and his system which relied entirely on the patient to return was not a reasonable standard or practice. Dr. Khan contends that to the contrary, his system was reasonable, as confirmed by the uncontradicted evidence of the expert witnesses, Dr. Donald McKenzie (also of the Sports Medicine Centre) and Dr. Richard Backus.

The Evidence

**139**  Dr. Khan took his medical training in Australia, and in 1993 completed his sports medicine specialty. He immigrated to Canada in July 1997, obtained his PhD in 1998, and in March 1999 started working at the Sports Medicine Centre.

**140**  Dr. Khan explained that the number one reason for presentation at the clinic is knee injuries. Shoulder injuries, he said, are also common. Back pain makes up a reasonable proportion of the practice, and it is a core business for a sports medicine specialist to diagnose and prescribe treatment for back pain.

**141**  Dr. Khan has no memory of seeing Mr. Kahlon. The records of the Sports Medicine Centre were destroyed in the normal course due to the passage of time. Dr. Khan's testimony was therefore based on his usual practice and his reporting letter to Dr. Bermann of July 28, 1999 following his appointment with Mr. Kahlon.

**142**  When he saw Mr. Kahlon on that date, Dr. Khan was working two days per week at the clinic; he worked on academic research the other days. Basing his recollection on his report to Dr. Bermann, Dr. Khan said Mr. Kahlon presented with back pain, and also mentioned weight gain. He noted that Mr. Kahlon suggested he had had some back pain while twisting in September, which was about ten months prior to the appointment. Dr. Khan testified that having listened to Mr. Kahlon, he then examined him to try to narrow down and confirm one diagnosis. That examination revealed tenderness at the second and third lumbar level, and the L5-S1, which was consistent with disc injury at one or both of those places.

**143**  Dr. Khan testified that MRI was not easily available in 1999, and that a CT scan was the standard way of investigating patients with a suspected disc injury. He said that his management plan was to recommend physiotherapy and activity because that was and remains the first line of care for this type of injury. He said that his standard practice was to ask patients to return for follow up after tests.

**144**  Asked whether he would have shared his working diagnosis with Mr. Kahlon, Dr. Khan replied:

Yes. My firm belief is that I would have shared the working diagnosis with him, because that's my standard practice. And I feel this is the crucial part of what patients come for to get a working diagnosis. Maybe even in cases where I'm not very sure I would share what I think the options are. So I would say that I discussed, you know - and using this note as a guide - I would have discussed the diagnosis of a disc and what that means and what that looks like and the fact that the treatment would involve being active and getting some physio. And I wouldn't necessarily get into the topic of surgery or not because it's not part of the mainstream management. So unless the patient brought it up I wouldn't raise that as an option in the first appointment.

**145**  Dr. Khan testified that he had planned to see Mr. Kahlon again because his standard practice after an investigation is to have the patient return in order to go through the results. He said that it is important for patients to understand their pathology, and that in the case of back pain, it is important for patients to understand that it can be benign. Dr. Khan referred to a portion of his letter to Dr. Bermann where he indicated that he would review the imaging results and assess Mr. Kahlon's progress at that time. He testified that that told him that he was expecting to see Mr. Kahlon after his CT scan, and that he also would have wanted to review his progress and response to the treatment plan.

**146**  Dr. Khan testified that he would generally advise patients with an L5-S1 disc injury that it is often a benign condition with a typically good prognosis, and that treatment involves exercise and physiotherapy. He said that he would explain the natural history of an L5-S1 disc injury is that 95% of the patients get better. However, Dr. Khan also testified that how he contextualizes this information to the individual patient is important, and that a patient presenting with 10 months of back pain or whom he has referred to a CT scan faces a poorer prognosis than a patient with a short-term history of back pain.

**147**  Dr. Khan testified that patients sent for a CT scan are not given a specific date to return because at that stage they did not know when their CT scan will be scheduled. Patients are asked to book an appointment about a week after the test to allow time for the test results to come back. Dr. Khan said that his understanding was that clinic staff faxed the requisition to the radiology department, and that it was the latter that contacted the patient with respect to the appointment. Once the CT scan was done, the results would be forwarded promptly. However, there could be a long delay between the request for an imaging test and the scheduling of that test.

**148**  Dr. Khan was adamant that he would not have told Mr. Kahlon that he could assume that the CT scan was normal if he did not hear from him. That was simply not his practice, and was also inconsistent with his reporting letter to Dr. Bermann. He further testified that he was not expecting Dr. Bermann to follow up with him in terms of Mr. Kahlon's test results.

**149**  Dr. Khan described his patient follow-up system, which entailed patients booking appointments to return following their tests. Additionally, when the clinic received test results, the documents were stamped for the doctors to select one of three options: essentially, "ready to file", "please pull the chart", and "recall the patient". However, Dr. Khan agreed that there was no system in place to ensure that the results of tests that had been requisitioned had in fact been received.

**150**  Dr. Khan was strenuously cross-examined with respect to why he did not have a system in place that ensured that he received the results of a CT scan if one had been ordered for a patient. Dr. Khan acknowledged that his system was to have patients return to follow-up every test result. Asked why he did not have a card index to follow up CT scans he had ordered, he responded that it was simply not feasible as it would be excessively time-consuming to fill out cards for all the various tests. While the clinic had a computer system, its purpose was for billing, not for monitoring whether results had been received on tests. Dr. Khan said that prior to this case, he was unaware of a CT scan or other examination being unreported.

**151**  Dr. Khan testified that even after 1999, he did not change his practice to include a system to verify whether results for tests he had ordered had been received.

**152**  Ms. Woods cross-examined Dr. Khan on various publications from the College of Physicians and Surgeons (the "College"). A 2002 College recommendation provided, in part:

Additionally a lack of patient compliance wilfully or absent-mindedly is a factor. Physicians are therefore urged to ensure to the extent possible that office systems are in place to ensure that investigations and consultations are received and that abnormal results are noted and acted upon in a timely fashion.

**153**  Dr. Khan agreed with this recommendation, noting that "to the extent possible" was an important phrase.

**154**  Ms. Woods referred in her questioning to a 2003 College Quarterly, which read, in part:

It has always been the College position that the ultimate responsibility for the follow-up of an investigation rests with the ordering physician. This applies unless that responsibility has been specifically delegated to another physician and that physician has agreed to accept that responsibility.

**155**  Dr. Kahn agreed with the statement, and said that he discharged that responsibility by asking his patients to come back to see him so that they could discuss the test results.

**156**  Ms. Woods showed Dr. Khan an information letter from the Canadian Medical Protective Association of June 2004 which said:

When physicians order an x-ray or any other test they need to be satisfied that there is a system in place to follow-up on the results.

**157**  Dr. Khan said that his system was to ask the patient to make an appointment so that he could see the patient in follow-up, and that he still has not been told of a better system. He said that he took all reasonable steps to ensure the patient did not "fall through the cracks" by putting the onus on him to come back and see him in his office so that they could discuss the test results.

**158**  On re-examination, Ms. Khanna noted that the excerpts put to Dr. Khan all post-date this case. She pointed out to Dr. Khan with respect to the 2002 College Quarterly shown to him by Ms. Woods that it went on to say, "your efforts to contact patients regarding significant abnormal tests or poor appointments should be recorded" and "clear communication to patients about your expectations of them regarding test results and consultative appointments and follow-up visits is of paramount importance". Dr. Khan testified that is what his practice was, and he did that by asking Mr. Kahlon to come back to see him.

**159**  Ms. Khanna also put to him the following passage from the summer 1995 College Quarterly:

It is potentially dangerous to tell the patient that if they do not hear from you that they can assume that everything is normal. A better, safer method is to instruct the patient to call your office after a suitable interval. Normal results can be given over the telephone by your office assistant. If the results are abnormal, then the assistant can make an appointment for the patient to come in to discuss the findings with you. Patients must be protected from the danger of mislaid results. You may be able to think of a better way to ensure that all results are communicated to patients. If you do have a better idea, please call the College.

**160**  Dr. Khan explained that his practice was to see the patient in person and go through the results with him in order to explain them properly and to integrate them into the care he would like to give the patient going forward.

Dr. Donald McKenzie

**161**  Dr. Donald McKenzie was a defence witness qualified as an expert in sports medicine. He is a colleague of Dr. Khan at the Sports Medicine Centre.

**162**  Dr. McKenzie obtained his MD from UBC in 1977 and returned after residency training in New Zealand to set up a practice focussed on sports medicine at the Sports Medicine Centre. He has been a fully-tenured professor in the UBC Faculty of Medicine since 1992.

**163**  Dr. McKenzie said that it is part of his practice to order CT scans on patients in appropriate cases. He currently orders five or six per month and probably did double that number when he was practicing more frequently. He said that the members of his practice in the Sports Medicine Centre have a close relationship with the radiologists at UBC Hospital. He testified that the standard practice at the Sports Medicine Centre when a CT scan is ordered for a patient is to advise the patient to make an appointment to return to the Centre after they have had the scan done. The reason for that practice is that it is the most reasonable way to engage the patient in the health care process.

**164**  Dr. McKenzie testified that there are several reasons why a patient sometimes does not receive the CT scan at the prescribed time; for instance, they may decide they do not want to do it or would like to see another physician. He said that there were no electronic systems available to track test results in 1999.

**165**  On cross-examination, Dr. McKenzie agreed that the practice at the Sports Medicine Centre with respect to follow up to see if test results have come back remains having the patient book a follow-up appointment. He described two mechanisms for this. One was to request the patient to return for a follow-up appointment. The other was for the physician reviewing a report to decide to have the patient called for an appointment. He agreed, however, that where for any reason test results do not come back, there is reliance on the patient returning as a trigger.

**166**  Dr. McKenzie testified that the system the Centre uses has worked very well in his 28 years of practice, and that a system in which patients are followed throughout their investigations to ensure they attend would be totally impractical in a medical practice. When asked whether it would be difficult to have a bring-forward system for CT results, he said that it would be given that they receive 250 faxes per day and would be overwhelmed with the duty of following up on all tests, prescriptions, referrals to physiotherapy, and referrals to other health practitioners.

**167**  Dr. McKenzie testified that he was not aware of any other case in which both the patient did not return and test results were not received.

**168**  On cross-examination by Mr. McGivern, Dr. McKenzie acknowledged that there had not been any audits at the Sports Medicine Centre, and he agreed that without a system of audits he has no idea whether Mr. Kahlon was the only person that this happened to.

**169**  Dr. McKenzie agreed that if a finding is both unexpected and carries potentially a very significant health care risk, the radiologist can pick up the phone and advise him of this information rather than send a report in the routine way. He also agreed that 5% of patients do not actually return to see the doctors. He agreed with the following recommendation of the College that was put to him:

The follow-up of investigations and treatment is an important part of medical practice for both specialists and family physicians. ... The lack of appropriate timely follow-up has the potential for harm for medical legal liability and is a source of significant complaint to the College. With the complexity of the system there is potential for information to be lost at more than one level. Additionally lack of patient compliance, wilfully or absent-mindedly is a factor. ... Physicians are therefore urged to ensure to the extent possible that all systems are in place to ensure that investigations and consultations are received and that abnormal results are noted and acted upon in a timely fashion.

Dr. Richard Backus

**170**  The defendant doctors filed a report of Dr Richard Backus, a physician whose practice is also limited to sports and musculoskeletal medicine. He is a principal at the Muscoloskeletal Rehabilitation Centre in Victoria. He filed a written opinion and was not required for cross-examination.

**171**  Dr. Backus described two approaches regarding follow-up for tests. The first is when the date for imaging can be determined at the time the doctor is seen. The second, he said, is as follows:

A second situation occurs when the imaging takes place at an indeterminate time. The usual pattern is that the patient is told at the time of the original appointment that as soon as she gets a date for imaging, she must phone the office to make an appointment to come in and review that imaging with the doctor immediately following the test. The hospital or laboratory usually sends out a report. These reports are reviewed on a daily basis in the office and if any of them are unusual, then the patient is phoned and asked to come in if she has not made the requested appointment. Occasionally, with multiple physicians ordering, it is unclear who should receive the report, and some are missed.

**172**  In the situation where there is no report from the laboratory or imaging centre and the patient has not made an appointment to come in or does not make an inquiry about the results, the results are effectively lost.

**173**  Dr. Backus wrote that there is some hope that electronic medical records will give a third level of security in the future. It is interesting to note that most electronic medical records do not have the capability to routinely check whether ordered imaging has been done or if there is a missing report.

Discussion

**174**  The system upon which Dr. Khan relied for follow up when sending a patient for a CT scan had two components: (1) advising the patient to make a follow up appointment after the scan was completed and having staff ensure that the results had returned prior to the appointment, and (2) when received at the clinic, test results were stamped with three options for the doctor when he reviewed the results: "Chart please", "Recall (the patient)" and "Complete. Ok to file". The patient could thus be recalled even if he or she had not made a follow-up appointment as directed.

**175**  The question is whether this system constitutes a "reasonably effective 'follow up' system": *Braun Estate v. Vaughn*, [*[2000] 3 W.W.R. 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22GV-00000-00&context=), [*145 Man.R. (2d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22GV-00000-00&context=) (C.A.).

**176**  There was nothing in the evidence in the present case that suggests it was unusual for a physician not to have a follow up system that specifically monitored whether tests of this sort that had been ordered had actually been conducted and the results received. I also find, on the evidence, that the follow-up system employed by the Sports Medicine Centre was the standard practice for a case of this kind. There was also no expert evidence that was critical of Dr. Khan's standard practice. Nevertheless, the mere fact that a doctor's standard practice conforms to the standard practice of the profession does not necessarily insulate the doctor from liability. As Sopinka J. wrote in *ter Neuzen*:

1. 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. ...
2. 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***. ...

...

1. ... Thus, it is apparent that conformity with standard practice in a profession does not necessarily insulate a doctor from ***negligence*** where the standard practice itself is negligent. The question that remains is under what circumstances will a professional standard practice be judged negligent? It seems that it is only where the practice does not conform with basic care which is easily understood by the ordinary person who has no particular expertise in the practices of the profession. That is, as Professor Fleming suggests, where the common practice is fraught with danger, a judge or a jury may find that the practice is itself negligent.
2. As was observed in *Lapointe*, courts should not involve themselves in resolving scientific disputes which require the expertise of the profession. Courts and juries do not have the necessary expertise to assess technical matters relating to the diagnosis or treatment of patients. Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent. On the other hand, matters falling within the ordinary common sense of juries can be judged to be negligent. For example, where there are obvious existing alternatives which any reasonable person would utilize in order to avoid a risk, one could conclude that the failure to adopt such measures is negligent notwithstanding that it is the prevailing practice among practitioners in that area.

[emphasis added]

**177**  It is the position of the UBC Hospital that relying on the return of a patient as the primary mechanism for follow up is a practice fraught with danger, and that doctors do not discharge their responsibility simply by asking patients to come back to see them. Ms. Woods submits that the proposition that a bring forward system is unworkable given the number of tests that are ordered is without merit in a computer age and in light of recommendations to the contrary by the College. As she points out, dentists and lawyers regularly use bring forward systems in their practices. The doctors' expressed concerns regarding the difficulty in following up tests they order, she contends, are made without their providing any concrete examples of why this would be the case.

**178**  UBC Hospital cites *Rupert v. Toth* [*(2006), 38 C.C.L.T. (3d) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-F1WF-M266-00000-00&context=) (Ont. S.C.J.) and *Braun Estate v. Vaughn* in support of its position. In *Rupert v. Toth*, the plaintiff was referred by a general practitioner to Dr. Toth, an otolaryngologist. Prior to surgery, Dr. Toth had believed the plaintiff's nasal obstruction to be a benign polyp; during the course of the surgery, however, he came to suspect it was an inverting papilloma. He advised the plaintiff of this information, but did not tell him that the suspect condition could turn into cancer. He scheduled a CT scan for the patient which revealed a significant abnormality.

**179**  The CT scan report was sent to both the plaintiff's family doctor and Dr. Toth. The family doctor advised the plaintiff of the results, though the evidence was that the condition was one that was rarely, if ever, encountered in the course of a family physician's practice and that he would not have been knowledgeable about it. He did not advise the plaintiff of the possible negative consequences of not having surgery within a fairly short time frame or of the possibility that the condition could become malignant. He did, however, clearly instruct him to contact Dr. Toth to arrange a follow up appointment about the CT results.

**180**  Dr. Toth routinely read all reports and flagged with a post-it note those that required action. In the case of the plaintiff's CT scan, he flagged it with a post-it note upon which he indicated to his secretary "Ensure follow-up appointment". It is not known what happened to Dr. Toth's instructions but the appointment never took place. The post-it note may have fallen off or become lost; his secretary may have failed to follow his instructions; or, she may have made the appointment but it was cancelled.

**181**  Ultimately, the plaintiff died from the papilloma that had turned malignant and invaded his cranial cavity.

**182**  Among the doctors, only Dr. Toth had the expertise to give the plaintiff the information about the potentially adverse turns the disease could take. Low J. found that Dr. Toth appreciated the importance of conveying that information to the plaintiff and the risks to the plaintiff of not doing so. She wrote at paras. 126 and 127:

[126] In my view, if the common practice for communicating test results is to shift the responsibility to the patient to attend to receive the information and the patient's compliance is the only mechanism for ensuring that the information is conveyed, then notwithstanding that it will generally suffice either because patients generally comply or because there is no time sensitive and/or further material information to be transmitted, the practice will nevertheless be fraught with risk in some cases. There will be patients for whom there is literally no time for the method of communication to be played out in the ordinary course; there will be patients who are not capable of following through with instructions; there will be patients who are forgetful or neglectful.

[127] I make no finding as to whether the general practice of asking a patient to book a follow-up appointment to receive and discuss test results is generally sufficient to meet the standard of practice. I am required to decide only whether the standard of practice was met on the particular facts of this case. In my view, it was not -- and, I would add, not because of lack of effort on the part of Dr. Toth. I found Dr. Toth to be truthful, sensitive and compassionate and I find that he set in motion the appropriate steps that, had they been executed, would have resulted in communication of the information that he had the obligation to communicate. It was his system that failed.

**183**  In the result, Dr. Toth was held liable.

**184**  *Braun Estate v. Vaughn* involved action against Dr. Vaughn, an obstetrician-gynaecologist, and the hospital where he practiced. Dr. Vaughn obtained a pap smear from the plaintiff and sent it off to the Health Services Centre for analysis. The cytology report dated June 2, 1992 indicated that the plaintiff had a pre-cancerous condition with a virtually 100% probability of successful treatment. The report had been returned to the doctor and the hospital/clinic within one month after the request. However, the positive lab report was not discovered until 11 months later when it was found in the plaintiff's chart. There was no evidence as to when it was placed there but it would have been discovered had the doctor reviewed the chart before leaving the hospital, which he did in August 1992, or before the gynaecological component of the clinic was closed on July 24, 1992. As Scott C.J.M., writing for the Court, explained:

[11] Nurses' aides and other employees of the clinic were, for ordinary purposes, guided by the procedures of their employer, the hospital, and reported to a hospital administrator. The hospital did not have any stated policies in place with respect to how documents or test results were to be reviewed. Despite this, Dr. Vaughn testified that he relied on the procedures and systems in place in the hospital clinic. He expected, he said, the Pap smear report in approximately four weeks. The clinic did not have a system to track requests for laboratory results.

[12] The testimony at trial by Dr. Vaughn's nurse, and accepted by the trial judge, was that she would assist Dr. Vaughn in the taking of a Pap smear (or other tests) after which the requisition and specimen would be taken to the hospital lab and sent to the HSC in Winnipeg. The test results were returned through the mail and directed to the attention of the individual doctor. Dr. Vaughn allowed his secretary to open test results but not other mail addressed to him. Test results would be either placed in a specified folder or placed directly in front of the doctor's chair. Dr. Vaughn would review the results and then issue instructions to the nurse either verbally or by attaching a yellow Post-It note to the document. Unlike the other physicians at the clinic, Dr. Vaughn did not initial the individual reports or test results.

**185**  The Court of Appeal concluded at paras. 33 - 34:

[33] The overwhelming weight of the evidence together with common sense and experience provide ample support for the conclusions reached by the trial judge. While it is clear that she set the standard upon Dr. Vaughn at too high a level, *i.e.* that he was responsible to see that a system was in place to "ensure" that a test result was read by the requesting physician, her conclusion would have undoubtedly been the same applying the correct standard, namely, that there was a duty upon the physician to see to it that there was a reasonably effective "follow-up" system in place. This is particularly so on the facts of this case since Dr. Vaughn knew full well that there was no system or procedures in effect on the part of the clinic. This error is exacerbated by his failure to have any personal system to confirm that a report or test ordered by him, or on his behalf, was seen by him.

[34] Applying the principle of law from *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=), and *Anderson v. Chasney*, [*[1949] 4 D.L.R. 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2CK-00000-00&context=) (Man. C.A.); aff'd. [*[1950] 4 D.L.R. 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05J-00000-00&context=) (S.C.C.), the trial judge was entitled to conclude that there was a failure to adopt "obvious and reasonable precautions which are readily apparent to the ordinary finder of fact" (*ter Neuzen*, para. 51).

**186**  The defendant doctors in the present case argue that there are very few cases where the *ter Neuzen* exception has been applied and the physician's standard practice been found to be fraught with obvious risks such that anyone is capable of finding it negligent. They caution that before finding a standard of care to be itself negligent, there should be obvious existing alternatives. While guidelines issued by bodies such as the College are a factor to consider, they are by no means a substitute for expert evidence. The defendant doctors point out that neither the plaintiff nor the UBC Hospital introduced any expert evidence with respect to the reasonableness of the follow-up system used at the Sport Medicine Centre.

**187**  The system that Dr. Khan and his colleagues used at the Sports Medicine Centre relied on, they said, intelligent and motivated patients. It depended on patients attending for their imaging tests and then returning to obtain the results. Nevertheless, in the event that a patient did not make an appointment to return, the test report would be reviewed by the doctor when it was received by the clinic, and the doctor could at that time direct that an appointment be scheduled. For the system to fail, the patient would either have to fail to attend for his scan or to return to the clinic for a follow up appointment as directed, and the laboratory would have to fail to return the report or otherwise fail to contact the clinic. The evidence of both Dr. Khan and Dr. McKenzie was that they could not recall a situation where both contingencies had occurred, that is, the patient did not return to the clinic and the test result did not come back.

**188**  I find the present situation to be quite different from that in *Braun Estate v. Vaughn*. In that case, the request for the test was sent directly from the doctor to the Health Services Centre, the results were returned to the doctor, and he knew that there was no system in place at the clinic. That error was exacerbated by his failure to have any personal system to confirm that a report or test he had ordered was seen by him. In the present case, there was a system. So long as the test results came in, there was a system for the doctor to review them and bring in the patient if necessary, even if the patient had not made a follow up appointment as directed. It is on that basis that the circumstances in *Rupert v. Toth* are also not analogous. There, the test results *had* been received and yet the system failed.

**189**  The UBC Hospital and the plaintiff submit that the Sports Medicine Centre should have had a computer or manual bring forward system. The evidence of Dr. Khan and Dr. McKenzie was to the effect that such a system was impossible to organize given the number of tests that are ordered, the fact that patients simply might not go for the tests, and the sheer volume of faxes they receive each day.

**190**  I question whether tracking test results is quite as difficult as Dr. Khan and Dr. McKenzie believe. Nevertheless, I am not persuaded on the evidence that the system in place at the Sports Medicine Centre and used by Dr. Khan could be characterized as other than a reasonably effective follow up system. I am also not prepared to conclude that the standard practice followed by Dr. Khan and his colleagues at the Sports Medicine Centre is negligent.

**191**  Accordingly, I find that ***negligence*** against Dr Khan and the Sports Medicine Centre has not been established.

1. *Dr. Bermann*

Introduction

**192**  Dr. Bermann was Mr. Kahlon's general practitioner, and had been so since June 1986.

**193**  As set out earlier in the review of the facts, Dr. Bermann saw Mr. Kahlon in August 1998 when the latter presented complaining of a sprained back, weight gain and an injured right ankle. His examination of Mr. Kahlon suggested that Mr. Kahlon's back problems were due to muscular back sprain, and he advised Mr. Kahlon to increase his exercise as tolerated with respect to both his back and ankle. Dr. Bermann advised continued exercise and massage therapy at an appointment in October 1998. In February 1999, Mr. Kahlon again presented with lower back pain symptoms. Dr. Bermann counselled Mr. Kahlon to be careful when lifting, prescribed an anti-inflammatory drug, and asked him to return in a week.

**194**  Dr. Bermann next saw Mr. Kahlon on July 19, 1999 when he complained of pain in his right thigh when sitting for extended periods, as well as pain in his left buttock area. At that time, Dr. Bermann referred Mr. Kahlon to the Sports Medicine Centre. Dr. Khan sent Dr. Bermann a consultation report dated July 28, 1999 advising that he had referred Mr. Kahlon for an x-ray and CT scan of his lumbar spine, and that he would review Mr. Kahlon after receiving the results and assess his progress at that time.

**195**  Following his July 19, 1999 appointment, Mr. Kahlon did not return to see Dr. Bermann until April 14, 2000 when he complained of a sore throat. Lab tests revealed he had strep throat. Dr. Bermann next saw Mr. Kahlon on September 8, 2000, when he presented with complaints of a new ache in the left groin and hip. Dr. Bermann ordered an x-ray, and blood count and sedimentation rate tests, and advised Mr. Kahlon of the abnormal results at an appointment on September 13, 2000. Dr. Bermann referred Mr. Kahlon to Dr. Reid, a rheumatologist.

**196**  Dr. Reid sent Dr. Bermann a consultation letter in late September requesting a copy of Mr. Kahlon's CT scan report. Dr. Bermann realized that he had not received the results, and contacted the UBC Radiology Department, at which point it was realized that the films had never been reported. Dr. Bermann saw Mr. Kahlon on October 2, 2000 to review Dr. Reid's report and the CT scan report. Following this appointment, Dr. Bermann made arrangements for Mr. Kahlon to attend for a follow-up MRI. Before the MRI could be performed, Mr. Kahlon was admitted to hospital.

**197**  I will deal with the arguments of the plaintiff and the UBC Hospital together. They assert that Dr. Bermann's conduct fell below the standard of care expected of him in two ways. First, he failed to have an appropriate follow-up system in place to ensure that important examinations, such as CT scans, that had been ordered were actually reported and received by him. The hospital specifically asserts that Dr. Bermann was negligent in not booking a follow-up appointment after referring Mr. Kahlon to the Sports Medicine Centre. Secondly, Dr. Bermann failed to ask Mr. Kahlon about his back and the status of his CT scan when Mr. Kahlon attended an appointment in April 2000; had he reviewed his notes of Mr Kahlon's previous appointment in July 1999, he would have been aware that this was an outstanding issue.

Dr. Farmer's Evidence

**198**  Dr. Farmer was called by the UBC Hospital and was qualified as an expert in general practice medicine. In his written opinion, Dr. Farmer expressed his view that:

... a family physician of average competence practicing in British Columbia at the time would have instructed the patient to arrange a follow-up visit after he had seen the specialist in order to discuss the specialist's recommendations and whether further action was required. This is part of the services a family physician offers to his patients in order to ensure that the patient does not "fall between the cracks" and so that there is a continuing source of care.

**199**  In response to the suggestion that it would be excessive duplication for a patient to return to his general practitioner after seeing a specialist, Dr. Farmer replied that 1999 was a different time and that the general practitioner then was, in essence, the orchestrator of the patient's health.

**200**  On cross-examination, Dr. Farmer agreed that in 1999, electronic medical records were not available in physicians' offices. He agreed that there were times when he expected the patient to stay with the specialist for a time for assessment and treatment. He also agreed that if Dr. Bermann had received the letter from Dr. Khan indicating that he would review Mr. Kahlon after his imaging results and assess his progress at that time, he would have felt satisfied that the specialist would be following up with the patient. He said that he absolutely thought that was very clear. Dr. Farmer testified that he would have expected that if Dr. Khan saw the patient in follow-up and was not going to be following up any further, he would send a consultation letter referring the patient back to the family physician.

**201**  Dr. Farmer was asked about a portion of the 1998 Medical Services Plan ("MSP") Guide to Fees that indicated that once a consultation had been rendered and a written report submitted to the referring physician, that aspect of the care of the patient was normally returned to the referring physician. He was asked about a reference in that guide to the referring physician generally should not charge for this aspect of the patient's care unless and until the full responsibility is returned to him. He said he was surprised by that and had never been aware of that.

**202**  Dr. Farmer agreed for the most part that a significant number of patients will undergo investigation and subsequent treatment for a presenting condition, all the while followed by the specialist and not returning to the family doctor. He agreed with a reference that where the patient is being followed by the specialist, a follow-up visit with the family physician could be redundant as the investigation and care of the patient was being looked after by the specialist.

Dr. Dwyer's evidence

**203**  Dr. Dwyer was called as an expert witness by the defendant doctors and was qualified in the area of general family practice.

**204**  Dr. Dwyer, in his written report, disagreed with the opinion offered by Dr. Farmer. Specifically, he disagreed that when a patient with chronic back pain is sent to a specialist, the referring doctor should advise the patient to also come back to see him or her within a couple of weeks.

**205**  At p. 7 of his report, Dr. Dwyer wrote:

A referral, made by a general practitioner to a specialist is undertaken to obtain a diagnosis and plan for further treatment from the specialist who has greater competence in the illness or issue presented. A significant number of patients will then undergo investigation and subsequent treatment for the presenting condition, all the while followed by the specialist and not returning to the family doctor or general practitioner. The condition may be completely treated by the specialist without returning to the family doctor, and indeed the family doctor may not see the patient again until they require an annual renewal of a consultation request to see the specialist as required by the Medical Services Branch of B.C. This happens in many cases in practice. To have [a] system in place where the patient would return to the G.P. after every specialist consultation would result in excessive duplication of service with the G.P. simply reiterating what the specialist had already told the patient.

**206**  He went on to say at p. 8:

Having patients return to the general practitioner after seeing a specialist on all occasions would result in a tremendous inconvenience for most patients, and would also result in unnecessary visits to the general practitioner and cost to the system. A general practitioner usually only sees the patient again on the instruction of the specialist.

**207**  Dr. Dwyer said that tracking systems for medical records or computerized medical records were not available in 1999. He said that they are also not presently available in the majority of general practitioners' offices.

**208**  The other allegation against Dr. Bermann is that he ought to have made himself aware of his notes regarding his prior consultation with Mr. Kahlon when he came to see him in April 2000 with respect to a sore throat. On cross-examination, Dr. Dwyer was asked:

1. Would you also agree that every time a G.P. goes in to see his patient that as a matter of good practice he should familiarize himself with the patient and his chart and what has been happening with the patient and his care?
2. That's a general statement. I really -- on the ground, it doesn't work as well as that, but as a general statement it's a fair statement.

**209**  On re-examination, Dr. Dwyer said that working family physicians deal with a patient's presenting complaints and rely on the patient to advise about any other problems he or she is having. Dr. Bermann's evidence read in from his examination for discovery was that he usually reads his notes but that would depend "on what they are in for". As to the results of CT scans, he said that "normally the patient asks him the results or makes a complaint about whatever he's got".

Discussion of Liability of Dr. Bermann

**210**  There are essentially two allegations against Dr. Bermann. The first is that he should have arranged a follow up visit after Mr. Kahlon had seen Dr. Khan to discuss the specialist's recommendations, or followed up on the CT scan ordered by Dr. Khan. The second is that on April 14, 2000, the first appointment following the July 1999 appointment when Mr. Kahlon was referred to Dr. Khan, he should have made himself aware of his notes of his prior consultation with Mr. Kahlon, and asked him about his referral to the Sports Medicine Centre and checked to see whether he had the CT scan.

**211**  The defendant doctors cite *Beninger v. Walton*, [*[1979] B.C.J. No. 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JT99-2170-00000-00&context=) (S.C.) which they say appears to be the only authority that directly addresses the responsibility, if any, of a general practitioner to follow up with respect to a referral to a specialist. In that case, the plaintiff alleged that he suffered a partial loss of sight due to a delay in the treatment of his glaucoma. Dr. Walton was a general practitioner who had seen the plaintiff a number of times for a variety of ailments over a seven-year period. Early in this period, Dr. Yule, another physician at Dr. Walton's clinic, referred the plaintiff to Dr. Howie, an ophthalmologist, for suspected glaucoma. Dr. Howie saw the plaintiff and wrote a letter to Dr. Yule advising that he suspected glaucoma and would be following up with the plaintiff. This letter was reviewed by Dr. Yule. Dr. Walton could not recall whether he had seen the letter at that time, but the trial judge, Rae J., held in any event at para. 14 that:

[14] ... Even if [Dr. Walton] had read [Dr. Howie's letter] it required no further attention or action on his part. Glaucoma requires the attention of a specialist and it is not treated by a general practitioner, and [the plaintiff] was in the hands of a specialist who was taking control.

**212**  The plaintiff alleged that Dr. Walton should have ensured that the plaintiff's referrals to both the ophthalmologists were followed up, and had he done so, treatment would have been started earlier and the development of glaucoma would have been arrested or at least slowed. In addressing this allegation, Rae J. held at para. 55 as follows:

[55] It is clear on the evidence, particularly in connection with referrals to ophthalmologists for something such as glaucoma, that it is generally considered in the profession, and in fact is the practice, that the ophthalmologist takes over completely and the matter of attending to the patient is his full responsibility after the referral. The only situation in which continuing follow-up, attention or treatment would be required from the referring general practitioner would be, as happens in connection with some other specialties, and perhaps also in referral to an ophthalmologist for some reason other than suspected glaucoma, where the specialist communicates to the referring general practitioner that something is expected of him. No such communication was made here, nor should it have been, having regard to the position of the ophthalmologist and the suspected medical condition.

**213**  The plaintiff adduced an expert report from a general practitioner which contained the following criticism of Dr. Walton, quoted at para 63:

[63] ... Dr. Walton did not fully meet responsibility for ongoing management of this patient's suspected glaucoma, in that he apparently did not note the records from preceding office visits on two occasions. It may however have been his assumption that direct responsibility for the ongoing management was not in fact his, that it was the consultant's. But it is at least his job to ensure that there is a general understanding and agreement as to where the long-term professional responsibility does in fact lie and this was apparently not made clear in this case.

**214**  Rae J. held at para. 64 as follows:

[64] ... Dr. Walton and others concerned had good reason to assume that the problem, having been referred to a specialist, it would thereafter be attended to as between him and the patient, the patient having the awareness of the matter which he had. As to the reference to the "long-term professional responsibility", clearly that responsibility was transferred on referral, to the knowledge and expectation of all concerned, to the specialist. The evidence before me amply demonstrates to my satisfaction that that is the general practice in the profession in a case of this kind.

**215**  The evidence given by Dr. Dwyer in the present case was largely consonant with the comments of Rae J. in *Beniger v. Walton*, and it establishes to my satisfaction the standard of care that is applicable in these circumstances. I find that Dr. Bermann, having referred Mr. Kahlon to a specialist with respect to his back pain, was able to assume that his care for that issue was in the hands of the specialist until it was returned to him. That practice is consistent with both common sense and the billing guide that was in effect at the relevant time.

**216**  Dr. Farmer, whose evidence was that Dr. Bermann fell below the appropriate standard of care by not booking a follow up appointment with his patient who he had referred to a specialist, agreed that if he had read Dr. Khan's letter to Dr. Bermann, it would have been clear that the plaintiff would be following up with Dr. Khan following his CT scan. I note that a family physician is restricted in the MSP Guidelines from charging for that aspect of a patient's care after it has been transferred to a specialist and until full responsibility is returned to the general practitioner. That is consistent with what I find to be the appropriate standard of care when there is a referral by a general practitioner to a specialist.

**217**  Dr. Farmer was of the view that the relationship of a family doctor to his or her patient in 1999 was different than it is today. Notwithstanding deference to the specialist with respect to how a patient is followed and what further investigations are required, and the billing guidelines, Dr. Farmer indicated that there is a standard practice in cases of longstanding relationships for a doctor to be actively involved in the management of his or her patient's care. In contrast, Dr. Dwyer's evidence was that there is no difference in the relationship between general practitioners and patients in 1999 and at present.

**218**  I am not persuaded that the relationship between family doctors and their patients in 1999 was significantly different than at present, such that the appropriate standard of care was any different than that suggested by Dr. Dwyer.

**219**  Given the standard of care as described by Dr. Dwyer, which I accept, I find that it has not been established that Dr. Bermann was negligent in failing to book a follow up appointment to see the plaintiff or to follow up on his referral to Dr. Khan and the results of Dr. Khan's ordered scan. Dr. Bermann was entitled to assume from Dr. Khan's letter to him that Dr. Khan had assumed primary responsibility for Mr. Kahlon with respect to his lower back pain and had not returned him to his care. In my view, the evidence of both Dr. Farmer and Dr. Dwyer supports this conclusion.

**220**  I turn now to the allegation against Dr. Bermann relating to the April 14, 2000 appointment. That allegation is that had Dr. Bermann exercised a reasonable degree of care, he would have reviewed his notes and followed up with Mr. Kahlon about his back problem even though Mr. Kahlon had come to see him about a sore throat and had not raised the matter of his back. I am hampered in my ability to assess this allegation by the very limited evidence with respect to the appropriate standard of care in such circumstances. This issue was not addressed in the evidence of Dr. Farmer, and in argument only brief passages in the cross-examination and re-examination of Dr. Dwyer were referred to. I have set that evidence out above, as well as the highlights of Dr. Bermann's discovery evidence. While I incline to the view that Dr. Bermann was not negligent in his failure to review his notes before Mr. Kahlon's appointment, I make no finding in that regard. It is not necessary, in my view, that I decide this issue since even if I were satisfied that Dr. Bermann had failed to meet the standard of care, I am not satisfied that causation has been established.

**221**  It is agreed by the parties that had Mr. Kahlon's CT scan in September 1999 been reported at that time or within the several months following, it would have led to a chain of inquiry resulting in the spinal TB diagnosis. Treatment would have been given and Mr. Kahlon would have recovered without sequela. However, Mr. Kahlon's appointment with Dr. Bermann in April 2000 was seven months after his CT scan. There is no evidence that Mr. Kahlon would similarly have recovered without sequela had his disease been detected at that stage and treatment provided. In the circumstances, therefore, I find that the plaintiff has not established causation.

**222**  I find that ***negligence*** against Dr. Bermann has not been established.

**6. Contributory *Negligence***

**223**  Ellen Picard and Gerald Robertson offer a convenient summary of a patient's responsibilities when seeking medical attention in their text, *Legal Liability of Doctors in Hospitals in Canada*, 4th ed. (Toronto: Thomson Carswell, 2007) at 368:

Patients have certain duties and responsibilities when seeking medical treatment, including a duty to provide information, to follow instructions, and generally to act in their own best interests. In carrying out these duties they are expected to meet the standard of care of a reasonable patient. If they do not, and the breach of this standard is the factual and proximate cause of their injuries, they are contributorily negligent and their compensation will be reduced accordingly. Of course, if the injury is due exclusively to the patient's own ***negligence***, the action will be dismissed. [footnotes omitted]

**224**  The defendants in the present case submit that Mr. Kahlon is wholly responsible for the outcome in this case or, in the alternative, that he is contributorily negligent. They allege three specific failures on his part to exercise reasonable care for his own health:

1. Failure to return for a contrast enhanced CT scan as requested by Dr. Li;
2. Failure to return to see Dr. Khan following his CT scan as instructed; and
3. Failure to follow up with his doctors when his back pain did not improve and continued to be quite debilitating.

**225**  Underlying these allegations is the contention that Mr. Kahlon engaged in inappropriate self-diagnosis.

**226**  Mr. Kahlon alone knows why he conducted himself as he did. However, as he is unable to testify, it is necessary to turn to the evidence to see what can be inferred as to his state of mind regarding his condition in 1999 and 2000. It is also necessary to keep in mind that the burden of proof is on the defendants on this issue of contributory ***negligence***: *Leischner v. West Kootenay Power and Light Co.* [*(1986), 70 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=), [*24 D.L.R. (4th) 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) (C.A.).

**227**  As described in the Agreed Statement of Facts, Mr. Kahlon presented to Dr. Bermann in August 1998 with three complaints: a sprained back, weight gain and a sprained ankle that had yet to fully resolve. Mr. Kahlon reported to Dr. Bermann that he had taken a muscle relaxant and an anti-inflammatory for his back, and that he felt much better. Dr. Bermann advised him to increase his exercise as tolerated with respect to both his back and ankle. By October 1998, Mr. Kahlon's back had improved but he had, according to Dr. Bermann, some nerve root irritation. Dr. Bermann advised Mr. Kahlon to continue exercising and to attend for massage therapy.

**228**  Mr. Kahlon saw Dr. Bermann again in February 1999. Dr. Bermann's view, which I infer he shared with Mr. Kahlon, was that Mr. Kahlon probably had a muscular back or sacroiliac sprain, or possibly a mild lumbar disc syndrome. He counselled Mr. Kahlon to avoid lifting and to get appropriate rest. He also prescribed anti-inflammatory medication, and asked Mr. Kahlon to return in a week.

**229**  Mr. Kahlon next saw Dr. Bermann on July 19, 1999, still complaining of pain down the right thigh when sitting, and pain in the left buttock area. The former symptom suggested to Dr. Bermann that the problem was muscular; the latter, some nerve root irritation. I find it is reasonable to infer that he likely shared this view with Mr. Kahlon. At this point, Dr. Bermann referred Mr. Kahlon to the Sports Medicine Clinic.

**230**  Mr. Kahlon was seen by Dr. Khan on July 28, 1999. Dr. Khan's working diagnosis was that Mr. Kahlon had an L5-S1 disc injury and that the prognosis was favourable. Dr. Khan's evidence based on his standard practice is that he would have shared with Mr. Kahlon his working diagnosis and its implications for his health care, and that treatment would involve being active and receiving physiotherapy.

**231**  Dr. Khan testified that he would generally advise patients with an L5-S1 disc injury that it is often a benign condition with a typically good prognosis, and that treatment involves exercise and physiotherapy. He said that he would explain the natural history of an L5-S1 disc injury is that 95% of the patients get better. However, Dr. Khan also testified that how he contextualizes this information to the individual patient is important, and that a patient presenting with 10 months of back pain or whom he has referred to a CT scan faces a poorer prognosis than a patient with a short-term history of back pain.

**232**  As set out in the Agreed Statement of Facts and as Dr. Khan testified, his usual routine is to advise patients who have been told to undergo tests, such as CT scans, to make a follow-up appointment with him after the test has been completed. His evidence was that his practice is to ask them to return approximately one week following the test.

**233**  I find that Dr. Khan shared with his patients his working diagnosis and its implications in terms of their healthcare. I find that in all likelihood Mr. Kahlon left his appointment with Dr. Kahn believing his problem to be an L5-S1 back injury, that 95% of patients with that condition recover, and that he should continue with his physiotherapy. I also find, based on Dr. Khan's usual routine, that Mr. Kahlon was probably told to make an appointment with Dr. Khan to discuss the test results following a CT scan. Dr. Khan's letter to Dr. Bermann that he would "review him after his imaging results and assess his progress at that time" is not inconsistent with his agreed usual practice.

**234**  The CT scan was arranged and conducted about six weeks later on September 10, 1999. Dr. Li, after his preliminary review of the films, made a note for the radiology department technician to arrange for Mr. Kahlon to return for a contrast enhanced CT scan. He understood that this task was delegated to the booking clerk. The evidence suggests that Mr. Kahlon was contacted by the booking clerk. In this regard, I note that Dr. Bermann's clinical notes for October 2, 2000 read, in part, "C/T Scan Report (Did not go back because he did not want dye injected in his body)". I am not aware of any other evidence that Mr. Kahlon received a call to return for a further scan, other than a possible inference from Mr. Li's testimony regarding the usual practice of hospital staff in recalling patients. However, I think that the only reasonable inference from the note in Dr. Bermann's file is that Mr. Kahlon was in fact contacted by the booking clerk to return for a contrast enhanced CT scan. There is no evidence that hospital staff followed up with Mr. Kahlon when he did not return for the scan.

**235**  Despite being contacted by the hospital, Mr. Kahlon did not attend for the contrast enhanced scan. Dr. Bermann's note to the effect that Mr. Kahlon did not do so because he did not want dye injected into his body potentially provides some insight into the latter's state of mind. However, I am wary about inferring too much from that note when neither of the parties to the conversation was available to testify. While I accept that Mr. Kahlon may have had a concern about dye, I consider his comment to be as equally likely a justification for procrastination as the true reason for his not attending for the scan.

**236**  On the topic of the CT scan, Ms. Kahlon, whom I found to be a credible witness, testified that she knew that Mr. Kahlon had gone for the initial scan but that she did not subsequently hear anything about it until a year later. In the weeks following the scan, she did not ask her husband about the test, nor did he tell her anything about it. She also did not recall Mr. Kahlon mentioning that he had been asked to return for a contrast scan. Ms. Kahlon testified to her assumption, based on her experience with the medical system, that the results would only come back to her husband if they were unfavourable, and, as a result, she did not ask him about them. On this point, however, Dr. Khan was adamant that he would not have told Mr. Kahlon to assume that the CT scan was normal if he did not hear from him (Dr. Khan); this was not his practice and it would also have been inconsistent with his reporting letter to Dr. Bermann. I have already concluded, based on Dr. Khan's usual routine, that Mr. Kahlon was probably instructed to make an appointment with Dr. Khan to discuss the results following the CT scan.

**237**  Counsel for plaintiff posits several possible explanations for Mr. Kahlon's failure to return for either the follow up contrast scan or an appointment with Dr. Khan. Firstly, assuming that Mr. Kahlon was instructed to return once the CT scan was complete, the fact is that the scan never was complete; accordingly, there would have been no purpose in returning to see Dr. Khan until it was. Secondly, he may have been waiting to hear from Dr. Bermann. Finally, he was following the advice he had been given regarding physiotherapy, exercise and medication.

**238**  In my view, none of these are compelling explanations. Whether he had made a deliberate decision not to attend for the scan or had simply procrastinated, Mr. Kahlon would not have been waiting for the test to complete since he probably would have known that the next step was his to take. The fact that he did not raise the issue of the CT scan when he went to see Dr. Bermann in April 2000 regarding a sore throat undermines the suggestion that he may have been waiting to hear from him. Finally, there is nothing about his following the advice he had been given regarding exercise and physiotherapy that goes any distance at all towards explaining why he did not follow up with the scan or return to see Dr. Khan.

**239**  Based on the information that Mr. Kahlon likely received from Dr. Bermann and Dr. Khan, I find that he understood himself to have a disc problem. Dr. Bermann had advised Mr. Kahlon of his view that he probably had a muscular sprain or possibly a mild lumbar disc problem. Dr. Khan had told him that he likely had a L5-S1 disc injury. There is no evidence that Mr. Kahlon was ever told he had a potentially life-threatening or life-altering condition. To the contrary, Dr. Khan probably told him that often that type of injury is benign and that the natural history of the condition is that 95% of patients recover. The first suspicion that Mr. Kahlon's condition was anything more serious only arose when Dr. Li reviewed the films from his non-contrast CT scan. There is no evidence that that information was ever conveyed to Mr. Kahlon.

**240**  Mr. Kahlon's belief that he had a problem with a disc is reflected in what he told Dr. Reid, his rheumatologist. As indicated in the Agreed Statement of Facts, when he saw Dr. Reid in September 2000, Mr. Kahlon understood that he had a disc problem or an abnormal disc, and that he used words to that effect in his discussions with the doctor. Following this appointment, Dr. Reid sent Dr. Bermann a consultation letter in which he reported that Mr. Kahlon "had a CT scan which apparently showed an abnormal disc".

**241**  The evidence does not suggest to me that Mr. Kahlon was a person who avoided medical treatment. He sought medical advice regarding back pain from Dr. Bermann, went to see Dr. Khan at Dr. Bermann's direction, and then attended for a CT scan as directed by Dr. Khan. He also regularly attended for physiotherapy sessions. Thus, it was not the case that Mr. Kahlon had a tendency to ignore recommended treatment or medical directions. While I do not rely on this evidence, I note parenthetically Ms. Kahlon's evidence when asked what she would have expected Mr. Kahlon's attitude to be if he had received communication recommending a medical procedure. Her response was that he would do whatever he needed to do to figure out what was wrong with his back and make it better.

**242**  Was there a misunderstanding between Mr. Kahlon and Dr. Khan or the UBC Hospital booking clerk who called about the contrast scan? There is no evidence of what Mr. Kahlon understood from Dr. Khan concerning follow-up other than that it can be inferred that he probably understood that he was to make a further appointment after the scan to discuss the results. It appears from his comment to Dr. Bermann that Mr. Kahlon knew that he was requested to return for a scan with contrast.

**243**  It is puzzling why Mr. Kahlon, by all accounts an intelligent and conscientious individual, failed to re-attend at the hospital for the contrast scan and then to follow up with Dr. Khan regarding the results. Nevertheless, on the totality of the evidence, I find that the underlying context was that Mr. Kahlon believed that he had a benign disc problem that would in all likelihood improve with time and exercise, and that he likely procrastinated in returning to the hospital for the contrast scan. Why did he procrastinate? Perhaps because this occurred at a busy time in Mr. Kahlon's life. He was about to marry and was also presumably busy with his teaching career. This, however, is only speculation.

**244**  I observe that Dr. Bermann advised Mr. Kahlon at his appointment on February 4, 1999 to return the following week; it was July 19 before Dr. Bermann next saw Mr. Kahlon again. While I place little reliance on this evidence as demonstrating a propensity towards procrastination on the part of Mr. Kahlon, it is certainly not inconsistent with a conclusion that he likely procrastinated in returning for his contrast CT scan. Procrastination in this regard also provides a possible and consistent explanation for his failure to make a follow-up appointment with Dr. Khan. As I have found, Mr. Kahlon was probably instructed to make an appointment with Dr. Khan to discuss the test results following the CT scan. It follows that he likely would not have made that appointment until after he had attended for the follow-up scan.

**245**  The authorities recognize that a patient's failure to attend a follow-up appointment when he or she knows the importance of keeping the appointment will result in liability on the part of the patient: *Centre Hospitalier de l'Université de Montréal v. Batoukaeva*, [*2008 QCCA 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JJ11-F81W-21Y2-00000-00&context=); *Wei Estate v. Dales*, [*[1998] O.J. No. 1411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62XP-00000-00&context=) (C.J. (Gen. Div)) aff'd [*(2000), 135 O.A.C. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDB1-JC5P-G2DR-00000-00&context=); *Patmore (Guardian ad litem of) v. Weatherston*, [*[1999] B.C.J. No. 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-227H-00000-00&context=) (S.C.); and *Rupert v. Toth*. In *Rupert v. Toth*, for instance, Low J. wrote:

[91] The defendants frame the central issue relative to Dr. Toth's management in this way: Does a physician, having clearly informed a patient of the need for follow-up, have an obligation to track and pursue a patient who does not make or show up for medical appointments?

[92] There is no recognized general obligation on the part of physicians to do so. See *Hebert v. Stanley*, [*[1989] O.J. No. 1418*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCN1-F8D9-M1VM-00000-00&context=) (Ont. H.C.) and *Patmore (Guardian ad litem of) v. Weatherston*, [*[1999] B.C.J. No. 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-227H-00000-00&context=) (B.C.S.C.).

[93] Likewise, there is a duty on the part of the patient to participate fully and honestly in his or her own health care. See *Atack v. Castle*, [*[2003] O.J. No. 1943*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDJ1-JGHR-M51M-00000-00&context=) (Ont. S.C.J.). This entails disclosing relevant information to his physicians and following the physician's clear instructions to him.

[94] Correspondingly, the treating physician has the right to expect that the patient will follow his clear instructions and if the patient does not intend to do so, he has a duty to so inform the physician. See *Wei Estate v. Dales*, [*[1998] O.J. No. 1411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62XP-00000-00&context=) (Ont. Gen. Div.); upheld on appeal [*[2000] O.J. No. 2753*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDB1-JC5P-G2DR-00000-00&context=) (C.A.) where the court stated,

The patient himself had a responsibility not only to take the medication as prescribed but to monitor his own signs and symptoms and to comply with the request for follow-up appointment.

The treating physician cannot be expected to follow-up every instruction given to a patient. The treating physician has the right to expect the patient will follow his or her instructions. If the patient disagrees with the doctor's instructions, then he has a duty to advise the doctor.

[95] The physician/patient relationship is a two-way street. There are duties and responsibilities running in both directions. As indicated above, I am satisfied that Pat was instructed by Dr. Toth both directly and indirectly to book an appointment following his CT scan to discuss the results and that Pat did not do so. In failing to follow that instruction, Pat breached one of his duties in the physician patient relationship with Dr. Toth.

[96] I cannot agree, however, with the way the defendants have framed the issue to be decided. In my view, what is at issue is not whether the physician has a general duty to chase down patients who do not comply with instructions to book an appointment but rather whether non-compliance by the patient with that instruction discharges the physician's obligation to inform, advise and warn, in timely fashion, in the particular circumstances of this case.

**246**  I conclude that Mr. Kahlon was negligent in not taking reasonable care for his own health when he failed to return for the contrast CT scan after being requested to do so and when he failed to return to see Dr. Khan to discuss the results of his CT scan.

**247**  The defendants submit that Mr. Kahlon's ***negligence*** is exacerbated by what they say is his failure to return for medical care and advice in light of evidence of his continuing and at times worsening symptoms. They say that the evidence indicates that his symptoms did worsen, and they point, for instance, to his continuing use of his backrest, his need to rise from the dinner table to do back exercises, and his physiotherapy records in this regard. The defendants submit that having made his own diagnosis, Mr. Kahlon then took no action.

**248**  That Mr. Kahlon's back problems persisted after the CT scan is clear on the evidence. Whether they worsened is less so. According to the Oakridge Physiotherapy Centre patient records, Mr. Kahlon appears to have attended physiotherapy between May 1999 and August 1999, requested a driving letter in September and then returned in March 2000. He appears to have returned on March 10, 2000, the note at that time being "patient doing well overall until before Christmas". The record also noted that he was getting married at the end of May.

**249**  Ms. Kahlon testified that Mr. Kahlon's back pain continued after September 1999 and could be characterized as very bad. She said that it would wax and wane but that it never went away. She did not agree that it had increased in severity after September 1999, which appeared to contradict what Dr. Cameron reported she had said to him. However, she did agree that his back pain increased in severity from time to time.

**250**  Although Mr. Kahlon's back problems continued after he went for the CT scan, I conclude that they did not significantly worsen for some time, and, as discussed above, that Mr. Kahlon likely believed he had a disc problem. He continued with his physiotherapy through March and April, such that at times he was doing very well. For instance, his back was pain free and without discomfort for his wedding day on May 20. Further, the fact that Mr. Kahlon did not mention his back when he went to see Dr. Bermann regarding a sore throat in April 2000 is also some evidence from which I can infer that it was not getting any worse.

**251**  The defendants contend that Mr. Kahlon engaged in self-diagnosis when, without a final diagnosis from Dr. Khan or the results of the CT scan, he declined to seek medical attention for his persisting back pain. In my view, the present situation can be contrasted with cases such as *Grant Estate v. Mathers* [*(1991), 100 N.S.R. (2d) 363*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPT1-F22N-X160-00000-00&context=), 272 A.P.R. 363 (S.C.), where Boudreau J. was critical of the patient, Mr. Grant, for having "indulged in self-diagnosis and self-treatment rather than consult a physician or return to the Emergency Department as Mr. Grant had been advised." Mr. Grant had been bitten by a dog, and was given a tetanus shot by an emergency department doctor. The doctor cautioned him to return if he subsequently became ill. When he did become ill a few days later, Mr. Grant's wife assumed that he was suffering from the flu, which she herself had had three days earlier, and they did not return to the hospital. His condition continued to worsen, and Mr. Grant died shortly thereafter from septicaemia associated to the dog bite.

**252**  In contrast to the foregoing, the medical advice that Mr. Kahlon had consistently received until the time he attended for the CT scan was that he likely had a benign disc or muscle problem. That diagnosis, in the result, was incomplete, as the CT scan would soon reveal. Nevertheless, Mr. Kahlon conducted himself on the basis of the working diagnoses of his doctors, and it is therefore not accurate, in my view, to say that he was engaging in self-diagnosis. It is, however, the case that Mr. Kahlon's lack of accurate information about his medical condition and its potential seriousness was in part a consequence of his own actions in failing to follow up as he had been instructed, particularly in light of ongoing back pain, and for that he must bear some liability for the outcome in this case.

**253**  I will discuss the issue of apportionment below.

**7. Liability and Apportionment**

**254**  I have concluded that the defendant Vancouver Coastal Authority, operating as UBC Hospital, was negligent and that Mr. Kahlon was contributorily negligent.

**255**  The question now is the apportionment of fault between them. For the reasons that follow, I have concluded that the division of fault is 70/30 between the UBC Hospital and Mr. Kahlon respectively.

**256**  Relevant provisions of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, provide:

Apportionment for Liability of 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.

...

Questions of fact

6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

...

Further application

8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

**257**  The authorities establish that the apportionment of fault under the ***Negligence*** *Act* is based on the degree of fault that should be attributed to each of the parties, not the degree of causation. In *Cempel v. Harrison Hot Springs Hotel* [*(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=), [*100 B.C.A.C. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), Lambert J.A. described the proper approach to apportioning liability when several parties are found to be negligent at para. 19:

[19] ... The ***Negligence*** *Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances. [Emphasis in original]

**258**  With respect to assessing relative blameworthiness, Lambert J.A.'s comments at para. 24 provide some guidance:

[24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. ...

**259**  In *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=), [*80 B.C.L.R. (3d) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), Finch J.A. elaborated at paras. 45-46:

[45] In my view, the test to be applied here is that expressed by Lambert J.A. in *Cempel, supra*, and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

[46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**260**  Fruman J.A. of the Alberta Court of Appeal summarized some of the factors that courts have considered in assessing relative blameworthiness at para. 34 of *Heller v. Martens*, [*2002 ABCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), [*303 A.R. 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=):

[34] Apportionment of fault between a contributorily negligent plaintiff and a negligent defendant under the *CNA* requires an assessment of the parties' degree of departure from the standard of care. Although not an exhaustive list, in assessing comparative blameworthiness courts have considered such factors as:

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 ...

[Citations omitted]

**261**  It is worth emphasizing that what I must assess is relative fault or blameworthiness, not causation. Were causation the test, the facts of this case might suggest an equal apportionment of liability: if either the hospital or Mr. Kahlon had not been negligent, as I have found them, Mr. Kahlon's injuries would have been avoided. However, that is not the test, and what I must instead consider is the blameworthiness of each to determine whether there is a difference in degree or whether it is too close to call such that I must have resort to s. 1(2) of the ***Negligence*** *Act*.

**262**  I turn first to the defendant hospital. As set out in para. 19 of the Agreed Statement of Facts:

1. The hospital understands that the radiology services are considered by physicians and the patients as an integral part of the investigation and diagnostic process of the patients;
2. The hospital understands the patients and physicians alike rely upon accurate and timely reports for all radiology services provided;
3. The hospital understands that a failure to provide accurate and timely reports may result in a delayed diagnosis of illness which could have potentially disastrous consequences for the patient;
4. In order to provide these radiology services, the hospital understands that it has to provide part of the process. In other words, they have to provide, for example,
5. good equipment;
6. properly trained personnel;
7. They also have to set up an appropriate system to verify that the

films are taken properly and that each film taken is reported as quickly as possible;

1. The hospital had undertaken the task of setting up a system set up to verify the accurate and timely reporting of X-rays;
2. The hospital understands that physicians and patients alike rely upon the system to verify that reports are done and sent to referring physicians in a timely way.

**263**  Moreover, the hospital additionally understood that the radiologists did not keep track of follow-up requests and relied on the hospital to ensure that the necessary follow-up occurred.

**264**  In my view, the hospital deviated markedly from the standard of care applicable in the foregoing circumstances.

**265**  As I discussed earlier, the hospital's protocol was not followed in two respects. First, the booking clerk failed to notify Dr. Li or another radiologist that arrangements had not been made for Mr. Kahlon to return for a contrast enhanced CT scan. Second, Mr. Kahlon's CT scan films were not returned to Dr. Li or any other radiologist when it became apparent that he had not returned for the contrast scan. It is likely that was because they were misfiled in the main film library which housed those films for which a finalized report had been issued. Such misfiling, as Ms. Stewart said, never should have happened. It did, however, despite a number of checks designed to protect against that eventuality. The sticker on the yellow master bag had not been initialled by Dr. Li, which should have alerted the clerk to the fact that films had not been reported on. Moreover, had the film bag been properly checked, it would have been apparent that it did not contain a finalized report.

**266**  Any system that relies on human beings is naturally susceptible to human error. The fallibility of the hospital's protocol is reflected in the fact that multiple employees were negligent in the discharge of their duties in this case, with the consequence that Mr. Kahlon's CT scan went unreported for over a year. Nevertheless, it is in the failure of the hospital to take into account the foreseeability of such employee error by having in place a back-up system that I find it also departed significantly from the standard of care. The hospital recognized the extent to which physicians and patients relied on its system, as well as the potentially disastrous consequences that could befall a patient in the event of a breakdown in that system. It should have been apparent to the hospital that whatever system it instituted to provide radiology services had to include a mechanism to monitor the timely reporting of films. Indeed, the Meditech system that the department used for billing purposes had that very capability, but it went unused by hospital staff. Given the magnitude of this systemic deficiency, coupled with the ***negligence*** of the hospital employees in the handling of Mr. Kahlon's CT scans, a high degree of fault must be attributed to the hospital.

**267**  What, then, of the fault of Mr. Kahlon?

**268**  There is no question that Mr. Kahlon, in the face of continuing back problems, was negligent in failing to re-attend the hospital for a contrast scan and to book a follow-up appointment with Dr. Khan. However, the underlying context is relevant in assessing the extent of his blameworthiness in this regard. Mr. Kahlon had sought medical attention for his back which he appeared to have initially injured during a lifting incident. He had received medical advice from two physicians that his back pain was most likely disc related and was in all likelihood a benign condition that would recover with time and exercise. While Mr. Kahlon would have been aware that the investigation into his condition was incomplete, and his back pain was continuing, there is no evidence that the possibility of the CT scan revealing a life-threatening or life-altering condition was ever suggested to him. As I earlier found, Mr. Kahlon's failure to re-attend for the contrast scan likely was the result of procrastination as opposed to a deliberate decision on his part.

**269**  There is a duty on the part of a patient to participate fully and honestly in his own health care. This entails disclosing relevant information to physicians and following the physicians' clear instructions: *Rupert v. Toth*. A significant degree of fault must attach to Mr. Kahlon's failure to re-attend for the contrast scan and, to a somewhat lesser degree, to follow up with Dr. Khan. In my view, however, not every failure of a patient to follow up appointments or testing equates to the same degree of fault. The patient's understanding of his condition and of the potential risks of not following up, and other steps he has taken, are relevant contextual factors in this regard.

**270**  Mr. Kahlon's situation might be contrasted, for instance, with a patient who presents with a lump in her breast and fails to attend for a mammogram or other diagnostic testing as directed by her physician. Given that breast cancer is an obvious potential diagnosis, it is my view that her failure to attend carries a higher degree of fault than Mr. Kahlon's failure in light of what he had been advised and understood about his condition as discussed above. Overall, Mr. Kahlon sought and generally followed the medical advice he received, and continued to seek physiotherapy treatment for his back after the missed scan. In the circumstances, I consider his conduct in failing to attend for that scan and then to see Dr. Khan to have been careless and, while a departure from the conduct of a reasonable patient, substantially less blameworthy than that of the hospital.

**271**  I conclude that the circumstances of this case point to a disproportionate assessment of fault. I apportion liability 70% to UBC Hospital and 30% to Mr. Kahlon.

**B. DAMAGES**

**1. Agreed and Not Agreed Damages**

**272**  The parties are in agreement with respect to several heads of damage. Others, however, remain in dispute. The parties filed an exhibit setting out the heads of damage that are both agreed and not agreed. They are agreed upon the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $324,500.00 |  |

Accessible housing:

|  |  |  |  |
| --- | --- | --- | --- |
|  | (It was agreed that Mr. Kahlon | $345,000.00 |  |
|  | is entitled to damages for the |  |  |
|  | additional cost to modify a new |  |  |
|  | home built for the purpose of |  |  |
|  | being wheelchair accessible and |  |  |
|  | having the appropriate space for |  |  |
|  | mobility in the home transfer |  |  |
|  | and bathing equipment storage. |  |  |
|  | It was further agreed that if |  |  |
|  | the modification of one bedroom |  |  |
|  | by adding the requisite space |  |  |
|  | for a live-in caregiver, |  |  |
|  | including a bathroom and |  |  |
|  | kitchenette, is not needed, |  |  |
|  | there would be a deduction of |  |  |
|  | $18,000. I will deal with that |  |  |
|  | issue below.) |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss to September 1, | $395,000.00 |  |
|  | 2008: |  |  |

Special Damages

|  |  |  |  |
| --- | --- | --- | --- |
|  | Medications and therapies | $103,592.00 |  |
|  | paid by Blue Cross to |  |  |
|  | August 31, 2008: |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | (plus $1,600 per | $16,000.00 |  |
|  | month from September |  |  |
|  | 2008 to June 30, 2009): |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Expenses of Michelle and | $139,565.11 |  |
|  | Shawn Kahlon: |  |  |

Expenses of Jaghdir and

G.S. Kahlon:

|  |  |  |  |
| --- | --- | --- | --- |
|  | (The parties agree this has | $187,309.60 |  |
|  | been incurred by Mr. |  |  |
|  | Kahlon's parents, but do |  |  |
|  | not agree that all of this |  |  |
|  | is recoverable) |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Earning Capacity | $1,362,400.00 |  |

(The parties agree that this

amount is based on a normal

life expectancy, and that this

figure is to be adjusted based

upon an agreed formula

following my determination of

life expectancy.)

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future care costs: | $71,265.48 |  |
|  |  | (initially) |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | (These figures, which include | plus |  |
|  | costs for bathing and personal | $77,012.03 |  |
|  | care supplies, activities of | (annually) |  |
|  | daily living supplies, |  |  |
|  | nutritional requirements and |  |  |
|  | supplies, pharmaceutical |  |  |
|  | requirements, physiotherapy and |  |  |
|  | massage equipment and services, |  |  |
|  | occupational therapy, |  |  |
|  | psychological counselling, |  |  |
|  | rehabilitation case management, |  |  |
|  | transportation costs, additional |  |  |
|  | dental needs, recreational |  |  |
|  | community programs, interior home |  |  |
|  | maintenance, exterior home |  |  |
|  | maintenance and associated travel |  |  |
|  | costs, have been agreed.) |  |  |

**273**  The issues regarding which there is no agreement are these:

1. care aide award
2. rehabilitation aide
3. swallowing therapies
4. speech language therapies
5. cost of care contingency
6. in-trust damages or award for:
7. Michelle Kahlon
8. Mr. and Mrs. Kahlon
9. the life expectancy of Mr. Kahlon

The parties acknowledge that prejudgment interest should appear on past and incurred losses. The parties also acknowledge that issues of post-judgment interest, tax gross-up, the committee and management fees, and taxable costs and disbursements will have to be agreed or assessed following judgment.

**2. Mr. Kahlon's Condition**

**274**  As it is relevant to the disputed damage claims, I will briefly review Mr. Kahlon's condition and the care he requires.

**275**  Mr. Kahlon's TB Meningitis infection resulted in an inflammatory reaction within the blood vessels serving the base of his brain. Dr. Cameron, a neurologist, explained that he had a severe cerebral vascular accident or stroke about three weeks after a ventricular peritoneal shunt was placed and, as a result of this complication from TB Meningitis, he has suffered a severe brain injury. Mr. Kahlon has a shunt in place to reduce excess pressure from spinal fluid, which shunt is susceptible to infection and blockage that may result in possible surgical replacement.

**276**  As a result of the damage to the motor regions of his brain, Mr. Kahlon has spasticity and reduced motor control. He is virtually unable to speak and has significant cognitive deficits. Mr. Kahlon is severely compromised and is unemployable.

**277**  Dr. Anton, a physiatrist, assessed Mr. Kahlon on July 27, 2007. He found that Mr. Kahlon has the following:

1. a spastic quadraparesis, a term that means weakness in all extremities associated with spasticity;
2. neurogenic bowel and bladder, which describes a compromise of neurological control;
3. significantly reduced lung function and reduced ability to cough;
4. dysphagia;
5. dysarthria;
6. visual defect;
7. impairment of cognitive function;
8. ongoing pain;
9. osteoporosis;
10. sleep apnea;
11. risk to develop contractures and probably already has some;
12. fatigue;
13. hydrocephalus with a shunt in place to manage same;
14. requirement for a gastronomy tube for nutrition and hydration.

**278**  Mr. Kahlon requires assistance in all aspects of his care, 24 hours a day. There may be short periods when he does not require care, but he cannot be left alone. Transfers to the bathroom, the shower and a vehicle are time consuming and difficult for his caregivers. Ms. Kahlon has been involved in all aspects of his care since the time that Mr. Kahlon has been living at home.

**279**  I will deal in more detail with some of Mr. Kahlon's disabilities, their extent and whether they are subject to variation when I discuss particular aspects of his future care that are in dispute. I will not dwell on others because of the agreements between the parties on a number of heads of damage.

**280**  Let me describe Mr. Kahlon's usual daily routine.

**281**  Mr. Kahlon sleeps about 12 hours each day and naps for an additional 3 or 4 hours. During the hours when he is not sleeping, Mr. Kahlon has a bowel bathroom protocol which takes approximately 2 to 1 hour. He spends about 20 minutes to 1.5 hours in a standing frame; this exercise assists with spasticity and bone density. He is tube-fed 3 meals and has 1 to 3 oral snacks. An oral feeding takes about 10 minutes per snack.

**282**  Mr. Kahlon receives massage therapy twice each week for 45 minutes to 1 hour, and receives physiotherapy three times each week for 1 to 1.5 hours per session. Twice a week he attends the Kinsmen Centre for 2 hours per session. On Fridays to Saturday evenings, for a period of about 30 hours, he goes to his parents' home.

*Chronology of Care*

**283**  Since Mr. Kahlon's stroke in October 2000, Michelle Kahlon has been his caregiver and the person responsible for decisions involving his care.

**284**  Mr. Kahlon was in RGH until October 2001. He went to Purdy Pavilion for just over a month and then to Ponoka until November 10, 2003 when he was discharged. In Ponoka, according to Ms. Kahlon's evidence, she was there during that two year period about 15.5 hours per day during the week and 21 hours per day on the weekends.

**285**  Since about November 12, 2003, Mr. Kahlon has been living at home with his wife, who is his primary caregiver. If not directly providing his care, she is responsible for supervising all personnel involved in his care and instructing them to ensure that his needs are safely and properly met. Ms. Kahlon is engaged in and responsible for all of Mr. Kahlon's care which includes feeding, bathing, toileting, teeth brushing, condom catheters, speech exercises, assisting with physiotherapy, massage, physical exercises, transportation, medications, cleaning and laundry, making arrangements with caregivers and providing supervision. Ms. Kahlon assists most caregivers who provide morning shifts with feeding, bathing and transfers.

**286**  Ms. Kahlon also tries to sleep in bed beside her husband. She sets up and monitors his sleep apnea with a Bi-Level Positive Airway Pressure (ABiPAPA) machine. Although there is dispute about whether she needs to do it, she checks on Mr. Kahlon in the evenings every thirty minutes. Mr. Kahlon receives some home care assistance at the present time, and, as noted above, spends some time at the Kinsmen Centre and with his elderly parents. In terms of the visit to Mr. Kahlon's parents, Ms. Kahlon takes him there in the van after physiotherapy.

**287**  There have been about 20 different caregivers since Mr. Kahlon returned home. The care provided by Vancouver Coastal Health Authority and the Kinsmen program is supplied on an urgent basis due to lack of funds. That will cease when this judgment is handed down.

**288**  Ms. Kahlon's evidence is that she is required to provide care for 118 of the 168 hours in a week, the time off being the time Mr. Kahlon is at his parents, the homecare hours, and the time he is at the Kinsmen Centre day program.

**289**  The provision of this care has been difficult for Ms. Kahlon. She has exhibited signs of burn out, requires sleeping medication, and has started to drink more, something she had not done in the past. She has suffered from some depression, has put on weight, has become irritable and suffers from headaches. She has put her life and career on hold since Mr. Kahlon's injury.

**290**  Mr. and Mrs. Kahlon Sr. are 78 and 67 years of age respectively. They are involved in the care of Mr. Kahlon each week from Friday afternoon to Saturday, plus a few other days each year. Given her age, Mr. Kahlon's mother requires help and pays a former house cleaner $500 a month in cash for her assistance, for which she receives two hours of homecare to assist with Mr. Kahlon's morning routine. His parents have purchased and installed an overhead lift, which is equipped with a sling and helps move Mr. Kahlon, but they managed manually from 2003 to 2007. Mrs. Kahlon Sr. says that she and her husband were very concerned about Michelle Kahlon looking after Mr. Kahlon because of the recentness of the marriage, and felt they had to be there to make sure their home was appropriate and accessible. Mrs. Kahlon Sr. travelled to Ponoka when her son was at the rehabilitation centre and was trained to care for him. Mr. and Mrs. Kahlon Sr. have relocated to another home and have incurred various costs which I will discuss when I outline their claim for special damages.

**3. Discussion of Contested Damage Claims**

**291**  As noted in *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 243-244, [*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=):

An award must be fair to both parties, but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other parties is achieved by assuring that the claims raised against him are legitimate and justifiable.

**292**  In *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.), McLachlin J., as she then was, said the following which is relevant to the cost of future care at 78:

The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.

...

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 on the medical evidence to promote the mental and physical health of the plaintiff.

**293**  As McLachlin J. noted at 83-84:

The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews*, supra, Dickson J. said at p. 586:

... to the extent, within reason, that money can be used *to sustain or improve the mental or physical health* of the injured person it may properly form part of a claim. [Emphasis added by McLachlin J.]

...

... 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.

**4. Life Expectancy**

**294**  The first issue that I should discuss relating to damages is the question of Mr. Kahlon's life expectancy. This is, of course, relevant to the determination of the cost of future care and his loss of earning capacity.

**295**  Mr. Kahlon was born in 1967. According to the expert witnesses, as of mid-2008, males of his age have a life expectancy of a further 37.1 to 37.7 years. It is common ground that Mr. Kahlon's life expectancy has been reduced. The expert evidence was directed towards predicting the extent to which this is the case.

**296**  The plaintiff's position is that the most compelling evidence on life expectancy is that of Dr. Chambers and Dr. Elliott, which is based on the traumatic brain injury population as the comparator group. Citing *Dennis v. Gairdner*, [*2002 BCSC 1289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-206H-00000-00&context=), [*5 B.C.L.R. (4th) 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-206H-00000-00&context=); and *Arce (Guardian ad litem of) v. Simon Fraser Health Region*, [*2003 BCSC 998*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-2299-00000-00&context=), [*17 C.C.L.T. (3d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-2299-00000-00&context=), he submits that I must take a reasonable and not pessimistic view of Mr. Kahlon's life expectancy, and that in the circumstances, 25 years is a reasonable estimate.

**297**  The defendants disagree and submit that the most persuasive evidence is found in the expert testimony of Dr. MacKenzie; his opinion is that Mr. Kahlon's life expectancy is in the range of 12-16 years. The defendants say that Dr. MacKenzie>s evidence is based on more current data than that relied upon by the plaintiff's two experts, and while also based on traumatic brain injury data, it adds a more refined indicator of life expectancy, that being the extent to which a person is able to feed him or herself.

*Discussion of Life Expectancy*

**298**  The difference between the life expectancy estimates of the plaintiff's experts on the one hand and the defence expert on the other stems primarily from the studies upon which they relied. Dr. Chambers and Dr. Elliott relied principally on Robert Shavelle, PhD and David Strauss, PhD, "*Comparative Mortality of Adults With Traumatic Brain Injury in California, 1988-97*", J Insur Med 2000, 32:163 - 166 (the "2000 study"). That study was based on 2629 individuals over the age of 15 who had suffered a traumatic brain injury, and stratified that population into three groups based on ambulation: unable to walk, some walking ability and able to walk alone. The 2000 study has been peer reviewed.

**299**  While Dr. MacKenzie relied on this study, he additionally turned to a 2007 study by Drs. Shavelle and Strauss (and also Steven Day and Kelly Ojdana) that was published as a chapter in a text, *Brain Injury Medicine: Principles and Practice* (New York, Demos Medical Publishing) (the "2007 study"). That more recent study provided new estimates of life expectancy based on what the authors describe as "a refinement of data presented in our earlier publications". The 2007 study was based on 3598 individuals over the age of 10 who had suffered a traumatic brain injury, and it broke down the "unable to walk" category into "fed by others" and "self feeds". In the former sub-category, the life expectancy of a 40 year old is 16 years; in the latter, 26 years. The 2007 study has not been peer reviewed.

**300**  I turn now to briefly review the evidence of the three experts.

**301**  Dr. Keith Chambers is a physician and associate clinical professor at UBC's Faculty of Medicine with a masters degree in clinical epidemiology. He has written and studied in the area of life expectancy for over 20 years, and has published numerous articles in peer-reviewed medical journals. He has been accepted by the Supreme Court of British Columbia as an expert in life expectancy.

**302**  Dr. Chambers conducted an independent medical examination of Mr. Kahlon in October 2007. His opinion was based on the factors he summarized in his report: Mr. Kahlon had suffered severe brain damage, was immobile without a wheelchair or a person assisting, had severe cognitive impairment, had swallowing difficulties that were managed by tube feeding, and had respiratory problems and aspiration but no chest infections. In Dr. Chambers' view, the traumatic brain injury and cerebral palsy populations were the best comparator groups. It was clear from that data, he opined, that life expectancy for those with such non-progressive brain injuries was related to the severity of the damage, regardless of the cause.

**303**  Dr. Chambers relied on the 2000 study, and determined that Mr. Kahlon's excess mortality ratio was equivalent to those in the 30 to 44 age range in the non-ambulatory group. He arrived at a life expectancy of 64% of normal, or 24 years. (Dr. Chambers' evidence was that Mr. Kahlon's normal life expectancy would have been 37.2 years.) He also referred to data related to the survival risk of those with cerebral palsy, which gave a similar life expectancy of 65% for the most approximate age group to Mr. Kahlon. Dr. Chambers indicated that based on the cerebral palsy literature, if Mr. Kahlon improved to the point where he could receive his nutrition and medications orally, his life expectancy would improve by an additional 1.1 years.

**304**  Dr. Chambers agreed in cross-examination that the non-ambulatory category referred to in the 2000 study could be misleading given its scope, ranging from individuals in a vegetative state to those able to engage in self-care; as such, it risks grossly overestimating the life expectancy of some and underestimating the life expectancy of others. Dr. Chambers was referred to the 2007 study, which study was referred to by Dr. MacKenzie, and he was strongly of the view that it should not be relied upon for an opinion as to life expectancy because it was not a peer-reviewed publication. He also expressed his view that feeding ability was simply a marker for mobility as opposed to an independent risk factor.

**305**  Dr. Thomas Elliott was the second expert called by the plaintiff. He is a specialist in internal medicine with a subspecialty in endocrinology and is an assistant professor at UBC's Department of Medicine. He has an active clinical practice and is certified by the American Association of Insurance Medicine in mortality, statistics and actuarial methodology. Like Dr. Chambers, Dr. Elliott has been accepted by the British Columbia courts as an expert witness on life expectancy.

**306**  Dr. Elliott based his opinion on Mr. Kahlon's current symptoms which he described as including near-quadraparesis with the left side essentially non-functional, restrictive lung disease, sleep apnea, feeding difficulties, aspiration, pneumonia, fatigue, reliant on virtually total care as a result of neurological dysfunction, inability to dress or feed himself, inability to manage bowel or bladder care, and use of a feeding tube. He assumed that Mr. Kahlon's excess mortality over normal life expectancy was due to his status post-tuberculosis meningitis. He described it as TB meningitis complicated by hydrocephalus and a right cerebralvascular accident or stroke affecting the left side of his body. He did not examine Mr. Kahlon. Dr. Elliott's opinion was that Mr. Kahlon had a life expectancy of a further 25.9 years, or, in other words, a reduction of life expectancy of 11.2 years due to medical risks.

**307**  Like Dr. Chambers, Dr. Elliott was of the view that Mr. Kahlon fit into the 30 to 44 age group in the non-ambulatory category in the 2000 study. Dr. Elliott, although agreeing that those at either end of the non-ambulatory spectrum would have either overestimated or underestimated life expectancies, also did not rely on the 2007 study because it was not peer-reviewed. In re-examination, he was asked to assume the accuracy of the 2007 study and was questioned whether Mr. Kahlon fell into the "fed by others" category, defined as "does not feed self, must be fed completely (either orally or by a feeding tube", or "self feeds", which was defined as "can feed self with fingers or utensils, with assistance and/or spillage". He said the latter, self feeds, which according the data resulted in a 26 year life expectancy.

**308**  The defendant called Dr. Ross MacKenzie as an expert witness on this issue. He was for many years the Chief Medical Officer of Sun Life Financial. He is editor of the Journal of Insurance Medicine, and also works as a consultant to the California Life Expectancy Project which maintains a database for calculating life expectancy opinions.

**309**  Dr. MacKenzie set out the assumptions upon which he based his opinion. Among Mr. Kahlon's functional limitations that he considered relevant to life expectancy were cognitive impairments consistent with global and diffuse brain disfunction (poor short-term memory, disorientation, inability to perform basic activities of daily living, requirement of around the clock supervision), limited motor function (spastic quadriparesis, left hemiplegia, and dependent in all aspects of mobility), high aspiration risk and requiring a feeding tube, and neurogenic bowel and bladder. Dr. MacKenzie testified that he referred to the 2000 study as well as to the 2007 study. He used the methodology of Drs. Strauss and Shavelle for traumatic brain injury, and explained that it relied on mobility and feeding status to stratify mortality risk. Two levels of function were assumed to estimate life expectancy: limited motor function - fed orally, and limited motor function - tube feeding. Applied to Mr. Kahlon, he opined his life expectancy was 16.2 years if fed by others, and 13.1 years if he was reliant on tube feeding. This was respectively 43% and 35% of the life expectancy for a man of Mr. Kahlon's age.

**310**  Dr. MacKenzie explained that he had compared these results to the stroke-brain injury model to see if he was in the ball park. The stroke-brain injury model, he said, produced a very similar number to the traumatic brain injury model. He arrived at a figure of 15.4 at the high end and 12.4 at the low end, depending on the level of disability assigned.

**311**  Dr. MacKenzie commented upon the reports of Dr. Chambers and Dr. Elliott. He testified that the principal reason for the difference in their estimates was that they used the 2000 study, which stratified mortality risk strictly on the basis of mobility. He explained that within the group of individuals with traumatic brain injury who cannot walk, there is a wide spectrum of risk from those in a vegetative state with low life expectancy to those whose cognitive function enables them to perform daily living activities and who have fairly reasonable live expectancy. Dr. McKenzie testified that investigators into life expectancy are constantly refining the manner in which they approach the issue, and have done so by introducing the aspect of feeding. He said that while he would have preferred to see the 2007 study in a peer reviewed journal, the authors are recognized experts in their field and the text in which it appears has been peer-reviewed. Further, the methodology was described and the sample size was larger than the 2000 study, something he thought allowed the authors to further segregate their approach to determine the risks to life expectancy. Dr. MacKenzie testified that the ability to walk is a powerful marker and that the ability to feed oneself was the next most significant marker because of the complexity of the activity.

**312**  Dr. MacKenzie was asked his opinion about Dr. Elliott's evidence that he would characterize Mr. Kahlon as a self-feeder for the purposes of the 2007 study. He disagreed with that assessment, and said that based on his review of the information from Mr. Kahlon's caregivers, assessments and the video that was introduced as an exhibit at trial, he would not characterize him as a self-feeder.

**313**  Dr. MacKenzie testified that he relied on Dr. Anton's report which, among other things, noted that Mr. Kahlon required a gastronomy feeding tube for nutrition and hydration.

**314**  Dr. MacKenzie testified that to further test his opinion, he programmed his clinical assumptions into the California Life Expectancy Project database. Those clinical assumptions included Mr. Kahlon's age, sex, his inability to walk and the fact that he was fed orally by others. The computer program indicated a life expectancy of 15.3 years.

**315**  The plaintiff's counsel questions whether Dr. MacKenzie's opinion was really his own, given that he did not do a clinical assessment of Mr. Kahlon, relied on assumptions, and went to a website and completed a form. He challenges whether Dr. MacKenzie performed an independent analysis rather than relying on the computer program for an answer. I conclude that Dr. Mackenzie's opinion was his own and not simply the result of his entering information into a computer program on the California Life Expectancy Project website. That was something he did for the purposes of testing his view.

**316**  For the reasons that follow, I conclude that Dr. MacKenzie's opinion is the most persuasive and therefore entitled to the most weight in determining Mr. Kahlon's life expectancy.

**317**  The contention by Dr. Chambers and Dr. Elliott that the 2007 study was not peer-reviewed is not, in my view, a proper basis to reject it out of hand. While I consider that to be a factor to take into consideration, I also note the following: two of the authors of the 2007 study are the same authors of the study that Drs. Chambers and Elliott rely upon entirely for the purposes of their opinions; the 2007 study is based on a larger sample size; and the 2007 study has been published in a text, *Brain Injury Medicine: Principles and Practice*, which Dr. MacKenzie testified has been favourably reviewed in the New England Journal of Medicine and is likely to become the authoritative text on traumatic brain injury in the future. Dr. MacKenzie says, and I accept, that the authors summarize their methodology at the end of the chapter, which is something Dr. Chambers is critical of the study for lacking.

**318**  Further, and significantly, the 2007 study uses more refined criteria than does the earlier study. The authors themselves referenced the difficulty of relying entirely on the 2000 study when they noted that:

The simple stratification into three groups on the basis of ambulation is somewhat crude; a more refined analysis that takes account of the patient's mobility, feeding and cognitive levels is possible using statistical methods ...

**319**  Indeed, both Dr. Chambers and Dr. Elliott agree that looking only at the non-ambulatory spectrum risks overestimating or underestimating the life expectancy of those at the upper and lower levels of the range.

**320**  The 2007 study is more refined in that it incorporates feeding ability into the data. The plaintiff's counsel asserts that Dr. MacKenzie is double counting risk factors but, upon my review of his evidence, I disagree. I also note Dr. Chambers' opinion that a person's feeding ability is simply a marker for mobility as opposed to an independent risk factor. However, I find Dr. MacKenzie's explanation to be persuasive. He testified that walking is a complicated movement that requires complex neural and muscular input. The inability to walk is a reflection of the amount of damage that has been done, which is a determinator for mortality. Similarly, he said, feeding ability, while a different kind of activity, also requires complex neural and muscular input, and is similarly a marker of the degree of damage. Dr. MacKenzie explained that in an earlier work that Drs. Strauss, Shavelle and Anderson did with young adults, they found that walking ability was the major marker, but that feeding ability was the next most powerful marker. That is why he said the authors had chosen to include feeding ability in the 2007 study. Tube feeding in the original study involving young adults had six times the mortality ratio when compared to people who were fed normally.

**321**  The evidence is that determination of life expectancy depends upon a consideration of various factors, and that the methodology continues to evolve. I accept Dr. MacKenzie's evidence about why the 2007 study reflects a more refined approach to the question than the earlier 2000 study. Particularly given that the primary authors of both studies are the same, I find that Dr. MacKenzie's reliance on the 2007 study was reasonable. As he relied on more precise and refined data and factors than did the experts called by the plaintiff, I conclude that in the circumstances, greater weight should be accorded his opinion.

**322**  The plaintiff argues that there is ample evidence that Mr. Kahlon feeds himself. Although he does pleasure feed with the assistance of a caregiver, the evidence indicates that he is now, and will be, essentially tube fed which, in my view, correctly was the assumption relied upon by Drs. Chambers, Elliott and MacKenzie.

**323**  The defendants submit that if weight is given to the 2007 study and had it been utilized by Dr. Chambers, based on his clinical findings, the life expectancy he would have found would have been at the most 16 years. That would then have to be further reduced because of Mr. Kahlon's tube feeding, since the 2007 study does not take tube feeding into account and looks simply at whether a person is self-fed or fed by others. I think that there is merit to that contention.

**324**  Predicting life expectancy is by no means an exact science. This is reflected in the broad range of estimates before me regarding Mr. Kahlon's life expectancy. The hospital, relying on Dr. MacKenzie's opinion that if reliant on tube-feeding, Mr. Kahlon's life expectancy is a further 13.1 years, contends that that is the appropriate figure I should use. The other defendants say that the best estimate of Mr. Kahlon's life expectancy is between a further 12 and 16 years. The plaintiff's experts predict a life expectancy in the range of 25 years. Although, for the reasons I have discussed, I attach less weight to this evidence, it is, nevertheless, entitled to careful consideration.

**325**  As Dr. MacKenzie noted in his report, "the magnitude of the increase in long term mortality rates in brain injury patients largely depends on the severity of the resulting disability". While the evidence is that mobility and ability to feed provide helpful insight into gauging disability, they are, nevertheless, only general and approximate measures. In ascertaining life expectancy, I must take an approach that is reasonable and not unduly pessimistic and recognize that he has received and will likely continue to receive excellent care. Taking into account the fact that the expert evidence can provide only estimates of Mr. Kahlon's life expectancy, I find that in the circumstances, Mr. Kahlon's life expectancy is an additional 17 years from the date of these reasons.

**5. Care to be Provided (24-hour care)**

**326**  There is no issue but that Mr. Kahlon requires 24-hour care. The plaintiff's expert, Janice Landy, a nurse of lengthy experience, was of that opinion. The evidence and the submissions show that is now common ground. Mr. Kahlon's needs for which he requires care and assistance are extensive.

**327**  The question is how that care can reasonably be provided and at what cost.

**328**  In *Bystedt (Guardian at litem of) 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=), D. Smith J. (as she then was) said at paras. 162-163:

[162] The test for an award of future care is "whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money": *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=) (S.C.). In formulating this test Harvey J. referred to the decision of *Zapf v. Muckalt* [*(1996), 26 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1MM-00000-00&context=) (C.A.), where Donald J.A. stated at para. 36:

I think the proper test is reasonableness and that the psychological and emotional factors influencing the choice of where to live must be considered: *Andrews v. Grand & Toy Alberta Ltd.* ... Medical necessity is too stringent a test.

[163] Thus, the claim must be supported by evidence that establishes the proposed care is what a reasonable person of ample means would provide in order to meet what the plaintiff "reasonably needs to expend for the purpose of making good the loss": *Janiak v. Ippolito* [*(1985), 16 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=) (S.C.C.), at 17, quoting from the decision of *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at 1075. It must also be based on an objective test of what is moderate and fair to both parties: *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.); and, *Andrews*, *supra*. As stated in *Andrews*, at page 235, "What is being sought is compensation not retribution." Similarly, in *Sigouin (Guardian ad litem of) v. Wong* [*(1991), 10 C.C.L.T. (2d) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X3FK-00000-00&context=) Melvin J. stated at p. 281:

... An award [for future care] must not take the form of retribution or punishment of the tortfeasor, but should reflect the needs of the plaintiff as demonstrated by the evidence.

**329**  Accordingly, the issue for me to decide is the amount that should be awarded for that level of future attendant care that is reasonably necessary on the medical evidence to promote the mental and physical health of Mr. Kahlon.

**330**  The plaintiff's position is that the issue essentially reduces to a choice between 24-hour awake care supplied by an agency or 24-hour awake care supplied by caregivers with Ms. Kahlon managing that care. (24-hour awake care refers to a caregiver being awake and on duty to care for Mr. Kahlon.) The defendants disagree and say that the question is whether the care should be 24-hour live-in care and how that care should best be provided. (Live-in care refers to a caregiver living in the Kahlon home.)

**331**  The plaintiff says that live-in care is not reasonable as it does not meet Mr. Kahlon's needs: Mr. Kahlon requires 24-hour awake care, and the optimum and realistic way of providing that care is through a care agency. As a practical matter, the plaintiff's counsel contends that the major care agencies in British Columbia simply cannot and will not provide live-in care for Mr. Kahlon, and that, he says, effectively ends consideration of that possibility. The plaintiff argues that the defendants' insistence that a live-in care worker provide the required overnight care is contrary to employment standards legislation, given that the significant degree of care Mr. Kahlon requires both during the day and at night requires the caregiver to be rested and awake. The plaintiff submits that "nanny care", which is a reference to privately hired caregivers, is also not acceptable since Ms. Kahlon would be forced to advertise, screen, and supervise new employees. Hiring caregivers privately is difficult, and the legal burden for the contract would rest on Ms. Kahlon. Further, not only can the process for recruiting foreign care workers take up to two years, but the agreement can be broken at any time by the care worker requiring a new employee to be hired.

**332**  In the plaintiff's submission, live-out care on a 24-hour basis provided by an agency is the only way to provide optimum care to ensure health and longevity for Mr. Kahlon. Accordingly, the plaintiff submits, an application of the test in *Milina* leads to an award based on care being provided on that basis.

**333**  The defendants disagree. They dispute what the plaintiff says is the extent of Mr. Kahlon's needs, particularly at night. They submit that care is best provided on a live-in care model where the caregiver lives in the Kahlon home and is supported with additional care through an agency or another private caregiver. This approach, they say, enhances continuity, which is an important consideration, as well as flexibility.

**334**  The defendants submit that notwithstanding the plaintiff's submissions, Ms. Kahlon wants as normal a life for her and her husband as possible, and that desire is contrary to 24-hour awake care provided by an agency. They point out that even after Ms. Kahlon spent time with the plaintiff's key expert witness on this issue, Ms. Landy, she (Ms. Landy) still recommended a live-in caregiver with a suite in the house.

**335**  The defendants' position is that the plaintiff's care needs do not justify live-out 24-hour awake care. They submit that while Ms. Kahlon sleeps in the same bed as Mr. Kahlon, she has rarely had to provide night time assistance to him. They argue that in the last five years, Mr. Kahlon has only occasionally fallen out of bed. Rarely has Ms. Kahlon had to change the bedding and she has never had to change his diaper. Mr. Kahlon does not have bed sores, he is able to move, including by ridging or arching his back, and there is no medical evidence from any treating physician to the effect that he has ever needed to be turned at night. Moreover, Mr. Kahlon's sleep apnea machine contains an alarm but it does not go off. In fact, say the defendants, the only expert called by the plaintiff who gave evidence on the issue of night time care and whose opinion was supported by medical evidence was Ms. Landy. Her recommendation was for a live-in caregiver, a recommendation supported by Dr. Van Rijn, a specialist in physical medicine called by the plaintiff.

**336**  The range of annual cost for attendant care depends on the nature of the services provided, whether it is on a live-in or a live-out basis and whether the caregivers are supplied by an agency or are hired directly by Ms. Kahlon. I was given evidence of costs based on various permutations of care, as I will set out.

**337**  The live-out 24-hour awake care option recommended by various caregiver organization witnesses called by the plaintiff would cost between $231,000 and $265,000 per annum. That is the evidence supporting the plaintiff's suggested award of $250,000 under this head of damage.

**338**  According to the doctor defendants, the reasonable range for future attendant caregiver costs is between $138,000 and $198,000 per annum. The defendant hospital provides a somewhat narrower range, and says that a reasonable award for attendant care would be in the range of $145,000 to $165,000 per annum.

1. *Attendant Care Evidence*

**339**  Ms. Landy, a nurse of 39 years experience, was called by the plaintiff to give opinion evidence. Her report dated November 25, 2007 stated that "funding is recommended for the provision of a live-in care provider hired through an agency to support Mr. Kahlon at home". Her care plan provided that the caregiver receive four hours per day of break time, coverage for which amounted to a further cost of $25,000 per year. Added to her estimated cost of $99,483 to $108,784, the total cost she described ranged from $125,000 to $134,524 per year.

**340**  Ms. Landy noted in her report that if live-in care cannot be provided, then the cost would be greater and would include, at a minimum, daily coverage for two care personnel to work 12 hour shifts or three to work eight hour shifts with additional coverage.

**341**  The question that arose at trial was whether, given Mr Kahlon's needs, live-in care could be provided and if so, at what cost? Tied in with this question of whether live-in caregivers were appropriate were questions regarding the extent of Mr. Kahlon's needs, the availability of live-in staff from agencies or other sources, and whether there were legal requirements, such as employment standards legislation, relating to the provision of in-house care that would affect the cost or the ability to provide that service during the night.

**342**  Ms. Landy did not testify regarding the availability of any option, but provided some costing based on quotes she had obtained. Mr. Webster called evidence from representatives of four leading caregiver agencies with respect to the cost of providing care to Mr. Kahlon and whether they would provide live-in care in his circumstances. Since part of their evidence was expert evidence based on their assessment of Mr. Kahlon's care needs, the trial was adjourned so that the plaintiff could provide notice of their opinions. The witnesses were then called when the trial recommenced and cross-examined.

**343**  Mr. Webster provided these witnesses with a summary of Mr. Kahlon's medical condition that was essentially taken from Dr. Anton's report of November 23, 2007, which I have summarized earlier in these reasons at paragraph 277. Mr. Webster also provided them with certain assumptions, as follows:

Please assume the following regarding Mr. Kahlon:

1. He is 6 "2" tall and weighs approximately 160 lbs.
2. He has very significant cognitive dysfunctions and impairments. He has reduced short-term memory.
3. Mr. Kahlon either needs someone with him or immediately available at all times. Mr. Kahlon can respond to questions, but cannot communicate to call for help. He can make noises to indicate severe pain.
4. He has significant damage (neurologically) such he is physically disabled and his physical condition is spastic quadriplegia with more significant left sided hemiparesis and spasms.
5. He has communication dysfunctions (aphasia). Mr. Kahlon is capable of understanding communication directed with him, his receptive language skills are relatively functional; however he has very significant impairments in communicating as such he is only able [to] respond by using a spelling or communication device to respond to questions. His speech volume is so low as to be ineffective in normal conversation. He requires a worker who will be able to be trained to communicate with Mr. Kahlon, in English and who is willing to do so.
6. He has a visual dysfunction.
7. He has significant eating and swallowing impairments (dysphagia).
8. He requires direct supervision for all meals by a person trained in his feeding needs. The careworker must be trained in the feedings but also in avoidance of aspiration and emergency procedures to respond to aspiration.
9. His medications are: Baclofen, Losec, Paxil, Clonazepam, Tizanidine, Morphine, Vitamins, Colace, Glycerine suppository.
10. His oral diet must be provided in a minced or pureed and if liquids, needs to be thickened medication may be administered orally or by PEG tube
11. He has a PEG tube and may receive some of his nutrition through the PEG tube at intervals.
12. He is incontinent in respect to his bladder and bowel and must be maintained on a regular bowel and bladder program. He has condom catheter.
13. He suffers from spasticity and painful muscle spasms on an intermittent basis and requires someone to be present to assist him.
14. He will at some point be residing in a more suitable home i.e. a home that is wheelchair accessible and has a room to appropriately do physiotherapy exercises. His new home may have a separate room for a live-in caregiver.
15. He requires assistance for the following:
16. Bathing
17. Grooming
18. Dressing
19. Undressing
20. Toileting
21. Condom catheter and diaper
22. Bowel and bladder routines
23. Maintaining skin integrity
24. Administering and monitoring the provision of medication
25. All aspects of feeding as described above
26. Stretching, physiotherapy, and massage
27. All transfers, including from bed, to bath, and to vehicle
28. Positioning
29. BIPAP
30. He requires assistance with all supportive and instrumental aspects of daily life, including someone to do all of his laundry, purchase stock and sort all of his supplies, do all of his shopping, attend all appointments with him, arrange all appointments for him.
31. We ask you to assume that the time of your agency's involvement, Ms. Michelle Kahlon maybe be [*sic*] present but will not be providing required assistive and medical care for Mr. Shawn Kahlon but the agency will be required to provide such care.
32. With regard to Mr. Kahlon's needs in the evening, please assume that while his needs vary, the normal routine for Mr. Kahlon is to go to bed at around 7 or 8 in the evening and be taken from bed approximately 12 hours later.
33. Please assume that in the evenings and night, the care provider will be responsible for dealing with the bipap machine, both set up and supervision as needed.
34. Please assume that the caregiver will have to intermittently deal with muscle spasms during the day or night and this may require removal from wheelchair or bed to assist with stretching or other monitoring.
35. Because of risks related to skin breakdown and to maintain skin integrity, Mr. Kahlon needs to be turned at night.
36. Please assume that the caregiver will have to intermittently deal with bladder accidents that will require changing clothing and bedding.
37. Occasionally Mr. Kahlon dislodges his bipap mask or falls out of bed.
38. Please assume Mr. Kahlon will have physiotherapy several times a week but the caregiver will need to be present, and rehabilitation assistant 4 hours a day 4 days a week during which the caregiver will not need to be present.
39. Mr. Kahlon will own a wheelchair accessible van.
40. The caregiver will be responsible for transporting Mr. Kahlon to appointments in his vehicle.

**344**  The four witnesses who testified work at the major care providers in the Lower Mainland, and all are registered nurses: Maureen Butterworth of We Care Home Health, Deborah Sicker of Bayshore Home Health, Andrea Warren of Classic Caregivers and Rosemary Watson of Evergreen Nursing. They all testified to the effect that they would not be able to and would not provide live-in caregivers for Mr. Kahlon but would provide trained live-out caregivers on an hourly basis pursuant to a plan that their agency would monitor.

**345**  The defendants challenge the weight to be given to their evidence about their agencies' ability to provide live-in care on the grounds that their opinions were based on assumed needs that were different and greater than Mr. Kahlon's actual needs, particularly at night. In particular, the defendants say that assumptions 19-23 above are not proven on the evidence. The defendants called Kathy Phillips, who has been involved in nursing for over 35 years. She described various alternatives for providing the care that Mr. Kahlon requires.

**346**  Linda Waitham, an occupational therapist, testified as an expert in rehabilitation case management and home care management for disabled adults. She has dealt with private health care agencies and private care givers. Ms. Waitham received the summaries of the evidence of the four caregivers and observed Mr. Kahlon at his home for one hour in the morning. She did not know whether live-in caregivers were available through agencies. She described the availability of private live-in arrangements by the foreign live in care program and by adult care agencies such as Able Nannies and Caregivers. She recommended a private live-in care arrangement, and did not believe that Mr. Kahlon required 24-hour awake care, either based on her observations or on the medical evidence. She also did not believe that he was required to be turned every two hours. None of her care plans provided 24-hour awake care, although she agreed that Mr. Kahlon should not be left alone. Her care plans assumed that Ms. Kahlon wished to spend time with her husband.

Maureen Butterworth

**347**  Maureen Butterworth of We Care, like the other case managers from the care agencies, provided a quotation for care aides and the necessary nursing supervision. Ms. Butterworth's firm would charge out at $26.50 per hour plus GST, double-time for Christmas and Labour Day, and 1.5 times for all other statutory holidays. She thought that 4 - 6 people would be involved in the care of Mr. Kahlon. They would also charge for a registered nurse to set up and train staff 10 hours per week for the first few months, and five hours per week thereafter. Their nursing rate is $65 per hour. She said that care aides have 24 hour access to a nurse but that a weekly nursing visit is appropriate.

**348**  The We Care rate was $265,832 per annum. The annual rates of the other care agencies for which evidence was led by the plaintiff were in the range that I have described above at para. 337. This is the annual amount to provide 24-hour awake care on a live-out basis.

**349**  Ms. Butterworth's opinion was that Mr. Kahlon's neurogenic bladder would have to be monitored as there would be serious health consequences if ignored, and she thought it was too much for an individual on a live-in basis. Ms. Butterworth said that her company would use certified care aides supervised by a registered nurse (herself). She testified that she would like to see Mr. Kahlon turned or repositioned during the day and at night, and that absent the need for repositioning, his aspiration risk, the BiPAP machine, and the neurogenic bladder, she said, all necessitate awake night care. On cross-examination, Ms. Butterworth agreed that she was not aware that Mr. Kahlon was not turned at night, and also agreed that turning him every 2 or 3 hours would be arbitrary. Ms. Butterworth was asked to assume the following about a potential client in a similar situation: he had never needed night care for 5 2 years; he had no pressure sores and the doctors said they were unlikely; the patient was able to shift weight and there was some evidence that he was able to roll; and, he only rarely got up, had no bladder problems and did not require feeding at night. Ms. Butterworth said that on those assumptions, she would not recommend 24-hour awake live-out care

Deborah Sicker

**350**  Deborah Sicker is a registered nurse at Bayshore Health, a firm that has 200 clients, four of whom are live-in clients. Her agency also supplies certified care aides. She says that Bayshore would not be able to or agree to supply live-in care to Mr. Kahlon. She said that live-in staff are difficult to recruit, tend to leave employment quickly if conditions are unsatisfactory, and are difficult to replace.

**351**  Ms. Sicker saw Mr. Kahlon for 45 minutes and did not do a full assessment. She received the information regarding his medical condition and the assumptions set out at para. 343. Ms. Sicker described Mr. Kahlon's needs as complex, including compromised swallowing, risk of aspiration, use of a feeding tube, bowel and bladder routines, medications, communication difficulties, as well as requiring assistance with transfers. She said that Mr. Kahlon requires checking on a regular basis overnight. Behaving conscientiously, her agency's staff, she said, would not have eight hours of uninterrupted sleep. The agency's policy requires that a caregiver have an uninterrupted eight hours rest on an ongoing basis. She said that Mr. Kahlon's care needs are too intensive for a single caregiver on a live-in basis.

**352**  Ms. Sicker was aware that Ms. Kahlon has been sleeping in the same bed as Mr. Kahlon, and that she would have to leave in order that the caregiver could provide care during the night. Ms. Sicker did not realize that no doctor had indicated that Mr. Kahlon needed to be turned during the night. Ms. Sicker agreed that the policy of turning every 2 to 3 hours was arbitrary. She testified that she did a Braden assessment, a test which assesses the risk of a patient developing pressure sores, and that because of Mr. Kahlon's score, which she said was 10, he was at risk. She disagreed that Mr. Kahlon would not require 24-hour awake care, and disagreed with Ms. Phillips' Braden assessment which indicated a lower risk for pressure sores. Ms. Sicker's Braden assessment assumed that he was bedridden.

**353**  Ms. Sicker was asked in cross-examination to assume that a client, such as Mr. Kahlon, had never needed awake care in 5 1/2 years, had never had a pressure sore, could shift weight to avoid pressure, could roll, rarely needed night care and was not fed at night. Asked whether in those circumstances she would offer the patient 24-hour awake care, Ms. Sicker testified that although those things have not yet happened, Mr. Kahlon was at risk for same.

Andrea Warren

**354**  Andrea Warren is a director of nursing and care for Classic Caregivers, a company with a pool of 300 staff. She testified that her agency requires live-in caregivers to have 10 hours without duties. In her opinion, it would not be reasonable in caring for Mr. Kahlon to expect there would be 10 hours of uninterrupted rest, as she would expect the caregiver to check on Mr. Kahlon's breathing, reposition him on a regular basis and check for incontinence during the night. Ms. Warren testified that her company would not be willing to accept an assignment on the basis that Mr. Kahlon did not require overnight care. She said that even without turning Mr. Kahlon over, he still requires care due to bladder, respiratory and aspiration issues, which are areas that require constant monitoring.

**355**  Ms. Warren testified that it is extremely difficult to locate or train live-in staff and to find spares to cover staff that are absent for any reason. She said that of 500 personal care clients, only 1% are assessed as suitable for live-in care, and that is at the companion-level only.

**356**  Even accepting the assumptions put to her in cross-examination of a client similar to Mr. Kahlon, Ms. Warren said she was of the view that 24 hour live-out care was more appropriate. Those assumptions were: the client had never needed awake care in 5.5 - 6 years; had never had a pressure sore and was not likely to in the future; had the ability to shift weight, roll and bridge his back; rarely had to get up to access care at night; never had the BiPAP machine go off; was tube fed but not fed at night; and did not have bladder problems or problems with the condom catheter. Ms. Warren said that her expectation was that the caregiver would turn the patient twice a night, and that his diaper and condom catheter would have to be checked. She said that if a caregiver had to get up twice a night every night, the caregiver would burn out. Ms. Warren said that she has been in the business for 14 years and that the employees who would do live-in care do not stay.

Rosemary Watson

**357**  The final witness for the plaintiff from the care agencies was Rosemary Watson, the manager of nursing services for Evergreen Nursing. She gave similar evidence to the first three witnesses. She met Mr. Kahlon for 40 minutes. She is not a life care planner.

**358**  Ms. Watson said that her company must be satisfied before taking on a client that the client does not require monitoring or turning overnight. In her judgment, Mr. Kahlon will require both. Even assuming that no doctor recommended that Mr. Kahlon be turned, that would not change her recommendation. Ms. Watson was not aware that Mr. Kahlon was not turned and that a special mattress would assist against pressure sores. She distinguished between turning and repositioning, the latter being done to alleviate pressure without a full turn and something she said was done quite frequently.

Linda Waitham

**359**  On the issue of appropriate care options, Ms. Waitham, an occupational therapist, opined that private live-in care with additional private or agency live-out support was most appropriate. Her range of costs reflected this model. She did not provide for any active overnight care. The model was for two full time caregivers; at least one was live-in and would work 8 hours a day during the week, while the other would work 16 hours on the weekends and provide 3 to 3.5 hours per day respite care for Ms. Kahlon. She additionally recommended 8 hours of care, 4 weeks a year, if Mr. Kahlon experienced bed sores, spasm or pain, or was sick. The range for that care model, she said, is between $62,168 and $75,948 per annum.

**360**  According to her agency live-in model where the caregiver has their own bathroom and bedroom and is required to have a 4 hour break each day and a level of uninterrupted sleep (one - two sleep interruptions), the cost is between $82,634 and $108,784. This model assumes a daily rate from an agency of between $197.50 and $260.00 with a 4 hour break on weekends and a 4 hour break by Mr. Kahlon's attendance at outside programs during the week.

**361**  The agency live-out model proposed by Ms. Waitham costs between $81,648.00 and $99,148. That model provides respite night-time care for four weeks per month, but otherwise no assistance at night.

**362**  There were some difficulties with Ms. Waitham's model and recommended care regime apart from the heavy reliance on private caregivers who may be difficult to secure and retain. The care regime also relies heavily on Ms. Kahlon, as the least expensive option appears to rely on 13 hours per day of supervision on her part in that it only provides for 11 hours of care each day. The plan omits the cost of such things as WCB payments, GST, MSP premiums, and holiday pay. It omits, as well, a plan for the period between the release of this judgment and the hiring of a foreign care worker. Although Ms. Waitham recommended additional case management to assist Ms. Kahlon in the screening and scheduling of staff, her proposals rely heavily on Mrs. Kahlon, particularly at night. She said in her report that if in the future Mr. Kahlon needed total awake night-time care, the cost for that night-time care privately would be $43,000 - $58,000, and if provided by an agency, $63,000 - $77,000 per annum.

Kathy Phillips

**363**  On the issue of the level of care required for Mr. Kahlon, the defendants called Kathy Phillips, a nurse with 35 years experience in providing nursing care for adults like Mr. Kahlon. She has been involved for the past 13 years as the owner/director of a private health care agency in the Fraser Valley.

**364**  In Ms. Phillips' opinion, Mr. Kahlon does not require night-time awake care, and further, in her view, there is no medical documentation indicating that he requires awake monitoring of his breathing or any other aspect of his care.

**365**  Ms. Phillips testified that a better standard of care is achieved when there are fewer caregivers involved and more continuity. Her position was that while Mr. Kahlon has a lot of care needs, they are not complex and can be dealt with by a residential care aide. She described complex care as that required by a patient on a ventilator or needing tracheotomy care. With respect to bed rails to prevent Mr. Kahlon from rolling out of bed, she recommended they be padded.

**366**  Ms. Phillips maintained that although Ms. Kahlon checks on her husband every 30 minutes, there is nothing about his care needs that requires such checking. She testified that a caregiver would not go in and check on a client unless called or something unusual was on heard on a baby monitor that can be used for monitoring purposes. In her experience, families will take some level of responsibility for individuals regardless of the number of caregivers in the home.

**367**  Ms. Phillips emphasized the importance of continuity of care which was not, in her view, accorded by 24-hour awake care provided by an agency. Her options provided for agency involvement to supplement private care.

**368**  According to Ms. Phillips, the range of options for someone like Mr. Kahlon would result in a cost of between $138,000 and $199,000 per year. She described the care options in two categories. Option 1 was a live-in caregiver provided by an agency. Option 1, in Ms. Phillips's opinion, would be provided at a cost of $138,188 plus GST using up to six different staff. A live-in caregiver could be provided for 20 hours (8 sleeping) at an annual cost of $100,061 with four hours of daily relief at an annual cost of $38,172. Option 1.1 would be if Mr. Kahlon required some hands on care overnight. In that case, Ms. Phillips suggested that eight or more staff would be required and the additional cost would be for sleep-over services with one or two staff members for an additional cost of $60,160 per year. The total cost would therefore be $198,348 plus GST.

**369**  Option 2 posited by Ms. Phillips involves hiring a caregiver privately. Ms. Phillips broke this alternative down into various possibilities. She included 2-days weekly relief provided by an agency, and 2-weeks' vacation coverage at a live-in rate and at a sleep over rate provided by an agency. She set out alternatives depending on whether the care was provided by one foreign live-in caregiver, two foreign live-in caregivers or a caregiver hired privately and domestically. The range for these various options was between $143,258 plus GST and $170,017 plus GST.

1. *Discussion*

**370**  Given the catastrophic injuries that Mr. Kahlon suffered, it has clearly been established that he will require 24-hour care. There is no question that the care should be provided in Mr. Kahlon's home, which is the place most conducive to his happiness and his physical and mental health. The dispute is with respect to the precise nature of that care. The fundamental disagreement between the parties is whether 24-hour awake care is reasonably necessary and if not, whether care agencies in Vancouver will supply 24-hour live-in care.

**371**  Are Mr. Kahlon's care needs such that he requires 24-hour awake care? Put another way, are they such that 24-hour awake care is reasonably necessary on the medical evidence? I have summarized the evidence of the four expert witnesses from the caregiver agencies called by the plaintiff. The gist of their collective evidence was that because of the extent of Mr. Kahlon's health needs, his care should be provided on a 24-hour awake basis. Ms. Butterworth said that she would not recommend that her agency accept the premise that Mr. Kahlon does not require any night-time care. Ms. Watson said his needs are too complex, Ms. Warren said that his needs are too extensive to quote on a live-in care giver basis, and Ms. Sicker said that her agency would not provide live-in staff because of the magnitude of Mr. Kahlon's care needs, which she described as complex, including his need for overnight care.

**372**  Ms. Phillips gave a contrary opinion, as did Ms. Waitham. Ms. Phillips was of the view that while Mr. Kahlon had many care needs, they were not complex and could be managed by a live-in care aide. The defendants also point out that Ms. Landy, an expert witness of extensive experience who was called by the plaintiff, recommended live-in care, if available.

**373**  The question is the weight to be attached to the witnesses' opinions regarding the level of care that Mr. Kahlon requires. That depends, in part, on the extent to which the assumed facts are proven in the evidence. The four caregiver witnesses did not do full assessments of Mr. Kahlon. Although I found that each of them was a reasonable witness, as was Ms. Phillips, the evidence in some respects did not support the assumptions that they were asked to make. For example, their assumption that Mr. Kahlon must be turned during the night to avoid bedsores or that his BiPAP alarm goes off is, to date, not correct. Even though Ms. Kahlon checks on him regularly, the evidence shows that Mr. Kahlon has only rarely required night-time assistance. Therefore, as to assumptions 19-23 that were relied upon by the four caregivers, I find they were generally not established in the evidence; the medical evidence does not indicate that Mr. Kahlon requires to be turned at night to maintain skin integrity and the concerns relating to the BiPAP machine, bladder accidents and falling out of bed have rarely required night-time attention by a caregiver.

**374**  Both Ms. Stricker and Ms. Phillips did a Braden assessment which measures the risk for pressure sores. Ms. Phillips' result showed that Mr. Kahlon was at lower risk than the result that Ms. Stricker obtained. I place greater weight on Ms. Phillips' assessment because of what I think was an incorrect assumption by Ms. Stricker that Mr. Kahlon was bedridden. However, the Braden assessment appears to be quite subjective and Dr. Anton, it should be mentioned, noted that Mr. Kahlon was at some risk for bedsores.

**375**  Ms. Philips' evidence was that while Mr. Kahlon has many care needs, they are not complex, such as those of a person on a ventilator. In my view, while true, this may be too fine a point, as Mr. Kahlon's care needs are substantial and are such that he cannot be left alone. Mr. Kahlon, apart from his enormous care needs while he is awake, is also at risk for complications relating to his neurogenic bladder, his spasticity, his sleep apnea, his inability to call out for help and the possible blockage of his shunt. Nevertheless, although his care needs are extensive, I find that the evidence shows that at the present time, those needs are not as extensive as the expert caregivers assumed.

**376**  However, in determining the cost of Mr. Kahlon's future care, I also find that it is a reasonable inference from all of the evidence that Mr. Kahlon's needs, particularly at night, will likely increase in the future.

**377**  I find on the evidence that at the present time, Mr. Kahlon's needs would likely be met by 24-hour live-in care, if it was available. On a general basis, it has not been shown that 24-hour awake care is reasonably necessary, although, given what I find to be the complexity of Mr. Kahlon's condition, the likely need for increased care in the future, and the unavailability of live-in caregivers, there are times when 24-hour awake care will be required.

**378**  In assessing the appropriate award, I must, as noted, take into account the availability of 24-hour live-in care for a person of Mr. Kahlon's needs. The plaintiff's witnesses from the caregiver agencies testified that they would not provide live-in caregivers in Mr. Kahlon's circumstances due to the extent of his care needs. Ms. Phillips, however, disagreed that Mr. Kahlon's needs could not be addressed by a usual live-in care worker. She said that most agencies allow a caregiver to get up once or twice a night without additional cost; if it becomes routine, however, the agency resorts to 3 eight hour or 2 twelve hour shifts. Ms. Phillips noted that theoretically a live-in worker can get up several times a night as long as he or she is paid additionally for doing so. However, she also noted this could nevertheless affect the quality of their daytime care, and other options should then be considered for the night time, which would involve more care.

**379**  Although Ms. Phillips and Ms. Waitham based their opinions on the provision of various modes of care, including live-in agency provided care, there is no evidence that an agency will provide live-in care for Mr. Kahlon on a 24-hour basis. Even though I have found that the care needs of Mr. Kahlon are not to the degree assumed by the plaintiff's caregiver witnesses in the areas of complexity, the need for night-time care, and the need to reposition him during the night, their opinions are nevertheless entitled to some weight, particularly with respect to whether agency live-in care is realistically and readily available in the market place.

**380**  There are strong arguments that given the needs of Mr. Kahlon, his care, whether live-in or live-out, should be provided by an agency. The provision of care in this fashion will ensure quality, particularly with a nurse providing overall direction, which the evidence shows is something provided as part of the service by an agency.

**381**  The defendants led evidence through Ms. Phillips and Ms. Waitham of other possible sources for caregivers, such as the foreign caregiver program or a private caregiver hired by the patient's representative or with the help of an agency. However, Ms. Watson testified that private live-in caregivers are the hardest staff to hire and they receive the lowest pay. Ms. Butterworth echoed those sentiments, and pointed out that hourly caregivers are more readily available because they do not have to sleep in the client's home away from their families. Ms. Warren said it was extremely difficult to find live-in caregivers, and Ms. Sicker said that they tend to leave employment quickly if conditions are unsatisfactory. Ms. Phillips said that her agency provides short term 24-hour awake services and provides assistance to clients with employees in the foreign live-in care program. However, the foreign live-in care program has a two year recruiting time and the employee can leave at any time.

**382**  I do not consider it reasonable to assess the cost of future care on the basis that Ms. Kahlon will hire a private caregiver to provide the bulk of Mr. Kahlon's care. Ms. Kahlon would then have to bear the burden in terms of hiring, scheduling, and supervising to ensure the caregivers provide the necessary care. That would be no small task even if private caregivers were easily located and remained for many years. However, the evidence is that they can leave on short notice, there is a long lead time for foreign care workers to be hired, and they will likely be in short supply in the years ahead. Accordingly, I do not think that it is reasonable to base an award of future care on a scheme whereby Ms. Kahlon must be responsible for this uncertain and onerous task.

**383**  In my view, the basic approach to the provision of care in this case must be through an agency able to ensure that trained and supervised staff are in place and with the flexibility and resources to provide the care that Mr. Kahlon requires in the event of a disruption to the care schedule that is arranged. It is important for Mr. Kahlon's health that he is at home with his wife. However, it is not reasonable to download the burden of ensuring his care on her. That has occurred pending trial and it is apparent that it has taken a significant toll on her.

**384**  Nevertheless, in determining the cost of future care, I must be realistic, fair to both parties and recognize that Ms. Kahlon wants to be with her husband because they are a married couple and she loves him. I recognize that it is in the interests of Mr. Kahlon that care be provided in a fashion that provides some continuity and is least intrusive into the privacy of this family.

**385**  In my view, the reality is that the care that will be provided for Mr. Kahlon will be an amalgam of all of the options that were discussed in the evidence, and will not simply be 24-hour awake care provided by an agency or live-in care arranged through an agency or through the foreign care giver program supplemented by agency supplied caregivers from time to time. I think that it is reasonable to assume that Ms. Kahlon will attempt a number of arrangements that provide continuity and quality of care, ensure her family some privacy but does not download to her the heavy work, much of which she has borne to date.

**386**  What will this cost? This is not simple to assess, as there are many ways to provide the care that Mr. Kahlon requires, some more expensive than others. I find that the model which provides me with the best guidance for a realistic range of cost for the provision of attendant care is Ms. Phillips' Option 1.1, though I acknowledge that the care will not be provided precisely in that fashion. Her model is based on live-in care provided by an agency with hands on care provided on an overnight basis with a caregiver getting up once or twice in the night to attend to Mr. Kahlon. However, some adjustment to that model is required as, in terms of cost, it provides for only 20 hours of care each day.

**387**  Considering all of these factors, including the nature of the care Mr. Kahlon requires and will require, the availability of caregivers, the likelihood that his care needs will increase as he gets older and the additional cost when caregivers must get up in the night, I have concluded that a reasonable future cost is $210,000 per annum. I find that in the circumstances of this case, the evidence establishes that this is the annual cost of the care that Mr. Kahlon reasonably needs, is what a reasonable person of ample means would provide, and is fair to all parties.

**6. Rehabilitation Aid Worker**

**388**  This was advanced by the plaintiff as a separate future care cost.

**389**  The plaintiff's position is that the cost of care award should also include an amount for the provision of a rehabilitation aid worker five days a week, four hours a day, and the award sought is $55,000 per year plus GST.

**390**  The defendants argued that if rehabilitation aid care was shown to be necessary, it could be provided by an attendant caregiver, the cost for which was awarded in the last section of this judgment.

**391**  In the alternative, the plaintiff argues that a rehabilitation aid worker, if necessary, could also provide attendant care. In those circumstances, the plaintiff seeks an award of the full amount for a rehabilitation aid worker for one year, and then the difference between the rates for a rehabilitation aide and a certified care aide after that. The plaintiff says that this provides for a rehabilitation aide immediately, and allows this person time to learn Mr. Kahlon's care needs. The plaintiff's suggestion is that after the first year the rehabilitation aide can provide the care. The claim in those circumstances is the difference in the charge out rates of a rehabilitation aide and a certified care aide for 20 hours per week. The annual amount sought is $27,500 per year plus GST.

**392**  Ms. Landy's recommendation was that Mr. Kahlon:

... requires care 24 hours/day because of his tuberculosis meningitis and the subsequent complications which developed. ... He will require not only the provision of a continuous skilled level of care 24 hours /day but also specialized rehabilitation services, equipment and supplies on a lifelong basis. [page 13]

**393**  After describing his daily needs, she stated:

Mr. Kahlon is dependent upon others to facilitate his participation in activities of community inclusion, recreation and socialization. [page 20]

**394**  With respect to the need for a 'one to one rehabilitation support' worker, she wrote:

Mr. Kahlon responds positively to one-to-one level of intervention for activities of recreation, socialization and community integration as evidenced in observation and assessment. Funding is recommended for the provision of one-to-one rehabilitation support for Mr. Kahlon to support maintenance and continuation of physical therapy program and for his program of range of motion, stretching and flexibility exercises. The rehabilitation support worker would assist the physiotherapist in Mr. Kahlon's walking program. This program requires two people to attend to Shawn directly to facilitate this activity. He/she would incorporate and implement focused strategies into his daily activities under the direction of the rehabilitation intervention specialists (physiotherapy, occupational therapy, speech and language therapy, etc.). The one-to-one rehabilitation support worker would additionally provide transportation, accompaniment and direct assistance for Mr. Kahlon to facilitate his participation in activities of community integration, recreation and socialization (i.e.: swimming program, community-based day program, adapted recreational activities). [page 31]

**395**  The defendants' position is that there is no reason the tasks of a rehabilitation assistant or rehabilitation aid worker cannot be taken on by the live-in caregiver or the caregivers who will be with Mr. Kahlon in any event. They say that the cost of a rehabilitation aid worker is not a reasonable cost when Mr. Kahlon's needs can be met by a consistent, competent group of caregivers who are trained by the therapists who will be involved in Mr. Kahlon's care on a formal basis. As for the therapy, the evidence is that the caregivers should be trained to assist with such therapy, including daily range of motion exercises.

**396**  The defendants, in challenging the need for a rehabilitation aid worker, say that the evidence of Dr. van Rijn was only that at best, Mr. Kahlon might improve with intensive therapy. They point to Dr. Cameron's evidence that Mr. Kahlon's fatigue results from his brain injury and that there is no evidence that intensive therapy will improve his condition. Dr. Beckman, the defendants point out, was of the view that Mr. Kahlon's fatigue is a result of the brain injury and that therapy would not reverse its effects.

**397**  The defendants say that there is no evidence that suggests that residential care aides cannot be taught to assist with physiotherapy or playing cards at the Kinsmen Centre where Mr. Kahlon attends. In fact, they point to Ms. Phillips' evidence that they could be taught to provide these things. They say that as the plaintiff acknowledges that residential care aides are competent to care for Mr. Kahlon at his home, the same holds true in the community. The defendants point out that the provision of a case manager on Ms. Landy's model has already been agreed to by the parties. They also point out that they have already agreed to $7,450 per year for recreational community involvement. In this respect Ms Landy said:

Mr. Kahlon presently attends the Adult Day Program at Kinsmen Centre in Richmond, B.C. twice weekly. He also attends the swimming program at George Pearson Centre as able. Funding is recommended for continuation of attendance at specialized adapted community programs of inclusion, recreation and socialization for Mr. Kahlon. He would be accompanied to these community activities by his one-to-one rehabilitation support worker. A weekly allowance in the amount of $145.00 plus G.S.T. is recommended based on his present utilization of the Adult Day Program at Kinsmen Centre. Note that a companion is not usually charged admission to centres for adapted programs.

Cost per year (ongoing):

$145.00/wk X 52 wks = $7,540.00. [page 61]

**398**  The defendants, however, say that a rehabilitation support worker, in addition to a residential care aide or caregiver is an unnecessary duplication of care providers, particularly given Mr. Kahlon's major fatigue problems. They say that the cost of a rehabilitation aid worker is something that in substance is already compensated for by way of non-pecuniary damages.

**399**  Moreover, the defendants say that all of the therapies recommended by the plaintiff for which future care costs are sought are untenable given Mr. Kahlon's level of fatigue, the limited number of hours in the day available for therapy, the time that he spends and enjoys at the Kinsmen Centre (two days a week for four hours), and the hours he is awake every day. The defendant doctors say that as Mr. Kahlon needs someone to cover those four hours, as Ms. Landy points out in her report, a caregiver can be provided to Mr. Kahlon for those four hours at $24.75/hour at a yearly cost of $25,740, and that is included in her total annual estimate for the provision of attendant care as discussed in Section 5 above.

**400**  In my view, it is not reasonable to provide a rehabilitation worker in addition to the certified care aides. However, should one of the caregivers for 20 hours per week be a rehabilitation aide?

**401**  I find that the defendants' approach takes too negative a view of the benefit of therapy for Mr. Kahlon. Dr. Anderson, a psychiatrist, for instance, opined that "Mr. Kahlon needs multidisciplinary rehabilitation to improve the quality of his life and prevent further functional deterioration".

**402**  I am persuaded that it is reasonable to approach this issue on the basis that a rehabilitation aide will be secured who will also assist in the personal care of Mr. Kahlon four hours per day, three days a week. In my view, an award for future care for this item based on the additional cost for a rehabilitation aide of $16,500 per annum is an appropriate assessment.

**7. Swallowing Therapy**

**403**  The plaintiff claims as part of the cost of future care an amount for swallowing therapy.

**404**  The plaintiff's position is based on the opinion evidence of Kathy Silversides, a speech-language pathologist who works extensively in the area of swallowing. She suggested a dysphagia care plan (a care plan for swallowing difficulty), clinical and instrumental assessments, education, evidence-based swallowing therapies (i.e. Lee Silverman Voice Therapy), CPR training, and use of a suction machine to maintain oral feeding and associated skills. Ms. Silversides testified that the purpose of these therapies is to increase laryngeal function and reduce the risk of Mr. Kahlon aspirating.

**405**  The plaintiff claims an annual amount of $23,860; this is made up of 96 hours of direct therapy comprising 48 sessions, travel time for the speech language pathologist of $9000, and a one-time amount of $750 for a portable suction machine.

**406**  The defendants oppose this cost on the basis that the medical evidence and that of other swallowing experts is that Mr. Kahlon will not in future be an oral feeder for all of his nutrition. They point out that Ms. Silversides alone of all the experts recommended that Mr. Kahlon receive swallowing therapy as part of a plan to make him an oral feeder. They submit that Dr. Cameron, Dr. Anton, Dr. Chambers, Dr. Beckman and Veronika Larson all have opined that Mr. Kahlon will not be an oral feeder. Dr. Cameron, for instance, said that Mr. Kahlon has a 43% chance of developing aspiration pneumonia through oral feeding. Ms. Larson, the speech-language pathologist from G.F. Strong Rehabilitation Centre ("G.F.Strong"), participated in repeated barium swallow and fiberoptic endoscopic evaluation of swallowing assessments, and concluded that Mr. Kahlon was at high risk of aspiration and recommended he should not orally feed save for pleasure.

**407**  The evidence indicates that although Mr. Kahlon prior to 2007 was fed orally, with the assistance of his wife, he was also tube-fed during that time. Swallowing assessments were done in 2007 and 2008, and the recommendation was that Mr. Kahlon receive his feeding and hydration through tube-feeding. That has been the situation since.

**408**  As I noted in the section on life expectancy, the evidence, I find, indicates clearly that Mr. Kahlon will continue to be tube fed, apart from some pleasure oral feeds. It was the considered opinion of the members of the treating team at G.F. Strong following a modified barium swallowing test and a fibreoptic endoscopic evaluation by an ear nose and throat specialist and a speech pathologist that Mr. Kahlon be primarily tube-fed. Ms. Larson, who has been treating Mr. Kahlon since 2003, made the same recommendation following the endoscopic evaluation in April 2008. The evidence shows persuasively that Mr. Kahlon, because of risk of aspiration, should and will remain tube-fed.

**409**  According to Ms. Silversides, individuals who are tube-fed are at high risk for reflux when they use tube feed formulas, which emphasizes the need for these services independently of tube feeding. According to her evidence, aspiration risks arise from saliva, secretions, and stomach contents, whether one is fed orally or by tube, because reflux materials also come up from the stomach, which can occur from tube feeding.

**410**  I am not persuaded, given Mr. Kahlon's fatigue and medical condition, that it is in Mr. Kahlon's best interest to attempt to take him off his feeding tube and convert him instead to oral feeds. In my view, the evidence indicates that he would not obtain sufficient nutrition and there is a high risk in those circumstances of Mr. Kahlon developing aspiration pneumonia through oral feeding. Dr. Cameron said as much and Dr. Beckman agreed with that assessment.

**411**  Is the swallowing therapy that is proposed therefore reasonably necessary to promote the mental or physical health of the plaintiff? On the evidence, it cannot be supported on the basis that Mr. Kahlon might in the future be an oral feeder. To the extent that Ms. Silversides gave a stand-alone opinion that she can probably get Mr. Kahlon off tube feeding if intensive therapy is successful, the evidence indicates that that decision is made by a team of which the speech language pathologist is only one member. The weight of the evidence is that that is not a medical decision that has been or will be made regarding Mr. Kahlon.

**412**  Does the evidence suggest that swallowing therapy is nevertheless a reasonable expenditure to reduce possible deterioration of Mr. Kahlon's swallowing function and the risk of aspiration? It is the plaintiff's position that this is the case.

**413**  The evidence suggests that although Mr. Kahlon will be tube fed, he will and should continue to have pleasure feeds. The evidence shows that his care has been meticulous and he has avoided aspiration pneumonia. The issue is whether the medical evidence shows that this treatment is reasonably necessary for Mr. Kahlon's health. Dr. Van Rijn, an expert on physical medicine and rehabilitation, did opine that therapy to maintain his swallowing function should continue. Dr. Beckman, a neurologist called by the defendant doctors, said that Mr. Kahlon's swallowing mechanism is borderline and over time the spasticity in the swallowing mechanism will not improve.

**414**  Although Dr. Beckman felt that therapy should reasonably be tried for three months and discontinued if there is no objective improvement, I think the issue is whether the medical evidence supports swallowing therapy simply to maintain Mr. Kahlon's level of function so as to allow for continued pleasure feeds and minimize the risk of aspiration. I find it does. However, I have concluded that a more modest claim has been proven under this head of damage and I award $5,000 per annum.

**8. Speech Therapy**

**415**  The plaintiff claims an amount for speech language therapy services as part of the cost of future care.

**416**  Mr. Kahlon received speech language assistance at Ponoka. Since then, he has only received outpatient services from Ms. Larson, the speech language pathologist at G.F. Strong.

**417**  Ms. Wendy Duke assessed Mr. Kahlon at a number of sessions in June 2007. Her evidence was as follows:

Mr. Kahlon has a severe impairment of the speech muscles, including those involved in articulation (speech sound production), respiration and phonation (voice). His speech abilities are consistent with a condition known as "dysarthria", which is an impairment in the control and function of the speech muscles due to brain damage. ...

...

Most often, Mr. Kahlon must rely on various non-verbal methods of communication to convey his messages and thoughts. These include head gestures and hand gestures, which require that the "listener" (i.e., Mr. Kahlon's communication partner), has some familiarity with Mr. Kahlon's methods of communication, as they are not always clear. He also uses a laminated letter/message board to communicate. Interpretation of his messages typically requires close attention by the "listener", as well as familiarity with the context, as Mr. Kahlon's cognitive and motor impairments impede his ability to use the letter board in the most efficient manner. For instance, Mr. Kahlon will persist in spelling his message, even if the "listener" has indicated that they are lost, or that they have already received the message. ...

...

Mr. Kahlon's expressive communication abilities (ie, the ability to convey a message through any means, including speaking, pointing to letters, writing, and so on) are severely impaired. ...

**418**  In short, she said that Mr. Kahlon has a severe impairment of his speech muscles and must rely on non-verbal methods of communication to convey his messages and thoughts, such as head or hand gestures.

**419**  Ms. Duke testified that while Mr. Kahlon's neurological impairment is permanent, assistance will minimize further deterioration and perhaps allow for modest improvement and function. She emphasized both the importance of training to ensure he did his best at communicating outward messages and the need for trained aides able to understand and act in response.

**420**  Ms. Duke's therapy plan includes first year treatment costs of 100 hours therapy for a total of $11,000, the speech language pathologist's travel time from the office to Mr. Kahlon's home of $8600 and a SL 38 LightWriter, including warranty, for about $9000. (The LightWriter is a technical communication device which it appears can either speak the words indicated or spelled by Mr. Kahlon or simply displays them on a two-sided screen.) The first year cost for these things totals $28,675. Mr. Webster submitted that after the first year the proposal was that the sessions drop to two per month so that the annual cost of the sessions and travelling is about $4640 per annum. Ms. Duke said that consideration should be given to replacing the LightWriter every three years at a cost of $3,025.

**421**  The LightWriter that is proposed is different from the one that Mr. Kahlon tried earlier in that it allows the audio function to be turned off; where the earlier version would often result in incomprehensible output, the newer one has a two-sided screen that allows the partner to sit opposite Mr. Kahlon and observe the words.

**422**  The plaintiff argues that the purpose of training is to optimize and maintain Mr. Kahlon's level of function. The recommended treatment would not necessarily take place on a daily or weekly basis but would proceed in blocks of more intense treatment. The plaintiff says that Ms. Duke's evidence shows that Mr. Kahlon was able to complete the sessions and that fatigue did not stop them. He argues that Mr. Kahlon needs appropriate care to optimize his communication commensurate with his abilities. The plaintiff submits that his impaired speech and language system will be further compromised by the effects of aging and, potentially, by lack of use. He says that he is entitled to every reasonable opportunity to retain his abilities to express himself and communicate with those who care for him, even if it is only to get help or describe his needs.

**423**  The defendants argue that use of the earlier version of the LightWriter was discontinued because Mr. Kahlon was unable to use it effectively. They point out that the fatigue is a major problem for Mr. Kahlon such that Ms. Duke had to attend on three separate occasions to assess him as he was not able to stay focused or awake.

**424**  The defendants say that the kind of intensive therapy that Ms. Duke suggests is not reasonable. Ms. Duke suggested that the therapy would take an hour per day at the outset and then somewhat less thereafter. The defendants say that not only is Mr. Kahlon not expected to recover his speech and language abilities regardless of the successful implementation of the program, as Ms. Duke says, but that his impaired speech and language will be further compromised by the effects of aging and potentially by lack of use. The defendants point out that Ms. Duke was not specifically aware that Mr. Kahlon sleeps approximately 15 hours per day.

**425**  The defendants also refer to the evidence of Dr. Anderson and Dr. Anton in support of their submission that Mr. Kahlon is unable to retain information, and that interventions such as psychotherapy, as an example, would not be useful as he will not remember what was discussed from session to session.

**426**  The defendant hospital put it this way in their argument: it is not reasonable to expect Mr. Kahlon to learn to use this equipment given that he was not capable of using the last one, he is already extremely fatigued, and he has difficulty sustaining his attention and has limited short term memory.

*Discussion*

**427**  Dr. Schmidt, a neuropsychologist, assessed Mr. Kahlon on October 25 and November 1, 2006. In his report, he wrote:

Current cognitive testing was limited by his motor and expressive language deficits. In that context, he showed roughly average intelligence on measures that were administered. He also appeared to show relatively good receptive language, at least for very simple verbal information. Whether he can comprehend more complex verbal information, such as might be contained in sentences or paragraphs, cannot be determined. Significant weaknesses were found, on the other hand, in both visual learning and memory. He also showed disruption of visuospatial reasoning, selective attention and executive functioning. Mental efficiency, verbal learning, verbal memory and psychomotor speed could not be assessed but could very well have deficits over and above those already described.

**428**  Dr. Anderson, a psychiatrist, stated that Mr. Kahlon was unlikely to benefit from psychotherapy due to "his reduced executive functioning, poor communication skills and inability to retain information". Dr. Anton mentioned in his report that Mr. Kahlon had tried a LightWriter but did not initiate it, and used a letterboard that contained the alphabet and the words "yes" and "no". He examined Mr. Kahlon in July 2007 and using the letterboard, Dr. Anton was able to determine that Mr. Kahlon knew he was in Vancouver, that he indicated incorrectly that it was spring, April 2002, and that he spelled the name of an earlier prime minister when asked the name of the Prime Minister.

**429**  Mr. Kahlon's cognitive impairment is permanent. The recommendations will not allow him to recover his speech and language abilities. The question is whether they will prevent further decline and maximize his quality of life. I find it has not been established that they will prevent further deterioration of Mr. Kahlon's communication abilities. On the evidence, I find that Mr. Kahlon will not benefit from the proposed therapy and, more likely than not, will not be able to use the LightWriter effectively for communication.

**430**  This claim is therefore not allowed.

**9. In-Trust Claims**

**431**  This in-trust claim concerns the enormous amount of care services that have been provided by Michelle Kahlon and, to a lesser degree, by the plaintiff's parents as a result of Mr. Kahlon becoming disabled.

**432**  In *Bystedt (Guardian ad litem of) v. Hay*, D. Smith J., as she then was, canvassed the leading cases, including *Crane v. Worwood* [*(1992), 65 B.C.L.R. (2d) 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61X9-00000-00&context=), [*[1992] 3 W.W.R. 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61X9-00000-00&context=); and *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=) (S.C.), and described the relevant principles governing in trust claims at para. 180:

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

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 (here, the normal care of an uninjured child);
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. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
6. the family members providing the services need not forego other income and there need not be payment for the services rendered.

**433**  The parties, while agreeing that an award ought to be made, are significantly apart in terms of the quantum of that award.

**434**  The plaintiff claims that the in trust award should total the sum of $850,000 for Michelle Kahlon and Mr. Kahlon's parents.

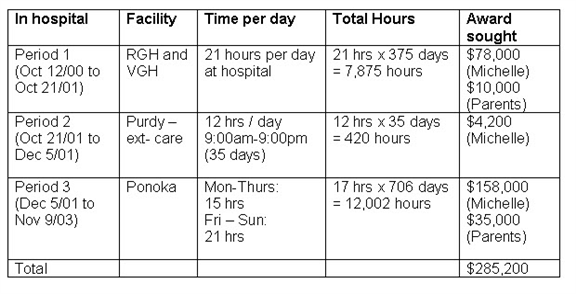
**435**  The plaintiff advances this claim over different periods corresponding to when Mr. Kahlon was at various facilities. Mr. Kahlon was hospitalized in RGH and VGH between October 12, 2000 and October 21, 2001 (418 days). He was then at the Purdy Pavilion for 45 days. Mr. Kahlon was placed in a rehabilitation program at Ponoka from December 5, 2001 to November 10, 2003 (706 days). Mr. Kahlon returned home to Richmond on November 11, 2003. From that time to the commencement of trial, he has lived in the apartment he and Ms. Kahlon purchased before his stroke.

**436**  In advancing this claim, the plaintiff submits that as so much time was committed to his care, the Court should award $20 per hour (higher than a caregiver rate) but limit the award to 1/2 of the time spent providing care at RGH, VGH and the Purdy Pavilion. In respect of Ponoka, the plaintiff argues that Ms. Kahlon was an active caregiver and received very specific training to allow her to provide extraordinary care. Using the same rate, $20 per hour, the plaintiff argues that 2/3 of this time is compensable.

**437**  The plaintiff further submits that his parents also provided respite, assistance, and, importantly, were informed and trained so that they could take him home. They went to the local hospitals daily and took turns going to Ponoka. The plaintiff advances the claim for his parents using a figure of 2-3 hours per day of compensable time and valuing their contributions to his care beyond that a parent would ordinarily provide at $25 per day at RGH/VGH and $50 per day at Ponoka.

**438**  The quantum claimed in relation to Michelle Kahlon's and his parents' care for this three year period (October 12, 2000 - November 9, 2003) is $285,200.

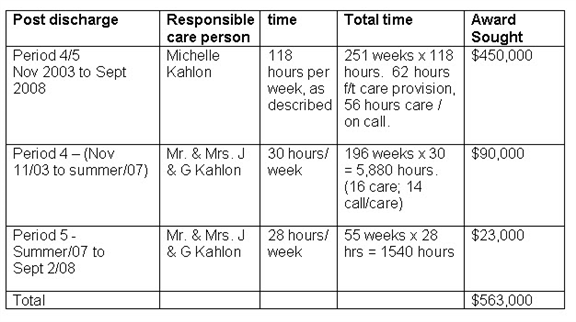
**439**  The claim for the time Mr. Kahlon was in a hospital facility is set out in a table prepared by the plaintiff's counsel and reproduced below. It describes the hours spent by Ms. Kahlon according to her evidence and the hours spent by the parents:



**440**  The next relevant period follows Mr. Kahlon's discharge from Ponoka. It is the plaintiff's position that following discharge, Ms. Kahlon has had 24-hour care responsibilities and has been the primary caregiver for Mr. Kahlon. Mr. Webster describes the care that she has provided this way: Ms. Kahlon has been on call 24 hours a day, has provided care (i.e., as a care aide) but also remains the substitute decision maker, advocate and care aide supervisor. Mr. Webster argues that during the time after Ponoka, Ms. Kahlon should be compensated for 118 hours of weekly care, which excludes 50 hours in the week made up of time when her husband is at his parents' home, respite time (other than travel and the time required to be with the caregivers) and time her husband is at the Kinsmen program. This method, he argues, effectively excludes compensation for the time she spends doing laundry, buying food, preparing food, or making plans for Mr. Kahlon's care and rehabilitation, unless she manages to do those things in Mr. Kahlon's presence.

**441**  In terms of his parents, the plaintiff points out that Mr. and Mrs. Kahlon Sr. have taken their son home every weekend. They did not receive assistance at first but later obtained assistance for two hours per week. Mr. Webster has reduced the claim so that there is no duplication.

**442**  Therefore, the in trust claim for the period following Mr. Kahlon's release from Ponoka is advanced as follows:



**443**  As can be seen from these summaries, the total claim for in trust awards for Ms. Kahlon and Mr. Kahlon's parents for the period when he was hospitalized and for the period after he was discharged from Ponoka are respectively about $690,000 for Michelle Kahlon and $158,000 for his parents for a total of approximately $850,000.

**444**  The defendants acknowledge that the plaintiff is entitled to an in trust award, but say that it should be in a much more modest amount. The defendant doctors argue that during the time that Mr. Kahlon was in hospital facilities, he was provided with intensive care and services by the nursing staff, physicians and other health care workers. Most of the services provided by Ms. Kahlon during this time, they say, should not be considered to be additional or necessary for Mr. Kahlon's care and, contrary to the plaintiff's submission, would not exceed the level of care Ms. Kahlon would be expected to provide in her relationship as his spouse. The defendant doctors say that the award for Michelle Kahlon should be in the range of $250,000 to $300,000 and that for the parents it should be $50,000.

**445**  The UBC Hospital concedes that since Mr. Kahlon's illness, Ms. Kahlon has essentially devoted her life to her husband's care and recovery, and deserves to be compensated. However, it says that Ms. Kahlon went to the hospitals essentially because she was Mr. Kahlon's wife, loved him and wanted to be near him. Its position is that Ms. Kahlon should be paid the opportunity cost for lost earnings from teaching since her husband's return to his home in 2003, which it estimates at about $246,265.83. In the alternative, the hospital says that the amount could be assessed by the cost of providing a caregiver since the time of Mr. Kahlon's return home, at $13 an hour according to the evidence of Ms. Butterworth, which would be $215,000; hence the hospital's midpoint figure of $230,000. The UBC Hospital says say that in the circumstances, a reasonable in trust award for the parents would be the sum of $28,000 that the parents have had to pay a person to assist them when their son visits.

*Discussion*

**446**  There is no doubt that Ms. Kahlon has expended numerous hours since her husband's injury on his care, both before and after the time he was discharged from Ponoka. The issue is really the extent to which her services were over and above what would be expected from the marital relationship, what was her opportunity cost and what was the reasonable cost of obtaining those services outside the family.

**447**  In terms of Ms. Kahlon's claim, I find that there should be some compensation for the period prior to Mr. Kahlon's return from Ponoka. Her services were not simply those that would be expected from the family relationship. Although I find that she largely went to Ponoka because she loved her husband and wanted to be near him, she also played a significant role in his recovery and provided care that went substantially beyond what would be expected of a loving spouse.

**448**  At VGH, Mrs. Kahlon slept overnight at the hospital. At RGH, the hospital was facing nursing shortages and job action by its staff. Ms. Kahlon provided care in repositioning him, among other things. She stayed there 21 hours each day, did daytime tube-feeds, helped with range of motion exercises and hired a speech language pathologist and practised with her husband. As Mr. Kahlon did not qualify for admittance to G.F. Strong, she submitted his application to Ponoka, including creating a video on his abilities.

**449**  At the Purdy Pavilion, where Mr. Kahlon was for a little over a month, Ms. Kahlon attended each morning, helped him with range of motion exercises, got him washed, dressed and into a chair.

**450**  At Ponoka, Ms. Kahlon testified that apart from being with her husband, she participated in his therapies in order to learn what she needed to do to care for him when she brought him home. She regularly provided support and care. On average, she was at the hospital 15.5 hours a day during the week and 21 hours a day on weekends. As the therapy staff did not work on the weekends, she helped out. She learned how to move her husband and was taught about all aspects of his care. She learned feeding skills and since returning home, has taught those skills, with the help of the speech therapist, to the other caregivers.

**451**  I have taken into consideration the fact that that the services Ms. Kahlon provided at Ponoka and at the other institutions must be assessed in light of the fact that Mr. Kahlon was generally receiving 24 hour care from professionals at the time. However, at Ponoka, I find that she provided extensive care every day and evening, slept over on the weekends to assist him and used the hospital van to take him on outings.

**452**  The amount of work she has expended since Ponoka is perhaps best understood by considering how Mr. Kahlon's required care is provided. Apart from being cared for by Ms. Kahlon, Mr. Kahlon currently receives some home care assistance, attends the Richmond Kinsmen Centre and spends time with his mother and father once per week. Assisted by 30 hours of home care support, Ms. Kahlon participates in all aspects of his care except when she has 4 hours of respite each week or when her husband is with his mother in her care. The 30 hours of home care that is provided includes travel time. Ms. Kahlon estimates she also must be at home 40% of the time the caregivers are there.

**453**  Ms. Kahlon has been responsible for, and is involved in, all aspects of Mr. Kahlon's care. The provision of that care is hands on, physically difficult and time consuming. Plaintiff's counsel described it this way:

If she is not directly providing care, she makes sure all personnel involved in her husband's care are supervised and motivated and up to date on the current procedures, ensuring that his needs are constantly being met and he is safe. If there is a recreational activity, such as going to a movie or going to a social gathering, she makes arrangements, drives, dresses him and coordinates the details of the activity for Mr. Kahlon. If she is not at home she must co-ordinate activities and be available on her cell phone.

I find that to be an accurate review.

**454**  As I noted earlier, where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will normally award the lower amount. In this case, the parties are agreed that Ms. Kahlon would have earned $374,224 in the relevant period (namely, the entirety of the pre and post Ponoka period) had she continued her normal employment as a teacher. I note that UBC Hospital suggests that her opportunity cost for the period post Ponoka is $246,000. The plaintiff's counsel argues that neither amount is a fair reflection of Ms. Kahlon's true opportunity cost as it fails to consider that she might have worked overtime, that she lost career advancement possibilities given her time away from her profession, and, there has also been a personal toll in taking care of her husband in terms of her health and family aspirations.

**455**  The plaintiff argues that by any measure, the cost of independently providing the care services provided by Ms. Kahlon substantially exceeds the opportunity cost. I find that to be true.

**456**  In my view, the bulk of the in trust award for Ms. Kahlon must relate to the period after Ponoka; a more modest part should apply to the period while he was at Ponoka and that before when he was at Vancouver General, Richmond General and Purdy Pavillion. During that time, Ms. Kahlon provided care beyond that expected of a spouse and also learned the skills to take care of him and teach others to take care of him when he returned home. At their home in Richmond, she has provided care far beyond what might be expected of a spouse.

**457**  The amount of the award is not easy to assess, and I should approach a claim of this sort cautiously. Using opportunity cost as a guide and recognizing the very substantial extent of the services that Ms. Kahlon has provided, services that I find go far beyond that which would be expected from the family relationship, I make a total in trust award in favour of Ms. Kahlon in the sum of $350,000.

**458**  I have reached the sum of $350,000 on the following basis. The services provided by Ms. Kahlon, I find, are over and above what would be expected of a family member. The cost of providing those services is unclear, but it is at least the amount I have ordered, given the lengthy hours and the nature of the services that were put in by Ms. Kahlon. The opportunity cost, while a check to determine a reasonable award, must reflect the true opportunity cost to the person making the claim. In that sense, the arguments made by the plaintiff of the true opportunity cost have some force and are worthy of consideration. I must also take into account the extensive time spent by Ms. Kahlon and the high quality and the difficult nature of the services she has provided for her husband.

**459**  Considering all of the above, I have concluded that $50,000 for the period before November 2003 and $300,000 for the period after is appropriate.

**460**  I turn to the in trust claim for the parents. Mrs. Kahlon is 67 and her husband is 78 years old. Mr. Kahlon visits his mother around noon on Friday and sleeps for few hours. Then, after watching television or listening to music with his mother, he is tube fed by her and goes to bed at around 8 pm. Mrs. Kahlon generally sleeps in the same room as her son. Her son has woken up four or five times a night moaning but medication has improved the muscle spasms he suffers from.

**461**  Mrs. Kahlon prepares and provides the morning tube feed to her son. Homecare of two hours' duration is provided now on Saturday morning, during which time the caregiver and Mrs. Kahlon give him sponge baths, brush his teeth, dress him, and get him in his wheelchair. After this, the homecare provider leaves and Mrs. Kahlon provides her son with his lunch. He naps for two to three hours a day while at her house and is picked up by Ms. Kahlon at 7:00 p.m. on Saturday night.

**462**  At the outset, Mrs. Kahlon attended at the hospital and went to Ponoka after her husband had first visited. At that time, I find that the parents were unsure whether Michelle Kahlon would remain, and Mr. Kahlon's mother, in particular, learned how to provide care for their son. In fact, Michelle Kahlon has been remarkably loyal and supportive of her husband, providing care far beyond what would be expected from a family relationship. Michelle Kahlon became her husband's committee in 2004.

**463**  In the circumstances, I make an in trust award of $75,000 for the parents, and in order that there is no duplication, I note that includes the amount paid by the plaintiff's mother to the caregiver of $28,000.

**10. Special Damages**

**464**  As I earlier noted, the claim for special damages for expenses incurred by Michelle Kahlon is not in dispute.

**465**  However, the claim for special damages in connection with the expenses incurred by the parents is, and the positions of the defendants in opposing it are somewhat different. I note that the parents' earlier claim for hyperbaric oxygen has been dropped.

**466**  The plaintiff seeks the sum of $171,408 for expenses incurred by his parents, Mr. and Mrs. Kahlon. The main claims in dispute are the cost to the parents of moving to a new home that would accommodate the needs of their son as well as the cost of travelling to and residing in Ponoka while their son was there.

**467**  The defendant doctors say that the claim for special damages should be reduced by the claim for the cost of the moving.

**468**  The defendant hospital also has that objection but challenges as well 2 of the cost of for the attendance by the parents at the hospital in Ponoka.

**469**  I address first the parents' moving costs, which are opposed by all defendants.

**470**  Mr. and Mrs. Kahlon have claimed the sum of $58,343, which they incurred in selling their home and buying one which, in their view, was more suitable for their son. The claim here is not for renovations to the plaintiff's home or the parents' home, but the costs of the realty commission and the late closing costs as a reasonable estimate of providing accessible housing. They say that the change in housing was done to accommodate their son's needs.

**471**  The defendants' position is not that the quantum is unreasonable or in principle not recoverable but that they should pay compensation either for the cost of accessible housing for Mr. Kahlon's main residence or the cost of his parents' move to a new house, but not both, particularly, they submit, as there is no medical requirement that the plaintiff stay with his parents part of the week.

**472**  In *Zapf v. Muckalt* [*(1995), 11 B.C.L.R. (3d) 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B12B-00000-00&context=), [*[1996] 1 W.W.R. 175*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B12B-00000-00&context=) (S.C.), Humphries J. held at 318 that "the defendants should either have to pay for renovations in the house, which I am satisfied the plaintiff wishes to purchase in the near future, ... or should pay for the set of renovations already done, but not both." This finding was upheld in the Court of Appeal, [*(1996), 26 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1MM-00000-00&context=), at para. 42, [*84 B.C.A.C. 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1MM-00000-00&context=), where Donald J.A. said "whether an allowance should be given for more than one set of renovations is bound up in the facts and I think the result must largely depend on the trial judge's overall appreciation of the case."

**473**  At the time the parents moved it was unclear to the parents whether Michelle Kahlon was going to stay with her husband. The parents bought a new home that was more appropriate and accessible for their son in 2004. Mrs. Kahlon Sr. testified that they wanted to be prepared if Michelle Kahlon did not want to take care of their son. Given the fact that Mr. Kahlon had returned from Ponoka less than a year earlier and the catastrophic incident that disabled their son had occurred only shortly after their marriage, the parents' concern about having a place to adequately care for their son was reasonable. It is remarkable that Ms. Kahlon has provided the care for her husband that she has. However, the parents' expense at the time was reasonable and I find this cost to be recoverable.

**474**  I turn to the cost of travelling to and staying in Ponoka. The defendant hospital opposes 2 of the amount claimed. The evidence shows that the parents took turns going to Ponoka and staying at a motel within a few miles of the hospital, so that they could visit their son and, in the case of Mrs. Kahlon, participate in his care and therapy and learn how to care for her son.

**475**  I am also satisfied that the claim for travel expenses is reasonable. The question is whether there is evidence adduced that suggests that Mr. Kahlon's parents' visits provided therapeutic or medical benefit. I find that it does and allow this claim for special damages as well. In all of the circumstances, I allow the parents the special damages claim in the amount of $171,408.

**476**  I should add that given my conclusion with respect to the cost of attendant care, the agreed amount of $18,000 should not be deducted from the damage award.

**11. Contingency Factors**

**477**  The plaintiff seeks an increase in future care costs based on a contingency that Mr. Kahlon's circumstances will deteriorate and his costs will increase. The plaintiff relies on *Morrison (Committee of) v. Cormier Vegetation Control Ltd*., [*[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=), 1998 BCSC 2067; and *Mitchell v. We Care Health Services Inc.,* [*2004 BCSC 902*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X04N-00000-00&context=), where Boyd J. and Kelleher J. respectively added a positive contingency of 15% and 5% for the fact that the contingencies are in one direction, that is, that the plaintiff's circumstances will become worse and require further care.

**478**  The defendants argue that Ms. Landy must have considered this in her plan and that certain costs that were conceded by the defendants, such as physiotherapy and a sum for community involvement, may tend to overcompensate Mr. Kahlon. If any expert had felt that further nursing care would be required in the future, the defendants argue that it would have appeared in their opinions.

**479**  The defendants submit that if in fact Mr. Kahlon does deteriorate, as indicated by Dr. Van Rijn's opinion, he will probably develop dementia and will likely require admission to an institution and thus have lower care costs; because of that possibility, the defendants argue there should likely be a negative contingency.

**480**  In all the circumstances, I think that the positive and negative contingencies generally balance out. While Mr. Kahlon may require additional care, I have considered that as part of my assessment of the cost of attendant care. Therefore, I do not think that applying an overall contingency factor is appropriate.

**12. Summary**

1. The plaintiff shall have judgment against UBC Hospital.
2. The claims against Dr. Li, Dr. Khan and Dr. Bermann are dismissed.
3. The plaintiff is contributorily negligent.
4. The defendant UBC Hospital is 70% at fault.
5. The plaintiff's life expectancy is 17 years from the date of these reasons.
6. The damages issues that were not agreed are decided as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (a) | Attendant care | $210,000 annually |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | Rehabilitation aide | $27,500 annually |  |

1. Speech language nil therapist
2. Swallowing $5,000 annually therapy
3. In-trust claim

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ms. Kahlon | $350,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mr. & Mrs. Kahlon | $75,000 |  |

1. Special damages $171,408 for parents

J.S. SIGURDSON J.

**End of Document**

[***Mineault v. Kamloops (City), [2017] B.C.J. No. 374***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N1F-TXX1-DXPM-S4BG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

S.A. Donegan J.

Heard: October 13, 2016.

Judgment: February 27, 2017.

Docket: 50773

Registry: Kamloops

**[2017] B.C.J. No. 374** | [*2017 BCSC 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY8-H081-JSJC-X1XS-00000-00&context=) | [*276 A.C.W.S. (3d) 715*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY8-H081-JSJC-X1XS-00000-00&context=) | [*64 M.P.L.R. (5th) 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY8-H081-JSJC-X1XS-00000-00&context=) | [*80 R.P.R. (5th) 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY8-H081-JSJC-X1XS-00000-00&context=) | [*2017 CarswellBC 524*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY8-H081-JSJC-X1XS-00000-00&context=)

Between Ruth Mineault, Plaintiff, and City of Kamloops, Jacqueline Balaski and Derek Learmonth, Defendants, and Jacqueline Balaski, Derek Learmonth and the City of Kamloops, Third Parties

(106 paras.)

**Case Summary**

**Tort Law — *Negligence* — Duty and standard of care — Duty of care — Standard of care — Causation — Causal connection — Foreseeability and remoteness — Strict liability (rule in Rylands v. Fletcher — Non-natural user of land — Water and flooding — Summary trial of plaintiff's action against defendants allowed — Parties owned adjacent residential properties — Plaintiff brought action for damage to driveway caused by leak from defendants' lawn irrigation system — Rule in Rylands v. Fletcher was not engaged as defendants' use of lawn irrigation system was not non-natural use of land — Defendants owed duty of care to neighbouring property to inspect and repair lawn irrigation system, particularly as plaintiff's property was lower than defendants' property — Defendants breached standard of care — Leak caused damage to plaintiff's property — Plaintiff awarded damages of $18,732.**

|  |
| --- |
| Summary trial of the plaintiff Mineault's action against the defendants, Balaski and Learmonth. The parties once owned adjacent residential properties. When the defendants purchased their property in 2010 it came with a lawn irrigation system. From that point until they sold the property in 2015, Learmonth would blow out the lines each fall remove residual water from the lines for the winter season. In 2013 water began to run out of Mineault's driveway. City employees determined the water was coming from a leak in the defendants' irrigation system. Mineault's driveway was undermined and had to be replaced. Mineault's insurance company would not pay for the cost of the repairs to as the leak did not emanate from Mineault's property. The City would not pay for the repairs because the City waterlines were not the source of the leak. Mineault sought damages against the defendants, alleging their lawn irrigation system leaked water onto her property, compromising the foundation beneath her driveway to the extent that it needed to be replaced. Mineault claimed that the defendants' liability was grounded either on the basis of the rule in Rylands v. Fletcher, or in ***negligence***.  HELD: Action allowed.  Mineault failed to prove the defendants' use of a lawn irrigation system in their backyard was a non-natural use of land. According, the rule in Rylands v. Fletcher was not engaged and Mineault's claim on that basis failed. The defendants knew their property lay above Mineault's property. They also knew they needed to blow out the irrigation system each year to prevent damage and potential leaks, and that water flowed downhill. The defendants owed a duty to their neighbours, including Mineault, who they might reasonably foresee would be at risk of harm if water were allowed to flow from the irrigation system. A leaky irrigation system was a foreseeable consequence of failing to properly maintain the system. A prudent homeowner would inspect the irrigation lines at the commencement of a watering season and periodically thereafter to assess the need for any repairs and make those repairs. The defendants breached that standard of care. Learmonth blew out the irrigation lines in the fall of 2012 without the requisite knowledge required to do so properly. The defendants did not inspect the irrigation lines at the commencement of the 2013 watering season, or at any time prior to the discovery of the leak. The leak caused the damage to Mineault's driveway. Mineault was entitled to the cost of repairs in the amount of $18,732. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Appendix B, Rule 9-7

**Counsel**

Counsel for the Plaintiff: L.H. Coulter.

Counsel for the Defendants and Third Parties, Jacqueline Balaski and Derek Learmonth: J.C. MacDonald.

No one appeared for the Defendant and Third Party, City of Kamloops.

**Reasons for Judgment**

|  |
| --- |
| **S.A. DONEGAN J.** |

**INTRODUCTION**

**1**  This is a summary trial initiated by the defendants, Jacqueline Balaski and Derek Learmonth (the "defendants").

**2**  The parties once owned adjacent residential properties in Kamloops, British Columbia. The plaintiff seeks damages against the defendants, alleging their lawn irrigation system leaked water onto her property, compromising the foundation beneath her driveway to the extent it needs to be replaced. She says liability is grounded either on the basis of the rule in *Rylands v. Fletcher* (1868), LR 3 HL 330, or in ***negligence***. Her claim against the defendant, City of Kamloops, is no longer advanced.

**3**  Both parties agree this matter is suitable for determination pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*Civil Rules*], as do I. This case is well suited for summary trial. The Affidavits, Examination for Discovery transcripts and admissions tendered are all sufficient for the Court to find the facts necessary to decide the issues of fact or law. Given the discrete issues for my determination and the amounts at stake, a summary determination is just in all of the circumstances.

**FACTS**

**4**  Most of the facts are not in dispute. Where they are, I will identify them and resolve the dispute.

**5**  The plaintiff owns property at 872 Linthorpe Road in Kamloops (the "plaintiff's property"). From August 2010 until May 2015, the defendants owned property at 1640 Hillcrest Avenue in Kamloops (the "defendants' property"). The plaintiff's property sits below the defendants' property. Their mutual property line was, at the relevant times, marked by a row of cedar hedges located on the defendants' property. The controversy between the parties revolves around a leak from the irrigation system watering the hedges.

**6**  When the defendants purchased their property in August 2010, the property came with an installed lawn irrigation system. It consisted of five separate zones. Four of the zones involved sprinklers and the fifth zone, watering the hedges, used a dripline. Upon purchase, the defendants tested the lawn irrigation system and noticed no issues with its operation. From that point until they sold the property in 2015, the defendant, Mr. Learmonth, received assistance from a family member and/or a friend each fall to "blow out" the irrigation lines. This is a process that uses an air compressor to remove residual water from the lines for the winter season. The aim is to prevent water from freezing in the lines over the winter which may cause them to crack.

**7**  Brett York, an irrigation maintenance worker, has provided maintenance services to irrigation systems for hundreds of people in Kamloops and blown out irrigation systems thousands of times. He deposed that when blowing out irrigation lines, it is essential to use the correct air pressure. He explained that too much pressure will cause cracks to form in the sprinkler heads, valves or irrigation lines. Too little pressure will leave water in the system to freeze and expand over the winter, with the same potential results.

**8**  In mid-August 2013, Dennis Forrester, the plaintiff's brother-in-law, noticed water running from the driveway of the plaintiff's property onto the street. The water was running in a steady flow from a black drainage pipe running parallel to the driveway and from the driveway itself. The pipe lies a few feet to the left of the plaintiff's driveway (when facing the house) and drains into Linthorpe Road.

**9**  Upon this discovery, Mr. Forrester informed the plaintiff, who was out of town at the time for medical treatment. The plaintiff contacted a lawn irrigation company, whose owner determined that her property was not the source of the running water.

**10**  The plaintiff then contacted the City of Kamloops (the "City"), which sent workers to investigate. As part of their investigation, they cut a roughly four foot by four foot hole in the driveway of the plaintiff's property to access the service box and check the curb-stop. The location of service boxes in areas difficult to access, including beneath concrete driveways, is a common occurrence.

**11**  Mike Aldrich, an experienced City utilities maintenance crew leader who cut the hole in the plaintiff's driveway, deposed that the weather in Kamloops had been quite warm and dry in the weeks leading up to and including the time he worked on the plaintiff's property. When he attended the plaintiff's property on or about August 14, 2013, he observed water running from the plaintiff's driveway into Linthorpe Road. After he cut the hole in the plaintiff's driveway, his next step was to vacuum the soil to enable access to the service box. While doing this, he observed something unusual. He deposed that ordinarily, the exposed soil under a driveway is hard and able to hold its position. However, in this case, the exposed soil was highly saturated with water such that it began sloughing in from above.

**12**  After vacuuming out the saturated soil to enable access to the service box under the hole in the driveway, Mr. Aldrich, Mr. Forrester and Brandon Bullock, another City employee working in leak detection, observed that the driveway was undermined. They observed a large cavern extending across most of the driveway's left side up to the garage footings. In other words, not only was the quadrant of the driveway containing the freshly cut hole undermined, the undermining was prevalent in the other quadrants under the driveway as well.

**13**  Mr. Aldrich shut off the water running through both the curb-stop and the main line and observed that water continued to leak into the hole in the driveway and onto the street. In his opinion, the water was coming from somewhere other than the curb-stop and the main line. Mr. Bullock observed that the majority of the water leaking in from around the curb-stop was coming from the direction of the defendants' property.

**14**  City employees tested the plaintiff's service line and concluded it was not leaking. They then expanded their investigation to neighbouring properties, including the defendants'.

**15**  With their permission, Mr. Bullock investigated the defendants' backyard. He found an irrigation system, including a drip irrigation line watering the cedar hedges bordering the plaintiff's property. He found the ground near the hedges was heavily saturated by water. He found it to be soft, wet and spongy, much more so than other parts of the defendants' backyard. He called Mr. Aldrich. Mr. Aldrich made the same observations about the ground in the area of the hedges, noting that the saturated area was about ten feet by ten feet in size.

**16**  The saturation of the ground on the defendants' property is a source of controversy. Mr. Learmonth testified in his Examination for Discovery that when he examined the area in question near his cedar hedges, he observed only a small amount of water, as "if you were to pour a bottle of water on gravel, and it looked like there was water on it." He denied there was any pooling of water, any saturation, any mud, or that the ground was spongy.

**17**  In this area of the evidence, I accept the evidence of Mr. Bullock and Mr. Aldrich over that of Mr. Learmonth. Mr. Bullock and Mr. Aldrich are independent witnesses whose job it was to investigate potential sources of the water running from the plaintiff's driveway. They are disinterested persons who were paying particular attention for signs of water. They have no reason to exaggerate their evidence. Their evidence is consistent with one another. I find their evidence to be credible and reliable and accept it over that of Mr. Learmonth.

**18**  After observing the ten foot by ten foot saturated area near the defendants' hedges, Mr. Aldrich also noticed that an irrigation pipe extending from the defendants' home was vibrating, even though the irrigation system was not running. In his experience, this usually indicates the presence of a leak. Mr. Learmonth was informed of the leak. The water to the pipe was shut off.

**19**  Mr. Learmonth first became aware of the leak in his irrigation system when informed by the City employees. Mr. Learmonth determined that the leak stemmed from a valve that controlled the dripline to the cedar hedges. He subsequently replaced that broken valve.

**20**  The day after the defendants' irrigation line was shut off, Mr. Forrester noticed that the flow of water from the plaintiff's property onto Linthorpe Road had slowed. After another two or three days, the flow of water stopped completely.

**21**  The City employees did not locate another possible source of the water seepage through their investigation.

**22**  Mr. York deposed that a crucial part of maintaining an irrigation system is to check it for leaks when first using it each season. He deposed that it is especially important to check zones with soaker or driplines for leaks because it is harder to observe such leaks from a casual glance. He also deposed that pressure from a compressor is more likely to crack an irrigation system if a person only blows out one zone of the irrigation system at a time.

**23**  Mr. Learmonth had the assistance of his wife's grandfather, Peter Balaski, and/or Peter Balaski's friend, Dave Teichroeb, in blowing the water out of his irrigation lines each fall. The fall of 2012 was the only year that Mr. Teichroeb did not provide assistance. Mr. Learmonth and Mr. Balaski blew the water out of the lines themselves that year. They blew out the lines in each zone in sequence, rather than blowing out all zones at once. They used a rented air compressor and were unaware of the pressure they used.

**24**  The defendants did not check the irrigation lines at the beginning of each watering season. Mr. Learmonth simply believed that the process to blow out the irrigation lines was successful because each spring the sprinklers worked.

**25**  In the summer of 2013, Mr. Learmonth ran zone 5, the zone containing the soaker line to the cedar hedge, for 40 minutes every other day. He and his family did not use their backyard very often - once per month at most. Other than replacing a nozzle at some point and undertaking the annual procedure each fall to blow out the irrigation system, the defendants did not otherwise maintain or inspect their lawn irrigation system.

**26**  After seeing the extent of the undermining beneath the plaintiff's driveway, City workers provided a temporary repair to the area they had excavated by filling that hole with gravel. Prudently, the workers opted not to patch the hole they created with cement, as it only would have covered up the undermined driveway, which clearly needed repair.

**27**  The plaintiff's insurance company would not pay for the cost of the repairs as it was determined the leak did not emanate from the plaintiff's property. The City would not pay for the cost of the repairs because the City waterlines were not the source of the leak. The plaintiff obtained two quotes from two repair companies in May or June of 2014. These quotes were updated in 2015.

**28**  Specifically, the plaintiff obtained a quote from Ben Pregent, of Pronto Enterprises Ltd. Mr. Pregent attended the plaintiff's property in early June of 2014. He observed that at least half of the plaintiff's driveway was undermined and determined that in order to properly repair it, he would have to demolish and remove the existing concrete of the entire driveway, excavate and rebase the supporting material beneath, pour new concrete and remove and replace the retaining wall that borders the left side of the driveway. Mr. Pregent is of the view that the driveway cannot properly be repaired without first removing the retaining wall due to its proximity to the driveway. He quoted the cost of these repairs at $16,422.75 on June 4, 2014. Mr. Pregent updated this quote on April 29, 2015, outlining that the total cost of repairs at that time would be $19,697.80. He deposed that the cost of materials has increased consistently between 2014 and 2016.

**29**  The plaintiff obtained a second quote from Russ Bouveur of Big Horn Excavating and Landscaping Inc. Mr. Bouveur attended the plaintiff's property in mid-June of 2014. His findings were the same as Mr. Pregent's. He determined that a substantial amount of supporting material beneath the driveway had been washed away. In order to properly repair the driveway, he would have to tear up and remove the old concrete on the entire driveway, install a new base layer, pour new concrete and remove and replace the existing retaining wall. Mr. Bouveur's 2014 quote was very similar to Mr. Pregent's - $16,254.00. Mr. Bouveur updated this quote in April of 2015. Due to the increased cost of material, his quote was increased to $18,732.00.

**30**  The defendants retained Thompson Valley Restoration to investigate and take photographs of the area claimed to be damaged by the plaintiff. Reg Dennill, a Project Manager at Thompson Valley Restoration, took photographs of the driveway and surrounding area, and prepared an estimate of the cost to repair the damaged driveway. His May 12, 2014 quote represents the cost to repair the quadrant of the driveway that had been cut and excavated by the City only. The estimated cost of repairing that area was said to be $4,804.20.

**31**  Since the damage was discovered, the plaintiff has advised others not to park on any part of the driveway. She absolutely forbids people to park on the left hand side of the driveway. She does this as a result of safety concerns related to the undermining of the driveway.

***RYLANDS v. FLETCHER***

**32**  The plaintiff first argues the defendants are liable for the damage caused by the water escaping their property based on the rule in *Rylands v. Fletcher*.

**The Rule**

**33**  This rule of strict liability stems from decisions of the English Court of the Exchequer and House of Lords in the 1860s. In this case, a land owner granted permission to the defendants, Ryland & Horrocks, to build a water reservoir on his land to supply their textile mill. The plaintiff, Fletcher, had a coal mining operation on the same land. The reservoir and the mine shafts were near each other. The water reservoir burst into an unused mine shaft, flooding Fletcher's mining operation. ***Negligence***, nuisance and trespass, as formulated at the time, did not apply in the circumstances.

**34**  For a unanimous Court, Blackburn J. stated the rule as follows at 279:

...the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

**35**  The House of Lords affirmed the lower court's decisions. Lord Cranworth essentially adopted the rule articulated by Blackburn J. above, a rule which distinguishes between dangerous and ordinarily safe activities. However, Lord Cairns, in a concurring decision, distinguished instead between a defendant's "natural" and "non-natural" use of land. This difference in wording "has been responsible for creating much of the subsequent debate concerning the principles' proper application": *Lewis N. Klar, Q.C., Tort Law*, 5th Ed. (Toronto: Carswell, 2012) at 645.

**36**  In *Smith v. Inco Limited*, [*2011 ONCA 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4N1-00000-00&context=), the Ontario Court of Appeal described the rule and its lineage this way:

[68] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance "likely to cause mischief". The exact reach of the rule and the justification for its continued existence as a basis of liability apart from ***negligence***, private nuisance and statutory liability have been matters of controversy in some jurisdictions: see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.); *Burnie Port Authority v. General Jones Pty. Ltd*. (1994), 179 C.L.R. 520 (Aust. H.C.); Murphy, "The Merits of *Rylands v. Fletcher"*. In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or ***negligence***.

**37**  Though this rule is one of strict liability, certain defences are available, including an act of God, consent of the plaintiff, default of the plaintiff, an act of an intervening third party, and statutory authorization.

**38**  While the rule has various formulations, the Ontario Court of Appeal in *Smith* at para. 71 and the British Columbia Supreme Court in *John Campbell Law Corp. v. Strata Plan 1350*, [*2001 BCSC 1342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6157-00000-00&context=) at para. 22 framed it as requiring the plaintiff to prove the following elements:

1. The defendant made a "non-natural" or "special" use of his land;
2. The defendant brought onto his land something that was likely to do mischief if it escaped;
3. The substance in question in fact escaped; and
4. Damage was caused to the plaintiff's property as a result of the escape.

**39**  As these reasons will disclose, I need not go any further than the first element as I conclude the plaintiff has not proven the defendants made a "non-natural" or "special" use of their property.

**Non-Natural Use**

**40**  In *Rickards v. Lothian*, [1913] AC 263, the House of Lords narrowed the rule in *Rylands v. Fletcher* to apply to only "non-natural" uses of land. Moulton L.J. stated at 280:

It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

**41**  In *Tock v. St. John's Metropolitan Area Board*, [*[1989] 2 S.C.R. 1181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652P-00000-00&context=), Justice La Forest affirmed this "definitive statement" by Moulton L.J. regarding the requirement of a "non-natural" use of land and emphasized that it is a flexible concept at 1189:

The courts...have, on the basis of this qualification, interpreted the notion of non-natural use as a flexible concept that is capable of adjustment to the changing patterns of social existence.

**42**  Mr. Justice Melnick, in *John Campbell Law Corp*, adopted the following discussion of "non-natural" at para. 31:

[31] Therefore, in Remedies in Tort (Canada: Carswell, 1987) at 21-20, the authors have concluded that non-natural must mean: special, exceptional, unusual or out of the ordinary. They further state that the courts not only look to the object or activity in isolation, but to the place and manner in which it was maintained and its relation to its surroundings. Time, place, circumstance and purpose are also material considerations.

**43**  Madam Justice Ross relied upon the above definition in *Roberts v. Canadian Pacific Railway Co.*, [*2006 BCSC 1649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2RR-00000-00&context=) at para. 66.

**44**  One of the most significant changes in society since the rule in *Rylands v. Fletcher* first emerged is the "ever-increasing" regulation of land use, development and planning: *Tock* at 1189. A court must consider this modern regulatory context, along with the place, time and manner of the use of land in determining whether a use is "non-natural": *Smith* at para. 97 and *Roberts* at para. 67.

**45**  The Ontario Court of Appeal in *Smith* discussed this concept at para. 98:

[98] The approach to non-natural user taken in *Tock* and in *Cambridge Water Co*. restricts those situations in which *Rylands v. Fletcher* applies. The non-natural use requirement of the *Rylands v. Fletcher* rule serves a similar role to the "give and take between neighbours" principle that is applied when determining whether one person's interference with another person's use and enjoyment of his property constitutes an actionable nuisance. Like the reasonable user inquiry in cases involving amenity nuisance, the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user. The nature and degree of the risk inherent in the use is obviously an important feature of this inquiry, but as *Tock* demonstrates, it is not the entire inquiry: see *Cambridge Water Co*. at pp. 299-300.

**46**  As the rule in *Rylands v. Fletcher* emerged in a case where water escaped from one person's property to another, it is hardly surprising that numerous cases since then have considered the rule in similar circumstances. However, plaintiffs in subsequent cases have generally had less success than Mr. Fletcher in establishing that a defendant who allows water to escape his or her property should be held strictly liable. This may reflect the fact that the use and storage of water for various purposes has evolved to be a common occurrence.

**47**  In this regard, Lord Moulton in *Rickards* held at 281-282:

The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who install or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no ***negligence***.

**48**  In *Tock*, the Supreme Court of Canada found that a municipal authorities' construction and operation of a sewer system was not a "non-natural" use of the land. In so finding, Justice La Forest noted that sewer systems are "an indispensable part of the infrastructures necessary to support urban life" and are "ordinary and proper for the benefit of the community": at 1190.

**49**  In *John Campbell Law Corp.*, the plaintiff sought damages after sewage effluent backed up into its strata unit due to a blocked sewer pipe. In concluding that the defendant strata owners' use of a sewer pipe for domestic water and sewage removal did not constitute a non-natural use of their land, the court reviewed a number of earlier decisions involving the escape of water from municipal infrastructure or household systems. There was found to be a rather clear consensus in Canadian law that sewer systems in domestic water supplies were ordinary uses of land.

**50**  Similarly, in *Carmel Holdings Ltd. v. Atkins*, [*1977 CarswellBC 382*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-JC5P-G0WV-00000-00&context=) (SC), Craig J. observed at para. 22:

In determining whether to apply the rule, courts have distinguished, also, between things which are inherently dangerous and things which are not inherently dangerous. If a thing which escapes from the land is inherently dangerous and harm results, then there is "strict liability" under the rule in *Rylands v. Fletcher*. If the thing which escapes the land is not inherently dangerous, there is not a liability under the rule unless there has been non-natural use. Water is not an inherently dangerous thing and if water escapes from an occupier's normal domestic water supply the rule will not apply. On the other hand, if an occupier accumulates or stores a large amount of water on his land and it escapes, this is a non-natural use and he is liable for harm... [Emphasis added]

**51**  In *Guerard Furniture Co. v. Horton*, [*1978 CarswellBC 631*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62D7-00000-00&context=), the plaintiff leased a portion of the ground floor of a two-storey building owned by the defendant. The plaintiff operated a furniture store in the leased premises. A toilet in a washroom on the second floor of the building leaked water through the ceiling and walls and damaged the plaintiff's goods. Citing *Carmel Holdings Ltd.*, Judge MacDonald of the County Court concluded at para. 16:

I cannot find here that the water contained within and flowing through the pipes and washroom fixtures contained on the second floor of the defendants' building on July 7, 1977, was inherently dangerous, nor can I find that it constituted a non-natural or special use of the land.

**52**  The County Court in *Kinaschuk v. Day*, [*1986 CarswellBC 2651*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-210X-00000-00&context=) faced a situation similar to the case at bar (and in Kamloops no less). The plaintiff and defendant owned adjoining properties, with the plaintiff's property situated approximately 12 feet below the defendant's. A retaining wall existed between the two properties and the defendant had a garden which adjoined the plaintiff's lot. The defendant began to water a fruit tree one day around 8:30 a.m. He left the hose running on full and intended to turn it off before he left for work at noon, but forgot. The plaintiff came home at 3:30 p.m. and saw that the defendant's property had slid down against the retaining wall, toppling one portion of it and cracking another.

**53**  The plaintiff brought its claim for damages based on the rule in *Rylands v. Fletcher*. Citing the House of Lords decision in *Rickards*, Judge Houghton concluded at para. 6:

In my opinion the use of domestic water for irrigation of a garden in the city of Kamloops is a normal use of the property and liability will attach only if ***negligence*** is shown. This is not a case of accumulating water in large quantities which becomes dangerous in itself.

**54**  The court in *John Campbell Law Corp*. interpreted *Kinaschuk* to mean that "the ordinary use of water in private residences is natural and not inherently dangerous": para. 46.

**55**  In the case at bar, the plaintiff submits that the defendants "made a non-natural use of their land by installing an irrigation system". I do not agree. The overwhelming weight of the authorities canvassed above supports the conclusion that domestic water systems, including lawn irrigation systems, do not constitute a non-natural use of land.

**56**  The plaintiff relies specifically on *Carmel Holdings Ltd*. to suggest that the following uses are non-natural:

1. Accumulating or storing a large amount of water on a property; and
2. Constructing an artificial work that alters the flow of water and causes damage to a neighbour.

**57**  In my view, these propositions do not assist the plaintiff because the defendants undertook neither activity.

**58**  The plaintiff also relies on *Canadian Pacific Railway Co. v. Parke*, [1899] A.C. 34, a decision of the Judicial Committee of the Privy Council, for the proposition that a person will be liable if they damage another person's property through irrigation, even if their conduct is not negligent.

**59**  *Parke* is distinguishable not only on its facts, but also in respect of its social context. In that 1899 case, a land owner in the Thompson River Valley diverted water from two creeks to irrigate his lands under statutory authorization. The statute also required him to carry off the surplus water from his land, which he apparently did not do. His lands were located on benches above the Thompson River. The property was approximately 800 metres from the railway line, which was closer to the river. Water saturated the soil and caused occasional landslides toward the river, damaging the railway line.

**60**  In reasons indexed at [*1897 CarswellBC 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6N1-FH4C-X2HC-00000-00&context=), the Full Court of British Columbia noted that the plaintiffs relied on the rule in *Rylands v. Fletcher*, but that the defendants were exercising a statutory right: para. 12. While this lower court concluded that the statutory language authorizing the water withdrawals was imperative, the Privy Council disagreed. The Privy Council did not refer to the rule in *Rylands v. Fletcher*, but framed the issue this way at para. 23:

...whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of ***negligence***, to inflict any amount of injury upon his neighbour without incurring responsibility.

**61**  *Parke* concerned the scope of the defence of statutory authority to avoid liability under the rule in *Rylands v. Fletcher*. Implicit in the decision is the notion that bringing water onto land is a non-natural use. However, it is important to remember that the concept of "non-natural" use is flexible and one that is "capable of adjustment to the changing patterns of social existence": *Tock* at 1189. Given the social conditions in which *Parke* was decided, the distinguishable facts and the more recent jurisprudence holding that the use of water in this context is a natural one, I find that *Parke* is not applicable to the present case.

**62**  From the above authorities and analysis, I conclude that the plaintiff has failed to prove the defendants' use of a lawn irrigation system in their backyard was a non-natural use of land. According, the rule in *Rylands v. Fletcher* is not engaged and the plaintiff's claim on this basis must fail.

***NEGLIGENCE***

**63**  The plaintiff asserts that the defendants, as neighbours, owed her a duty of care which was breached by their failure to properly maintain and inspect their irrigation system. She argues that the defendants used an improper pressure to blow out the irrigation lines in the fall of 2012 and thereafter failed to properly maintain and inspect the lines. These failures, alone or in combination, caused the leak, which caused damage by undermining her driveway.

**64**  In *Agar v. Weber*, [*2014 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B196-00000-00&context=), Smith J.A. set out the elements of ***negligence*** at para. 29:

[29] In ***negligence***, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [*[1999] 1 S.C.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41J-00000-00&context=) at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *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=); *Hussack v. Chilliwack School District No. 33*, [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=) at para. 54.

**Duty of Care**

**65**  The first question to consider in this action for ***negligence*** is whether the defendants owe the plaintiff a duty of care. This question focusses on the relationship between the parties, asking "whether this relationship is so close that one may reasonably be said to owe the other a duty to take care not to injure the other": *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. 4.

**66**  The duty of care analysis begins by considering whether the relationship between the parties falls into a category which the law already recognizes as giving rise to a duty of care. If it does, then the court need not consider the two-stage analysis set out in *Cooper v. Hobart*, [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=) and refined in subsequent cases: *Douglas v. Kinger (Litigation Guardian of)*, [*2008 ONCA 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64H8-00000-00&context=), leave to appeal refused [*[2008] SCCA No. 363*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F22N-X2V7-00000-00&context=) at paras. 13-14.

**67**  The law seems well settled that adjacent property owners owe each other a duty of care when it comes to the foreseeable risks of activities they undertake on their property. Lord Atkin, in *Donoghue v. Stevenson*, [1932] UK HL 100, famously discussed the neighbour principle, which taken more literally would support this position. More recent cases in British Columbia involving adjoining property owners and the flow of water from one property to the other supports the position that such neighbours owe each other a duty of care regarding that water.

**68**  For example, in *Orangeville Raceway Ltd. v. Adera Nurseries Ltd.*, [*[1995] B.C.J. No. 3061*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M211-00000-00&context=) (S.C.), the plaintiff sued an adjoining property owner in nuisance and ***negligence***. The defendant operated a nursery business, which involved significant irrigation. It had built several ditches to divert water off its property and onto the plaintiff's property. The winter rains in Victoria also contributed to the amount of water coming off the defendant's property. Portions of the plaintiff's property had become heavily saturated with water throughout the year and were unusable. The Court found the defendant liable in nuisance and also in ***negligence***, holding at para. 45:

...the overall failure of the defendant to consider the effects of its use of its land on the plaintiff's land amounts to ***negligence***. The defendant, because of its physical proximity to the plaintiff's land and the foreseeable risk of harm which the defendant's actions and operations created, owed a duty of care to the plaintiff. The damage to the plaintiff's land created by the water flow indicate a breach of that duty.

**69**  In *Kinaschuk*, discussed earlier in these reasons, the court addressed the duty of care issue this way at para. 8:

The first question is whether the defendant owed a duty of care to the plaintiffs. The defendant knew his garden lay above the plaintiffs' retaining wall and garden. He knew that from a few years before, water from watering his garden had run down into the plaintiffs' basement. The defendant had lived in his house many years and as he gardened, he must have been familiar with the type of soil which is described by the engineer as silt which dissolves when wet and is a common condition of the soils in the valley. The answer to the question must be that the defendant owed a duty to his neighbour whom he might reasonably anticipate would suffer loss if water were carelessly allowed to saturate the soil in his garden above the plaintiffs' lot.

**70**  In my view, the relationship between the plaintiff and the defendants in the case at bar falls into the category which the law already recognizes as giving rise to a duty of care. The defendants knew their property lay above the plaintiff's property. They knew they had an irrigation system on their property. They knew they needed to blow out the irrigation system each year to prevent damage and potential leaks. They knew, or certainly ought to know, that water flows downhill. The defendants owe a duty to their neighbours, including the plaintiff, who they might reasonably foresee would be at risk of harm if water were allowed to flow from the irrigation system.

**Standard of Care and Whether it was Breached**

**71**  The second question in a ***negligence*** action is whether the defendants' behaviour breached the standard of care.

**72**  The standard of care is not one of perfection. Rather, the standard of care must be one that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. What is "reasonable" is fact specific, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which will be incurred to prevent the injury. One may also look to external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards: *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 28.

**73**  The plaintiff alleges that the defendants breached the standard of care by failing to properly maintain and inspect their irrigation system. She argues that proper maintenance involves blowing out the lines at the conclusion of each watering season which includes using the correct pressure to blow out those lines as too much or too little pressure will result in cracks in the system causing leaks. Proper maintenance also involves regularly inspecting the system. By having a lay person, unaware of the pressure required to properly blow out the system, blow out the lines, by failing to inspect the system at the commencement of the 2013 watering season and by failing to repair degrading valves before they broke, the plaintiff says the defendants breached the standard of care owed to her.

**74**  The defendants contend that the plaintiff has failed to adduce sufficient evidence that their maintenance of the irrigation system fell below the standard of care of a reasonable homeowner. They point to the fact that they tested the irrigation system when they purchased the property in 2010 and determined it was in working order. They emphasize that they blew out the lines annually and were unaware of any leak in the irrigation system until City employees informed them in August of 2013. They quickly repaired the leak once they were informed.

**75**  I agree with the plaintiff's position here. A leaky irrigation system is a foreseeable consequence of failing to properly maintain the system. While the harm must be foreseeable to the reasonable person, the defendants in this case also foresaw the harm because they endeavoured to blow out their irrigation system each fall. The gravity of the foreseeable harm is uncertain, but it was clearly enough to compel the defendants to blow out the system each year. The burden to prevent the harm would be minimal.

**76**  A prudent homeowner in the circumstances of the defendants, aware of their irrigation system and its potential to leak if not properly maintained and their location in relation to the plaintiff's property, would inspect the irrigation lines at the commencement of a watering season and periodically thereafter to assess the need for any repairs and make those repairs. A prudent homeowner in the circumstances of the defendants would also conduct regular preventative maintenance on the system, including blowing residual water out of the lines at the end of each watering season. In so doing, a prudent homeowner would ensure that he or she was fully informed on how to properly maintain the system, including how to properly blow residual water out of the lines.

**77**  The defendants breached this standard of care. Mr. Learmonth and Mr. Balaski blew out the irrigation lines in the fall of 2012 without the requisite knowledge required to do so properly. The defendants did not inspect the irrigation lines at the commencement of the 2013 watering season, or at any time prior to the discovery of the leak.

**Damage**

**78**  The next question to be answered is whether the plaintiff sustained damage. Although quantum is in dispute, the evidence clearly proves the plaintiff suffered damage in this case.

**Causation**

**79**  The fourth and final question to consider in a ***negligence*** claim is whether the defendants' breach caused the plaintiff's harm in fact and law. This requires consideration of whether the evidence establishes the defendants' breach of their duty of care in fact caused the plaintiff's damage and whether the breach also caused the plaintiff's damage in law, or whether it is too remote to warrant recovery: *Mustapha* at para. 11.

**80**  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=), McLachlin C.J. set out the test for causation as follows:

[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, 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] HCA 31, 71 C.L.R. 637, at p. 649; *Bennett v. Minister of Community Welfare*, [1992] HCA 27, 176 C.L.R. 408, 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.

**81**  The Court in *Clements*, referencing *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=), also underscored the importance of the plaintiff establishing a substantial connection between the damage in question and the defendant's ***negligence***. At para. 21, the Court wrote:

... the usual requirement of proof of "but for" causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant's fault to the plaintiff's injury. Thus, Sopinka J. stated that if the injury likely was brought about by "neutral" factors, that is it would have occurred absent any ***negligence***, the plaintiff cannot succeed. To allow recovery where the injury was the result of neutral factors would neither further the goals of compensation, fairness and deterrence, nor comport with the theory of corrective justice that underlies the law of ***negligence***.

**82**  The plaintiff submits that the defendants' irrigation system was broken and leaking at the time water was discovered running out from her driveway onto the street in August of 2013. She says she has proven causation to the requisite standard. Specifically, she submits the evidence establishes that the leak in the defendants' irrigation line caused the damage underneath her driveway and that said leak was caused by the defendants' breach of their standard of care in maintaining and inspecting their irrigation system. In other words, but for the defendants' breach of the standard of care in maintaining and inspecting their irrigation system, the damage to her driveway would not have occurred.

**83**  The defendants submit the plaintiff has failed to prove causation. They first say the only damage proven is the damage caused by the City when they cut a hole in the plaintiff's driveway. This damage was necessitated by the location of the water shut off valve, which was installed underneath the plaintiff's driveway in contravention of municipal bylaws. They take the position that the plaintiff has failed to prove they breached the standard of care, but assert that if they did breach the standard of care, the plaintiff has failed to prove that their breach caused the leak and that the damage caused was not reasonably foreseeable by them.

**84**  I find the plaintiff has proven causation, in fact and in law, on a balance of probabilities.

**85**  First, I find the evidence establishes the excessive water that was seen to run out from the plaintiff's driveway in August of 2013 emanated from the defendants' irrigation system leak. I reach this conclusion on the basis of the totality of the evidence, which points only in this direction.

**86**  Kamloops weather had been warm and dry for weeks prior to the discovery of the water running out from the plaintiff's driveway. The defendants admit the dripline to their cedar hedge was found to have a leak at the time of this discovery. I accept the evidence of the City investigators who observed substantial saturation of a sizeable area of ground near the hedges on the defendants' property. The plaintiff's property is located immediately adjacent and downhill from this hedge. Investigation revealed no other leak or source that could potentially have caused the excessive water. The water only stopped running from under the plaintiff's driveway when the defendants turned off the water supply to the offending irrigation line. The only reasonable conclusion to be drawn is that the leak from the defendants' faulty irrigation line caused the excessive water running from the plaintiff's driveway.

**87**  Similarly, I find there is no other reasonable conclusion to draw from the evidence other than this excessive water undermined the plaintiff's driveway, as observed by the City workers. The undermining of the driveway did not occur as a result of the City workers' excavation in one quadrant. After they excavated that one quadrant, the City workers observed undermining to encompass most of the driveway. I am satisfied, on a balance of probabilities, that but for the water leak on the defendants' property, the damage suffered by the plaintiff would not have occurred.

**88**  However, this does not end the inquiry. There remains the question of whether the defendants' negligent conduct caused the damage. I have concluded that the negligent conduct in this case was the defendants' failure to properly inspect and maintain their irrigation system to the requisite standard of care. The question then is, but for this negligent conduct, would the damage have occurred?

**89**  Applying the "but for" test in a robust and common sense fashion, I am satisfied there is sufficient evidence connecting the defendants' breach of the standard of care to the harm suffered by the plaintiff to conclude the defendants' ***negligence*** caused the plaintiff's loss. It is more likely than not that the defendants used an improper amount of pressure to blow out the irrigation system in the fall of 2012, which damaged or degraded the system. Without an inspection at the beginning of the 2013 watering season anytime thereafter, any leak in the dripline could not be detected and repaired.

**90**  The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable": *Mustapha* at para. 12. The degree of probability that would satisfy the reasonable foreseeability requirement is "real risk" and "one which would occur to the mind of a reasonable man in the position of the defendant...and which he would not brush aside as far-fetched": *Mustapha* at para. 13.

**91**  I conclude that it is reasonably foreseeable that a failure to properly maintain and inspect an irrigation system on property that is located above a neighbouring property could cause water damage to the lower property. This is a real risk that would occur to the mind of a reasonable person in the position of the defendants.

**The Plaintiff's Contributory Action**

**92**  The defendants allege that the City was required to excavate a quadrant of the plaintiff's driveway because her water shut off valve was located underneath the driveway surface. The defendants submit this is a violation of City bylaws, which require property owners to make the valves readily accessible. If the property owner fails to do so, then the City will perform the necessary work at the property owner's expense. Although the defendants have not framed this as a contributorily negligent act by the plaintiff, it seems implicit in their argument.

**93**  In my view, the defendants have incorrectly focussed on the damage caused by the City workers' excavation of the plaintiff's driveway, rather than the damage to the driveway's foundation as a whole. The undermining of the plaintiff's driveway was caused by the leak from the defendants' irrigation system, not by the hole dug by the City workers. The hole simply allowed the extent of the undermining of the plaintiff's driveway to be revealed. The plaintiff was not contributorily negligent.

**DAMAGES**

**94**  The plaintiff seeks damages in the amount of $19,697.80, reflecting the cost of repairs from the 2015 estimate of Mr. Pregent. The plaintiff also seeks court ordered interest.

**95**  The defendants take the position that the plaintiff is entitled only to the cost of repairs for the quadrant of the plaintiff's driveway excavated by the City workers, in the amount of approximately $5,000. They also argue that the plaintiff should not be entitled to any costs associated with the retaining wall, as that would constitute a substantial betterment.

**General Principles**

**96**  When determining the measure of damages for loss of property, the fundamental principle is *restitutio in integrum*. The court attempts to achieve placing the injured party in the same position as before the tortious conduct which caused the loss: *Taylor v. King*, [*[1993] B.C.J. No. 1709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F4NT-X2NM-00000-00&context=) at para. 46.

**97**  There are two primary methods of assessing damages to property: the cost of repair/reinstatement and the diminution in value. In this case, there is no evidence with respect to diminution in value. The plaintiff seeks only the cost of repair. This desire of the plaintiff is, I find, reasonable in the circumstances.

**Mitigation**

**98**  The plaintiff is entitled to recover damages for her losses suffered, but the extent of those losses may depend on whether she has taken reasonable steps to avoid their unreasonable accumulation: *Mann v. Bains et al*, [*2006 BCSC 837*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1G4-00000-00&context=) at para. 32.

**99**  The onus is on the defendants to show the plaintiff failed to mitigate her damages. The defendants have not done so. The plaintiff did not have the financial means to carry out the repairs once she learned her home owner's insurance policy would not cover the loss as the loss did not emanate from her property. The filling of the hole in the driveway by the City workers at the time the damage was discovered was reasonable and done for the purpose of preventing any further potential damage to the driveway. There is no evidence that leaving the driveway as it was temporarily repaired by the City workers has made the problem any worse. In short, I find the plaintiff has not failed to mitigate her damages.

**Time of Assessment**

**100**  The usual rule with respect to the time to assess damage to property is that damages are to be assessed at the time of the loss. This rule is not, however, absolute. The court has the power to fix such other date, including the date of trial, as may be appropriate in the circumstances: *Mann* at paras. 36-42.

**101**  If damages are to be assessed as of the date of trial, the plaintiff is usually not entitled to pre-judgment interest. This is because pre-judgment interest is awarded to compensate a plaintiff for loss of use of money and inflation. When damages are assessed at the time of trial, the award necessarily takes into account higher costs due to inflation: *Mann* at para. 43.

**102**  In all of the circumstances, I conclude that damages should be assessed as of the most recent estimate, the estimate from 2015. In so concluding, I take into account that I have found the plaintiff did not fail to mitigate her damages both because of her financial circumstances and the temporary repairs done by the City workers.

**Quantum of Damages**

**103**  I conclude the plaintiff is entitled to the cost of repairs as estimated by Mr. Bouveur in 2015, which is the lower of the two repair estimates introduced into evidence by the plaintiff. Given the time of assessment of damages, the plaintiff is entitled to pre-judgment interest on that amount only from the date of the estimate forward.

**104**  The defendants' position that the plaintiff should only be entitled to the modest cost of repair to only one quadrant of the driveway fails to appreciate that most of the foundation beneath the plaintiff's driveway, encompassing much more than that one quadrant, was compromised by the water flow from the defendants' property and all needs to be replaced. The evidence establishes that in order to properly do so, the existing driveway and retaining wall must be removed and replaced.

**105**  I award the plaintiff damages in the amount of $18,732.00, plus court ordered interest from April of 2015.

**COSTS**

**106**  The plaintiff is entitled to her costs to be assessed in accordance with Appendix B of the *Civil Rules*, unless there are matters of which I am not aware. Should counsel wish to speak to the issue of costs further, they may arrange a time through Supreme Court Scheduling within the next 30 days.

S.A. DONEGAN J.

**End of Document**

[***Niedermeyer v. Charlton, [2012] B.C.J. No. 2339***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2MH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.C. Armstrong J.

Heard: June 18 and 19, 2012.

Judgment: November 8, 2012.

Docket: M102712

Registry: Vancouver

**[2012] B.C.J. No. 2339** | [*2012 BCSC 1668*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G222-00000-00&context=) | [*[2013] I.L.R. I-5355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G222-00000-00&context=)

Between Karen Niedermeyer, Plaintiff, and William Charlton and Ziptrek Ecotours Incorporated, Defendants

(94 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Action by plaintiff for damages for injuries suffered from motor vehicle accident that occurred while travelling in bus of defendant zip line tour operator dismissed — Plaintiff was not entitled to recover damages due to signed release and waiver agreement relieving defendants of liability — Plaintiff released defendants from claims and therefore did not have claim for indemnity under Insurance Vehicle Act — Travel was expressed as part of zip line activities in release — Defendants were not obligated to point out waiver clauses specific to bus transportation — Release was not unconscionable or contrary to public policy.**

**Insurance law — Automobile insurance — Compulsory government schemes — Subrogation or indemnity — Action by plaintiff for damages for injuries suffered from motor vehicle accident that occurred while travelling in bus of defendant zip line tour operator dismissed — Plaintiff was not entitled to recover damages due to signed release and waiver agreement relieving defendants of liability — Plaintiff released defendants from claims and therefore did not have claim for indemnity under Insurance Vehicle Act — Travel was expressed as part of zip line activities in release — Defendants were not obligated to point out waiver clauses specific to bus transportation — Release was not unconscionable or contrary to public policy.**

**Tort law — *Negligence* — Motor vehicles — Action by plaintiff for damages for injuries suffered from motor vehicle accident that occurred while travelling in bus of defendant zip line tour operator dismissed — Plaintiff was not entitled to recover damages due to signed release and waiver agreement relieving defendants of liability — Plaintiff released defendants from claims and therefore did not have claim for indemnity under Insurance Vehicle Act — Travel was expressed as part of zip line activities in release — Defendants were not obligated to point out waiver clauses specific to bus transportation — Release was not unconscionable or contrary to public policy.**

**Tort law — Defences — Voluntary assumption of risk (volenti non fit injuria) — Waiving right of action — Action by plaintiff for damages for injuries suffered from motor vehicle accident that occurred while travelling in bus of defendant zip line tour operator dismissed — Plaintiff was not entitled to recover damages due to signed release and waiver agreement relieving defendants of liability — Plaintiff released defendants from claims and therefore did not have claim for indemnity under Insurance Vehicle Act — Travel was expressed as part of zip line activities in release — Defendants were not obligated to point out waiver clauses specific to bus transportation — Release was not unconscionable or contrary to public policy.**

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| Action by plaintiff for damages for injuries suffered from a motor vehicle accident that occurred while travelling in a bus of the defendant zip line tour operator. Returning from zip line activities, the defendant's bus had gone off the road and fell down a hill. Liability was admitted by the defendants. The issue was whether the plaintiff was barred from succeeding in the action because she signed a release and waiver agreement relieving the defendants of liability for her damages arising from its ***negligence***. The plaintiff submitted that in signing the release, she did not intend to exclude liability for the defendants' ***negligence*** in the operation of a motor vehicle incidental to the adventure activities, as such ***negligence*** would result in compensation funded through the universal compulsory vehicle insurance plan. Further, the plaintiff argued that as she was not a resident of Canada, and had no knowledge of BC compulsory auto insurance, the defendants ought to have known some explanation of the release was necessary, including the distinction between zip line activities and transportation by automobile. The plaintiff asserted the release was unconscionable because the defendants took advantage of her ignorance of her statutory rights, and also contrary to public policy because it abrogated those statutory rights.  HELD: Action dismissed.  The plaintiff's argument could not succeed. Sections 76(2) and 76(3) of the Insurance Vehicle Act were complete answers to the plaintiff's claim. It was a precondition that a claimant either have a judgment or a settlement of a claim against an insured party for which indemnity was provided. Here, the plaintiff pre-emptively released the defendants from all claims and therefore did not have a claim for indemnity. Travel to and from the zip line was expressed as one aspect of the zip line activities and would have been in the contemplation of a reasonable person who had read the release. The release was a clear and relatively easy to read document. A reasonable person would have recognized the purpose and extent of the document, including the connection between the release and travel to and from the tour site. The defendants were not obliged to point out the waiver clauses, with specific reference to the bus transportation. The release was not unconscionable. The failure to disclose vehicle insurance, and the fact that the release operated in favour of the defendants, did not rise to the level of an unfair advantage obtained from an imbalance of the relative strengths of the parties. The release was not an impermissible undermining of public policy. The release did not impact public policy or the statutory automobile insurance scheme, only the right to recover damages from the defendants due to ***negligence***. The plaintiff was not entitled to recover damages due to the defendants' ***negligence*** because of the waiver. |

**Statutes, Regulations and Rules Cited:**

Insurance Vehicle Act, *RSBC 1996, CHAPTER 231*, Part VII, s. 7, s. 76, s. 76(2), s. 76(3), s. 76(6), s. 76(6)(a), s. 78

Insurance (Vehicle) Regulation, [*B.C. Reg. 447/83, s. 64*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-FD4T-B2BK-00000-00&context=)

**Counsel**

Counsel for Plaintiff: W.D. Mussio.

Counsel for Defendants: R. Brun, Q.C. and M. Howard.

[Editor's note: Corrigenda were released by the Court March 8 and October 11, 2013; the corrections have been made to the text and the corrigenda are appended to this document.]

**Reasons for Judgment**

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

**Introduction**

**1**  The plaintiff is a 51-year-old teacher living in Singapore. In October 2008 she came to British Columbia with students from her school to attend a conference in Victoria, BC. Following the conference she and her students embarked on a tour to Whistler, BC.

**2**  Before coming to Whistler the plaintiff arranged to take her students on some outdoor recreational activities including a zip lining experience offered by the defendant Ziptrek Ecotours Incorporated ("Ziptrek"). The plaintiff and her students were returning from the zip line to the Whistler Blackcomb village when the bus they were travelling in went off the road, overturned, and fell down a hill. The plaintiff suffered significant orthopedic injuries and commenced this action for damages.

**3**  The defendants admit liability for the accident but have raised several issues in this proceeding; one issue is whether the plaintiff is barred from succeeding in the action because she signed a release and waiver agreement relieving the defendants of liability for her damages arising from its ***negligence*** or the ***negligence*** of its employees.

**4**  The parties agreed that this narrow issue should be resolved before a trial on the issues of damages and contributory ***negligence***.

**Background**

**5**  The plaintiff was born and raised in Australia and has, for 20 years, been a teacher in a college in Singapore. She holds a degree in education and a Master's degree. The plaintiff is well educated says she was able to read and understand difficult written documents. Before moving to Singapore the plaintiff had taught school in Australia for a number of years

**6**  The plaintiff came to Canada with six students from her school to attend an international conference in Victoria from October 2 to 8, 2008. Prior to October 2008 the plaintiff had never visited BC and was unfamiliar with features of BC's car insurance system.

**7**  When planning for her visit to BC, the plaintiff received a proposal for a post-conference tour to Whistler, BC. She was provided with an itinerary covering October 9 to October 13, 2008. The itinerary included two events in Whistler; one was a kayak trip described as the "River of Golden Dreams" on October 11, and a zip line tour in the valley between Whistler and Blackcomb mountains on October 12. The itinerary contained a note explaining that participants were to have their "waiver form completed and ready" for the river trip but this document did not mention the defendants' zip line activity.

**8**  The plaintiff looked after the arrangements for the tour and used a credit card to secure the group's reservation for the zip line event on October 12, 2008. These arrangements were confirmed in a document described as "Ziptrek Ecotours-Group Contract" which was dated September 2, 2008.

**9**  The group contract contained the following:

I hereby authorize the following credit card to:

Secure the reservation, commit to cancellation policy and be processed for FULL payment (FULL payment posted on tour date) for the above services requested.

**10**  The group contract stipulated the following items:

1. A cancellation policy that "no-shows" within 72 hours of tour departure time will be charged full price to the credit card provided.
2. Participants who arrive later than 10 min. after the departure time will not be permitted on the tour and will be charged full price for the missed tour.
3. A warning that Ziptrek reserves the right to cancel the tour due to inclement weather, foreseeable hazards, insufficient bookings, or events beyond their control.
4. Restrictions as to age, height and weight of clients.
5. Warnings to customers with significant health issues that the tour includes stair climbing and some hiking requiring light physical exertion. Also, a warning that the tour may be stopped if a participant is endangering themselves or others.
6. General information regarding recommendations for appropriate dress, footwear, and other preparation.
7. Notification that harnesses and helmets are to be provided.

**11**  On the morning of October 12, the plaintiff and her students walked to Ziptrek's kiosk in the Carleton Lodge at Whistler.

**12**  On arrival at the lodge, she and her students were asked to wait for Ziptrek's staff to take the group to the start of the activity. The plaintiff has very little memory of the events that occurred while in the kiosk. She does not recall any discussion about the mode of transport to the zip line site.

**13**  She says that during the time they were in the Carleton Lodge no one explained the details of zip lining to them; a guide led them to a shed where they were provided helmets and harnesses.

**14**  They walked to the village where they received some training, following which they were taken to a van in a car park and driven up the mountain. The first part of the roadway is a paved surface. The next portion of the journey was along a decommissioned gravel logging road maintained by Ziptrek. The entrance to the gravel road was restricted by a gate and it was on the gravel part of the road where the accident occurred.

**15**  After completing their zip line activity, the plaintiff and the children boarded a bus for the return trip. As the bus travelled down the mountain, it went off the road and rolled down a hill.

**16**  Defendant William Charlton, the driver of the bus, said he allowed the bus to get too close to the edge of the road and, before he was able to take corrective measures, the bus went off the road and over the edge.

**17**  The plaintiff suffered a fractured neck, ribs and vertebrae. She endured a lengthy recovery which is not yet complete.

**The Release/Waiver**

**18**  Ziptrek has been in business since 2001 and offered three different tours at Whistler Blackcomb in 2008. The operations were carried out in the basement of the Carleton Lodge, located within 100 m of the base of each mountain.

**19**  Ziptrek created a release ("Release") as part of the risk management plan of the business. The Release is a key component of the defendant's operations and prospective guests are required to execute the Release, failing which they are not permitted to use Ziptrek's facilities.

**20**  A copy of the Release is annexed as Schedule 1 to these reasons. Pertinent parts of the Release include:

...

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of THE RELEASEES allowing me to participate in Adventure Activities and permitting my use of their property, ziplines, platforms, bridges, trails, roads, other structures and equipment (hereinafter referred to as "the facilities"), and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:

1. TO WAIVE ANY AND ALL CLAIMS that 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 resulting from either my use of or my presence on the facilities 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 UNDER THE OCCUPIER'S LIABILITY ACT, *R.S.B.C. 1996, c. 337*, ON THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF ADVENTURE ACTIVITIES REFERRED TO ABOVE;

...

I CONFIRM THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT PRIOR TO SIGNING IT, AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I .... MAY HAVE AGAINST THE RELEASEES.

**21**  The plaintiff acknowledges signing the Release for herself and for the six students accompanying her. She does not have an independent memory of signing these documents, but confirmed at her examination for discovery that she had been asked to sign a waiver.

**22**  David Udow was a co-director of Ziptrek and was responsible for all aspects of the Ziptrek management team. He indicates that staff were required to obtain a signed Release from guests but were not permitted to interpret or comment on an interpretation of the Release to prospective customers. He says that the waiver is a precondition to allowing potential customers to engage in their zip line activity. He says that changes to the Release are not permitted and if a person declines to sign the Release as presented, they are not permitted to participate.

**23**  Mr. Udow indicates that staff are told that if a customer refuses to read the Release, the staff are required to hand the document back and tell the prospective customer to read it.

**24**  He testifies that Ziptrek's website mentions the requirement that customers must sign a Release before embarking on the activity. He acknowledges that there were no signs at Ziptrek's kiosk in the Carleton Lodge notifying prospective customers of the requirement to sign a Release. He notes there had been a sign on the wall or pillar that showed a copy of the yellow highlighted portion of the Release.

**25**  Cindy Niewkuyk was Ziptrek's guest services supervisor in October 2008. She describes the general process that required staff to present Releases to guests including an emphasis on the importance of waivers. She witnessed and signed five of the Releases relating to the plaintiff's group, although she does not have an independent recollection of the event. She reiterates that staff were trained to never explain the contents of the Release to prospective guests; their only instructions were that guests must sign a waiver.

**26**  The plaintiff acknowledges that she also signed identical Releases for the six students. She assumed that she had filled in the details on these documents prior to signing, but could not remember reading them before she signed any of them. She accepts that she was acting as a prudent and careful guardian of the children and, in that capacity, would likely have read the document. She initialed the top right corner of the document by the words "Please Read Carefully!".

**The Plaintiff's Position**

**27**  The plaintiff submits that in signing Release she did not intend to exclude liability for the defendants' ***negligence*** in the operation of a motor vehicle incidental to the adventure activities that preceded the accident. She argues that the reference in the Release to "travel to and from the tour areas" and "backcountry travel" was not intended to relieve the defendants of liability for ***negligence*** in the operation of motor vehicles on highways.

**28**  The plaintiff says that in order to give the Release the meaning proposed by the defendants, it should have included language referencing "bus transportation to and from the Ziptrek location".

**29**  The plaintiff argues that the defendants failed to adequately inform her of the terms of the document contained in the Release and that this failure constituted a misrepresentation. The plaintiff recognizes that the defendants' obligation to apprise the plaintiff of onerous terms in the Release arises only in circumstances where a reasonable person should have known that the party was not consenting to the terms.

**30**  The plaintiff argues that the Release was unconscionable. She bases this argument on an inference that the Ziptrek took advantage of her ignorance of motor vehicle insurance legislation in this province and forced an unfair bargain on her.

**31**  The plaintiff also argues that the enforcement of the Release is contrary to public policy because the Release obviates the benefits afforded by the statutory automobile insurance scheme in the province. She argues that it is against public policy to require a person to contract out of statutory protections.

**The Defendants' Position**

**32**  The defendants argue that the references in the plaintiff's argument to ss. 76 and 78 of the *Insurance Vehicle Act*, *R.S.B.C. 1996, c. 231* ("*Act"*) have no application. Those provisions deal with rights to recover damages where there has been a breach of insurance coverage and do not afford the plaintiff any grounds to attack the enforceability of Ziptrek's waiver.

**33**  The defendants say this is not a dispute between the plaintiff and the Insurance Corporation of BC ("ICBC"). They argue that there is no legal principle or public policy reason to question the efficacy of the releases in the context of Ziptrek's automobile insurance coverage.

**34**  The defendants argue that that plaintiff would not have declined to sign the release and use Ziptrek's facility even if the effect of the release for ***negligence*** in the operation of a vehicle had been specifically addressed; they point to the fact that she made a subsequent trip to the mountain and she signed the same release to permit her to travel up the mountain to meet the staff who helped her after the accident.

**35**  The defendants rely on the reasons in *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=), a case dealing with almost an identical release, for the proposition that the defendants' Release is not void for unconscionability.

**36**  The defendants say there is no basis to conclude that the waiver is contrary to public policy. They argue that such releases are widespread and in the public interest because they allow individuals to undertake activities with significant risks of loss or injury which would otherwise be foreclosed to them. In the absence of this type of release Ziptrek would face unreasonably high risks (or presumably excessive insurance premiums) due to the dangerous nature of their business activities.

**37**  Furthermore, the defendants observe that the plaintiff signed seven waivers and is a well-educated, intelligent woman capable of understanding the content of those waivers. They argue that the plaintiff knew that participation in the adventure activities was conditional on her relieving them of any liability for injuries that might be suffered while she undertook the adventure. The defendants note that the plaintiff has previously signed a release/waiver agreement eight years ago before being permitted to sky dive. In that instance, the plaintiff thought the release was necessary because of the high risk nature of that activity.

**Analysis**

**38**  The plaintiff's overarching submission is that notwithstanding the risks and dangers attendant on the defendants' adventure activities, a motor vehicle accident caused by the ***negligence*** of a Ziptrek employee would not have been in the contemplation of the plaintiff at the time she signed the Release. She argues that, generally, victims of motor vehicle accidents in BC benefit from the universal insurance scheme that guarantees compensation for injuries caused by negligent drivers and car owners. She further asserts that a reasonably informed person would not agree to release an owner/driver from claims for damages which would otherwise be paid under the public insurance scheme insurance paid for by Ziptrek.

**39**  The plaintiff seeks to elevate the expectations of persons injured in auto accidents to a special category of claim, not governed or affected by releases of future claims as was given by a plaintiff in this action because of their reliance on the fact that Ziptrek's bus was insured by ICBC.

**40**  There are many possibilities that arise from the scenario involving this plaintiff. For example, if the defendants had collected guests in Vancouver to transport them by bus to Whistler and en route their bus was in accident on the highway, would a similarly worded release signed before the bus trip save the defendants from liability?

**41**  In the circumstances of this case, the bus trip was relatively short, but nevertheless started on a public roadway. The plaintiff's argument is that when signing the Release, the inherently dangerous aspects of Ziptrek's activities did not extend to the travel from the Whistler town site to the zip line and return along an ordinary road. No submissions were made that anything turned on whether this was a publicly maintained or privately maintained road.

**42**  The core of the plaintiff's argument is that the availability of a publicly mandated auto insurance scheme changed the nature of the risk assumed by Ziptrek's customer; a prospective guest of Ziptrek would not knowingly agree to waive a claim arising from the negligent operation of a motor vehicle. The plaintiff also argues that it is against public policy to permit one party to require the other to contract out of the statutory protection inherent in the *Act*. In order to succeed on this point, the plaintiff must be able to establish that a customer, properly informed, would not have continued on the course and use Ziptrek's adventure tour if they knew that the defendants would be immune from liability notwithstanding its purchase of publicly mandated auto insurance.

**43**  In my view, there is much to be said for the plaintiff's argument given people in BC ordinarily expect to receive compensation for injuries caused by the ***negligence*** of the driver of a motor vehicle. However, in the face of the legal principles I will discuss, the plaintiff's argument cannot succeed.

**44**  The plaintiff made extensive references to the universal compulsory vehicle insurance scheme created by the *Act*.

**45**  The relevant sections are as follows:

**Plan**

7 (1) Subject to section 2 and compliance with this Act and the regulations, the corporation must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the *Motor Vehicle Act*, of at least the amount prescribed, to all persons

1. whether named in a certificate or not, to whom, or in respect of whom, or to whose dependants, benefits are payable if bodily injury is sustained or death results,
2. whether named in a certificate or not, to whom or on whose behalf insurance money is payable, if bodily injury to, or the death of another or others, or damage to property, for which he or she is legally liable, results, or
3. to whom insurance money is payable, if loss or damage to a vehicle results

from one of the perils mentioned in the regulations caused by a vehicle or its use or operation, or any other risk arising out of its use or operation.

**Third party rights**

76 (1) In this section and sections 77 and 78, **"claimant"** means a person who has a claim or a judgment against an insured for which indemnity is provided by the plan or an optional insurance contract.

1. Even though he or she does not have a contractual relationship with the insurer, a claimant is entitled, on recovering a judgment against an insured or making a settlement with the insurer, to have the insurance money applied toward the claimant's judgment or settlement and toward any other judgments or claims against the insured who is covered by the indemnity.
2. The claimant may, on behalf of himself or herself and all persons having judgments or claims against the insured who is covered by the indemnity, bring an action against the insurer to have the insurance money applied in accordance with subsection (2).
3. The insurer may at any stage compromise or settle the claim.
4. A creditor of the insured is not entitled to share in the insurance money unless the creditor's claim is one for which indemnity is provided for by the plan or the optional insurance contract.

**46**  In my view, ss. 76(2) and (3) are a complete answer to the plaintiff's claim. Third party rights are dependent on a successful claimant recovering a judgment or settlement for which indemnity is provided by the plan. Persons with claims or judgments against the insured are entitled to bring action against the insurer to have insurance money applied in accordance with subsection (2).

**47**  It is a precondition that a claimant either have a judgment or a settlement of a claim against an insured party for which indemnity is provided. However, in this case the plaintiff (the claimant) pre-emptively released the defendants from all claims and therefore does not have a claim for indemnity.

**48**  The plaintiff submits that s. 76(6) defeats the argument that the release should be enforceable in the circumstances of this case. Section 76(6) provides:

76 (6) The following do not prejudice the right of a person entitled under subsection (2) to have the insurance money applied toward the person's judgment or settlement, and are not available to the insurer as a defence to an action under subsection (3):

1. assignment, transfer, surrender, cancellation, suspension, waiver or discharge of coverage under the plan or an optional insurance contract or under a provision of the plan or an optional insurance contract, or of an interest in either of them or of insurance money payable under either of them, made by the insured after the event giving rise to a claim under the plan or optional insurance contract occurs;
2. an act or default of the insured before or after the event giving rise to a claim under the plan or an optional insurance contract in contravention of this Act or the regulations or of the plan or optional insurance contract;
3. contravention of the *Criminal Code* or of a law or statute of any province, state or country by the owner, lessee or driver of the vehicle specified in the owner's certificate or policy.

**49**  A plain reading of subsection 6(a) relates to a "waiver or discharge of coverage under the plan". This section does not address a waiver of the Ziptrek's liability for a claim for damages arising from a motor vehicle accident; the Release in this case does not involve a waiver or discharge of coverage; it involves a waiver or release of liability for ***negligence*** and damages, including injury caused by the ***negligence*** of the Ziptrek's bus operator.

**50**  The plaintiff also relied on the *Insurance (Vehicle) Regulation*, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=) as support for the proposition that the plaintiff, as an occupant of a vehicle, is to be indemnified for liability imposed on the insured by law for injury or death pursuant to s. 64:

**Indemnity**

64 Subject to section 67, the corporation shall indemnify an insured for liability imposed on the insured by law for injury or death of another or loss or damage to property of another that

1. arises out of the use or operation by the insured of a vehicle described in an owner's certificate, and
2. occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

**51**  In the circumstances of this case, the Release relieves the defendants of any liability that might otherwise been imposed by law for Ms. Niedermeyer's injury. The law does not impose liability on Ziptrek and ICBC is not obliged to indemnify the defendants in the absence of a settlement or judgment in her favour. This section does not support the plaintiff's claim.

**Is the Release Effective to Extinguish the Defendants' Liability?**

**52**  The plaintiff argued that the intention of the parties was not to exclude ***negligence*** in regards to the motor vehicle accident because ***negligence*** in the context of a car accident would result in compensation payable to the plaintiff, and funded through the universal compulsory vehicle insurance plan.

**53**  The plaintiff relies on *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [*2010 SCC 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1H3-00000-00&context=) in arguing that the Release should not preclude the plaintiff's claim for damages.

**54**  In *Tercon,* Mr. Justice Binnie's minority opinion, accepted by Cromwell J. for the majority of the Court at para. 62, explains that three enquiries should be made in analyzing a plaintiff's claim to avoid the impact of an exclusion clause in a release. These enquiries, at paras. 122 - 123, are:

1. Whether the parties' intentions as expressed in the contract support an interpretation that the clause applies to the circumstances?
2. If the exclusion clause applies in the circumstances, is the clause unconscionable, as might arise from situations of unequal bargaining power between the parties at the time the contract is made?
3. Is there a reason to refuse enforcement of the release because of an overriding public policy? The burden of proof rests with the party seeking to avoid enforcement. To satisfy this burden, it must be established that the overriding public policy to refuse enforcement must outweigh a strong public interest in the enforcement of contracts generally.

**Were the circumstances such that the Plaintiff did not consent to releasing the defendants' from liability for the bus accident?**

**55**  In this case, the question is whether the Release, including the reference to travel to and from the tour areas, was objectively intended to refer to bus travel between Ziptrek's kiosk and the zip line area.

**56**  The principles applicable to this issue are set out in *Karroll 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=) (S.C.) in which McLachlin, C.J.S.C. (as she then was) says at 166:

... 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. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

**57**  The plaintiff argues that a reasonable person would not release a claim for the negligent operation of a motor vehicle when it was reasonable to assume that there was auto insurance in place. The plaintiff argues that in the circumstances Ziptrek ought to have known that the plaintiff would not consent to waiving her claims because she was from Singapore and lacked knowledge about the effect of the release. She claims she assumed that all vehicle passengers would be protected from a driver's ***negligence*** and indemnified by their insurer.

**58**  The plaintiff had previously signed a release before participating in a parachuting event and she recognized that the release in those circumstances limited her right to sue for injury suffered while sky diving. She asserts the circumstances in the case at bar are different because, here, the accident did not occur during the zip lining activity but on the transportation part of the activity.

**59**  The plaintiff recalls going to the defendants' premises in the Carleton Lodge at Whistler and being asked to sign a waiver. In fact, she signed six waivers for her students in addition to one for herself. She says she assumed that she filled in each waiver/release when in the Ziptrek premises at the Carleton Lodge. She assumes she initialed the documents and assumes that she observed the warning on the release to "Read Carefully", but could not remember if she read the document before signing. Her evidence on this point was contradicted by her answers at her examination for discovery.

**60**  She was not aware of the means by which she would be taken to the zip line site. She was aware that after the zip track event she would be returned to the village by the defendants. She did not know if the transportation either way was to be by bus, chairlift or walking.

**61**  In *Karroll* McLachlin C.J.S.C. says at 166:

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.

Applying these rules to this case, we start from the fact that Miss Karroll signed the release knowing that it was a legal document affecting her rights. Under the principles set forth in *L'Estrange v. F. Graucob Ltd.,* [1934] 2 K.B. 394, she is bound by its terms unless she can bring herself within one of the exceptions to the rule. This is not a case of non est factum. Nor was there active misrepresentation. It follows that Miss Karroll is bound by the release unless she can establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

**62**  In *Karroll*, the plaintiff had signed a release before she could participate in a ski race hosted by the defendants. She collided with another skier and she alleged that the defendants had failed to ensure other skiers were off of the racecourse before she began her race.

**63**  Ms. Karroll could not recall reading the document or whether she had been given an opportunity to read it. She had thought it limited her right to sue the defendants for injuries only if she fell on her own. She argued that the defendants' failure to give adequate notice of the contents of the document or sufficient opportunity to read or understand it, did not preclude her action against the race hosts. McLachlin C.J.S.C. considered the following at 167:

1. The purpose of the release of liability was consistent with the general terms of the contract, which was to permit the plaintiff to engage in a hazardous activity;
2. The release was brief and easy to read and did not have fine print; and,
3. The plaintiff had experience signing similar forms in the past and it was not an unusual requirement.

**64**  McLachlin C.J.S.C. concludes that because the defendants had no reason to believe the plaintiff was not agreeing to the terms in question, they owed the plaintiff no obligation to bring the contents of the release of liability clause to her attention or to ensure she had fully read it.

**65**  Ms. Niedermeyer argues that the intention of the words "travel to and from the tour area" were not intended to exclude liability for ***negligence*** in the operation of motor vehicles on highways. The plaintiff says that the defendant did not draft its release with the intention of excluding liability for motor vehicle accidents. Rather, Ziptrek only intended to obtain waivers of liability for injuries that might arise from the inherently risky outdoor sport of zip lining. Furthermore, she asserts that she did not intend to waive her claim to statutory rights under the *Act*.

**66**  Ms. Niedermeyer argues that if the Release had been intended to affect liability for motor vehicle accidents, the Release would have contained a reference to bus transportation to and from the zip track activity site. The plaintiff was "under the impression" that the Release applied only to the zip trekking activity and not transportation.

**67**  The plaintiff relies on *Newsham v. Canwest Trade Show Inc.*, [*2012 BCSC 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6236-00000-00&context=) for the proposition that there must be a direct link between the type of activity during which the injury was caused and the purpose of the waiver clauses. She argues that in her case, there is no direct link between the zip trekking activity and the transportation to and from the zip track site whereas *Newsham* is distinguishable from this case.

**68**  The plaintiff in *Newsham* wanted to occupy two booths at the defendant's tradeshow. The plaintiff was an exotic dancer, and agreed to perform at the defendant's tradeshow in exchange for the use of two booths without payment. The plaintiff had signed a waiver that applied to all exhibitors performing at the show; he was injured while dancing and argued that the waiver applied only to his use of the booth and not to his dancing activity.

**69**  Mr. Justice Brown concluded that the terms of the contract focused on the exhibitor activities and risks inherent to that activity. He concluded that the release did not preclude his claim for damages because the plaintiff's activity was sufficiently distinct from an exhibitor's anticipated activity, stating at para. 80:

Stated differently, the plaintiff signed the exhibitor's contract as an exhibitor and as a performer, the latter role not being one that the standard form contract was designed to capture. Thus, it was incumbent upon the defendant to convey to the plaintiff that the Waiver Clauses applied to his activities both as an exhibitor and as a performer.

**70**  The issue identified by Brown J. is apposite to the circumstances of this case. In *Newsham* the nature of the agreement focused on the plaintiff's intentions as an exhibitor. It was not brought to his attention that the terms of the release would also govern his role as a performer. In this case, Ms. Niedermeyer invited me to adopt the principle from *Newsham* on the basis that the bus trip to the zip line was sufficiently disparate from the zip line activity itself that it was incumbent on the defendants to convey to her that the waiver applied to both activities.

**71**  I do not think *Newsham* assists the plaintiff. In the circumstances of this case, travel to and from the zip line was expressed as one aspect forming part of the zip line activities and would have been in the contemplation of a reasonable person who had read the Release. The Release was essential to her participation in the zip line activity and referred to the transportation component of the activity.

**72**  Although the plaintiff may not have been aware of the need for a bus trip to the zip line site, travel to and from the tour area was clearly identified as one of the adventure activities included in the Release. The accident happened in precisely the circumstances contemplated by and described in the Release; she suffered an injury as a result of the ***negligence*** of Ziptrek's driver while travelling from the tour area.

**73**  The Release was incorporated onto a single page and was highlighted with warnings that it was an important document. It did not operate against the plaintiff's reasonable expectations because it clearly stated the activity included travel to and from the Ziptrek site.

**74**  There was no evidence that Ms. Niedermeyer lacked sufficient time to read the document. I infer from the fact she signed seven Releases and did so as guardian of the students that she was aware that she was releasing the defendants from any misfortune that might occur until everyone was returned to the village area.

**75**  The plaintiff relies on the decision in *Arndt v. The Ruskin Slo Pitch Association,* [*2011 BCSC 1530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22DX-00000-00&context=). *Arndt* involved a waiver on the back of a team roster signed by the plaintiff. In that case, the plaintiff thought she had signed a team roster and did not know there was a waiver of liability included. The document, on the face, did not appear to be a waiver. Humphries J. concluded that the form of the document in the circumstances under which it was signed failed to persuade her that the reasonable observer would have understood the nature of the document. The waiver was found to be unenforceable in the absence of the defendant taking steps to have the nature of the document explained to the plaintiff.

**76**  In my view, the evidence in this case does not reveal the same disconnect between the document and the waiver at issue in *Arndt.* In this case, the full impact of the Release was disclosed on the face of the single page and there was no demonstrable risk that Ms. Niedermeyer could have misunderstood that the Release governed her transportation to and from the zip line site.

**77**  The plaintiff relies on *Okihiro v. 572412 B.C. Ltd,* [*2008 BCSC 1161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M395-00000-00&context=), which involved a golf cart accident. Preston J. notes at para. 17:

[17] The purpose of the transaction within which the Waiver was proffered was the rental of a golf cart. The Heading "Cart Liability" and the brief nature of the transaction did nothing to alert Mr. Okihiro to the fact that he was signing a document as potentially wide-ranging as an assumption of liability to others for a breach of duty by the Golf Course Defendants and a release of claims against those defendants for any damages suffered "from or through [the] use of the golf cart".

**78**  The plaintiff argues that because she was not a resident in Canada and had no knowledge of the laws of BC with respect to the benefits of the compulsory auto insurance, Ziptrek ought to have known that some explanation of the Release was necessary. She argues that a reasonable person would have explained the Release, including the distinction between zip line activities and transportation by automobile and the implications of the difference.

**79**  The circumstances of the release in *Okihiro* are significantly distinct from the Release in this case. In *Okihiro*, the context of the transaction and the words of the release failed to alert the plaintiff to the fact that there was a potential wide-ranging impact arising from an innocuous addition to the plaintiff's credit card receipt. In the circumstances of this case, the Release is obviously directed, in part, at travel to and from the tour areas and includes a release of any and all liability resulting from Ms. Niedermeyer's use of, or presence on, the facilities. The evidence did not establish that the plaintiff would objectively have been misled by the Release in the circumstances surrounding her execution of it.

**80**  In my view, the Release is a clear and relatively easy to read document. Although some of the print is small, large capitalized portions of the Release draw attention to the important features of safety, assumption of risks, release of liability and waiver of claims. A reasonable person would recognize the purpose and extent of the document, including the connection between the release and travel to and from the tour site.

**81**  I have concluded that the defendants were not obliged to point out the waiver clauses, with specific reference to the bus transportation to and from the tour site. There were no distinct features of the bus trip as opposed to the other zip line activities that should have been brought to the plaintiff's attention.

**Unconscionability**

**82**  The plaintiff argues that the Release was unconscionable because the transaction was a diversion from community standards of commercial morality. She argues that because she resided in Singapore and was ignorant of her statutory rights under the *Act*, the defendants took advantage of her ignorance in achieving a waiver of a significant right through the BC insurance regime.

**83**  The law relating to unconscionability is referred to 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=) where the Court said at paras. 33 and 40:

[33] To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release or waiver as a condition of participating.

...

[40] The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for ***negligence*** against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.

**84**  The plaintiff does not argue the Release was unconscionable because she was required to enter into the Release but because it deprived her of access to the defendants' insurance policy.

**85**  It is clear that in the case at bar, for the plaintiff to succeed she must establish that there was an inequality in her position arising out of endurance or weakness, which left her in the power of the defendants. She must also establish proof of substantial unfairness in the bargain obtained by the defendants.

**86**  In *Loychuk*, *supra*, the Court of Appeal quoted Madam Justice McLachlin, as she then was, at para. 31 in *Principal Investments Ltd. v. Thiele Estate* [*(1987), 12 B.C.L.R. (2d) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MH-00000-00&context=) at 263 (C.A.), where she summarized the result:

... The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable.

The plaintiff argues that the defendants' duty to address the issue of motor vehicle travel to the zip line site, and the fact that the plaintiff would not receive compensation for injuries caused during the transport, creates a presumption of fraud. She argues that because she was ignorant of her statutory rights under the *Act,* the defendants took advantage of her ignorance in having her waive her statutory rights under the ICBC regime. This attempt to circumvent the universal compulsory vehicle insurance scheme was offensive to commercial morality and rendered the Release an unconscionable bargain.

**87**  It is my view that one of the risks the plaintiff assumed on the day she signed the Release was that an accident might occur when travelling to or from the zip line site. If the trip to the site had been by an uninsured mode of transport, the plaintiff's Release would clearly extend to such an accident en route.

**88**  For the plaintiff to succeed in this action, I must be satisfied of the defendants' failure to bring to the plaintiff's attention that she was releasing any claims arising from ***negligence*** of Ziptrek and its employee in the operation of the zip line as well as the transportation to and from the zip line site, was in the nature of a fraud because the terms were unfair, unjust and unreasonable.

**89**  It is not unconscionable for the operator of a recreational sports facility to require persons to sign releases as preconditions to the use of that facility. Although the defendants' bus may have been insured by ICBC, I do not accept that the failure to disclose the existence of the insurance, and the fact that the release would operate in favor of the defendants in the case of a motor vehicle accident, rises to the level of an unfair advantage to the defendants obtained as a result of the imbalance of the relative strengths of the parties. This is not a case where "the transaction seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded" as per Lambert J.A. in *Harry v. Kreutziger* [*(1978), 9 B.C.L.R. 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=) at 177 (C.A.).

**Is the Release Contrary to Public Policy?**

**90**  The plaintiff argues that the Release is contrary to public policy because it abrogates the protection and benefits that are afforded by the statutory scheme of mandatory public and auto insurance. The plaintiff reviews a number of cases in dealing with human rights issues, cell phone contracts and employment contracts.

**91**  On this issue, I accept the plaintiff's argument that contracts precluding one party from taking advantage of statutory rights may, in some circumstances, constitute an impermissible undermining of public policy.

**92**  However, in this case, the Release does not impact public policy or the statutory automobile insurance scheme. This Release deals only with the plaintiff's right to recover damages from the defendants caused by the defendants' ***negligence***. The statutory scheme is not engaged until there has been a determination, or settlement, of a complainant's entitlement to money as compensation for injury suffered as a result of the ***negligence***. In my view, the plaintiff's argument does not engage a debate about public policy.

**Conclusion**

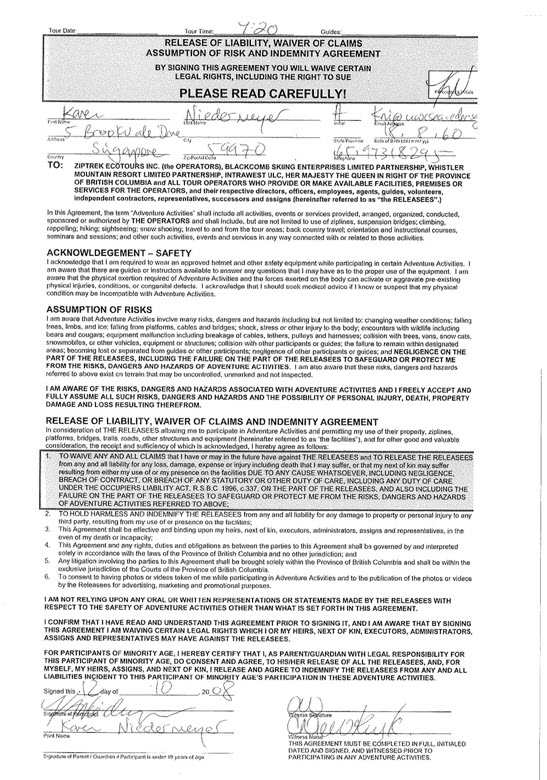
**93**  I have considerable sympathy for the plaintiff due to the injuries sustained in the accident. The plaintiff is entitled to some benefit as an insured person under Part VII of the *Act*. However, the plaintiff is not entitled to recover damages due to the defendants' ***negligence*** because she surrendered that right when agreeing to the waiver and release of all claims as a condition of being permitted to use the defendants' zip line facility.

**94**  The action is dismissed and the defendants will have their costs of proceeding; however, if the parties wish to make submissions as to costs of this proceeding they will have liberty to bring this issue before the Court within 30 days or such other time as they agree.

T.C. ARMSTRONG J.

\* \* \* \* \*

**Schedule 1**



\* \* \* \* \*

Correction

Released: March 8, 2013

Reasons for Judgment of Mr. Justice Armstrong dated November 8, 2012 have been amended as follows:

1. On the front page Matthew Howard, has been added as Counsel for the Defendants.

T.C. ARMSTRONG J.

\* \* \* \* \*

Corrigendum

Released: October 11, 2013

[1] In paragraph 17, the word "length" has been replaced with the word "lengthy".

[2] In paragraph 69, the word "exhibitors" has been replaced with the word "exhibitor's".

[3] In paragraph 74, the word "Neidermeyer" has been replaced with the word "Niedermeyer"

[4] In paragraph 86, the quote is corrected to read as follows:

... The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable.

The remainder of the quote in paragraph 86 is not part of the quote, but a continuation of paragraph 86. In this continuation of paragraph 86 the word "wave" has been replaced with the word "waive":

[5] In paragraph 89, the word "under" has been deleted from the second sentence.

T.C. ARMSTRONG J.

**End of Document**

[***Parker v. Ingalls (c.o.b. Pure Self Defence Studios), [2006] B.C.J. No. 1394***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1R5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Campbell River, British Columbia

Allan J.

Heard: May 30 - June 1, 2006.

Judgment: June 20, 2006.

Campbell River Registry No. S5806

**[2006] B.C.J. No. 1394** | [*2006 BCSC 942*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MX-00000-00&context=) | [*150 A.C.W.S. (3d) 508*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MX-00000-00&context=)

Between Robert Lorne Parker, plaintiff, and Jodey Preston Ingalls doing business as Pure Self Defence Studios, defendant

(74 paras.)

**Case Summary**

**Tort law — Dangerous things and situations — Sports — Action in *negligence* against the proprietor of a martial arts studio, for an injury the plaintiff received during a demonstration of a "shoot-fighting" move and countermove — The plaintiff alleged that the defendant negligently exerted torque or pressure on his right leg and knee joint, which caused a severe knee injury — Action allowed — The plaintiff's injury occurred as a result of the defendant's *negligence*, in particular the excessive force sufficient to dislocate his knee, and the speed which prevented Parker from vocally telling Ingalls to stop or from tapping him, the protocol to one used to indicate that the other person should discontinue the contact.**

**Tort law — Defences — Disclaimer or exclusion of risk — Voluntary assumption of risk (volenti non fit injuria) — Action in *negligence* against the proprietor of a martial arts studio, for an injury the plaintiff received during a demonstration of a "shoot-fighting" move and countermove — The defendant claimed that the plaintiff had signed a waiver when he registered for the course — Action allowed — The liability waiver constituted a very small portion of the overall document, and appeared in extremely small print with no emphasis to direct the reader to its importance — It did not refer to *negligence* — In any event, an injury such as that experienced by the plaintiff, which was caused by the defendant's *negligence*, did not fall within the scope of the waiver.**

**Tort law — *Negligence* — Causation — Causal connection — Forseeability and remoteness — Standard of care — Action in *negligence* against the proprietor of a martial arts studio for an injury the plaintiff received during a demonstration of a "shoot-fighting" move and countermove — The plaintiff alleged that the defendant negligently exerted torque or pressure on his right leg and knee joint, which caused a severe knee injury — Action allowed — The plaintiff's injury occurred as a result of the defendant's *negligence*, in particular the excessive force sufficient to dislocate his knee, and the speed which prevented the plaintiff from vocally telling the defendant to stop or from tapping him, the protocol to one used to indicate that the other person should discontinue the contact.**

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| Action by Parker, who sought damages from Ingalls, the proprietor of a martial arts studio, Pure Self Defence Studios (the "Studio"), for an injury he received in January, 2003, during a demonstration of a "shoot-fighting" move and countermove -- Parker alleged that Ingalls negligently exerted torque or pressure on his right leg and knee joint, which caused a severe knee injury -- Ingalls claimed that he was not negligent and, in any event, Parker agreed to waive any claim for damages against him when he registered for the course -- Ingalls testified that because the martial arts involve contact, he always discussed the possibility of injury with new students, including Parker -- He stated that he gave Parker a copy of a document that explained the costs of instruction and the risks of injury -- He said that he utilized a system that explained both the contract and the risk of injury to new students, and that included a waiver which Parker signed -- HELD: Action allowed -- Parker's injury occurred as a result of ***negligence*** by Ingalls, in particular the excessive force sufficient to dislocate his knee, and the speed which prevented Parker from vocally telling Ingalls to stop or from tapping him, the protocol to one used to indicate that the other person should discontinue the contact -- The liability waiver constituted a very small portion of the overall document -- It appeared in extremely small print with no emphasis to direct Parker to its importance, or to the fact that he was giving up all rights to sue the Studio -- It did not refer to ***negligence*** -- In any event, an injury such as that experienced by Parker, which was caused by the ***negligence*** of Ingalls, did not fall within the scope of the waiver -- When he engaged in shoot-fighting lessons, Parker accepted certain risks of injury but he did not accept the risk of injury at the hands of his instructor, whom he trusted not to harm him -- It was not reasonable for Ingalls to seek to exclude himself from his own ***negligence*** in the conduct of a demonstration in which he had complete control over the safety of the student -- Parker was not asked to consent to that risk and he did not do so -- Damages were to be determined at a subsequent hearing. |

**Counsel**

Counsel for the plaintiff: Sandra J. Gordon

Counsel for the defendant: Gerald P. Sinnott

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| **ALLAN J.** |

***INTRODUCTION:***

**1**  The plaintiff, Mr. Parker, seeks to recover damages from the defendant, Mr. Ingalls, who is the proprietor of a martial arts studio, Pure Self Defence Studios (the "Studio"), for an injury he received on January 23, 2003 during a demonstration of a "shoot-fighting" move and countermove. Mr. Parker alleges that Mr. Ingalls negligently exerted torque or pressure on his right leg and knee joint, causing a severe knee injury. Counsel for the defendant, Mr. Sinnott, submits that Mr. Ingalls was not negligent and, in any event, Mr. Parker agreed to waive any claim for damages against Mr. Ingalls. Mr. Ingalls also pleads that any injury was attributable to previous incidents or conditions or congenital defects.

**2**  Approximately two weeks before trial, Master Patterson severed liability and quantum. Only the liability issues were before me for determination.

***BACKGROUND:***

**3**  Mr. Parker, who is the operations manager of the Strathcona Gardens Recreation Complex, is 39 years of age. He first met Mr. Ingalls when the latter opened the Studio in Campbell River in 1997. The parties agree that Mr. Parker was the tenth student to sign up in for classes at the Studio. Mr. Parker, who places a high premium on fitness and weight training, was excited about training in the martial arts. He began sessions in Kenpo karate and achieved either his blue or his green belt. He assisted Mr. Ingalls from time to time, doing demonstrations and warming up the class.

**4**  After three or four years, Mr. Ingalls introduced shoot-fighting into his class routine. Shoot-fighting is a mixed martial art and is more physical than Kenpo karate which is less "hands on". It involves kick-boxing principles (stand-up and striking) with submission ground skills (wrestling). Apparently a student must master ten techniques to be proficient in shoot-fighting and, by the time of the incident, Mr. Parker had not yet achieved level 1.

**5**  Mr. Parker took a break from his training in 2002 for financial reasons but returned to the Studio in December 2002. At that time, a friend, Jeff Pearson, also wished to learn the martial arts. They spoke to Mr. Ingalls and negotiated a "two for one" family-type plan so that they could train together in shoot-fighting for the cost of a single person. They participated in one-hour group classes, which were free, and half-hour private sessions where they received detailed instruction at the reduced rate.

***THE EVIDENCE OF MR. PARKER:***

**6**  Mr. Parker said that he understood the "rules" of shoot-fighting for the students were that they should proceed lightly and not hurt each other. If the instructor uses a student to perform a demonstration, the student trusts the instructor not to hurt him. The instructor applies very little force because the student is watching and paying attention to the lesson. Mr. Parker testified that he never thought "in a million years" that he would be injured in a demonstration. Mr. Ingalls had used him for demonstrations hundreds of time and he had complete faith in Mr. Ingalls.

**7**  In cross-examination, Mr. Parker disagreed with the suggestion that he anticipated that he might get hurt in training, other than by a scratch from someone's nails. He said he specifically decided not to enter competitions because he did not want to get hurt. For the same reason, he rarely attended sparring courses. He was interested in the art and the physical fitness aspect of martial arts. Mr. Parker was a credible witness and I accept his evidence in that regard. It is obvious that he is a careful and meticulous man who takes pride in his fitness and appearance.

**8**  On January 23, 2003, Mr. Parker and Mr. Pearson went to the Studio and performed their usual routine of callisthenics and cardio-vascular activity to warm up. Mr. Ingalls then demonstrated a particular shoot-fighting technique to the class. The class broke into pairs and Mr. Parker and Mr. Pearson went to a separate area in the back of the dojo. They practiced for five or ten minutes before Mr. Pearson asked Mr. Ingalls to assist them. Mr. Ingalls told Mr. Parker to lie down and he did so, with his back on the floor. Mr. Parker said he had his head tipped forward to watch and both legs in the air. Mr. Ingalls was standing over him and Mr. Pearson was to his left, watching. In each martial arts technique, there is a move and a countermove. Mr. Ingalls demonstrated the technique but all of a sudden, during the countermove, Mr. Parker heard tearing and ripping and felt his knee pop. He felt "terrific pain" and briefly lost consciousness. He was taken to the emergency department of the local hospital with injuries that required treatment, including a cast, and later, surgery.

**9**  Mr. Parker testified that he had never experienced knee problems in the past, despite the fact that he was extremely active physically.

**10**  It is common ground that Mr. Ingalls did not give Mr. Parker any warning that force would be applied or any direction to do or not do anything. If a student wishes another student or the instructor to stop contact, the protocol is to tap the other person. Mr. Parker said that he had no time to react or respond and he had no opportunity to resist anything that Mr. Ingalls was doing.

**11**  Mr. Parker does not suggest that Mr. Ingalls intentionally hurt him. Both he and Mr. Pearson were unaware of any other injuries that students had incurred at the Studio.

***THE EVIDENCE OF MR. PEARSON:***

**12**  Mr. Pearson said the protocol during a demonstration was to just relax and let the instructor use the student's body as he wished. That protocol was understood although never discussed. The students treat one another with human decency and understand that they are not there to hurt each other.

**13**  Mr. Pearson said the injury to Mr. Parker occurred within 30 seconds of Mr. Ingalls commencing the demonstration. He described Mr. Parker as lying on the floor, on his back. His right leg was entwined with Mr. Ingalls' legs and his left leg could have been either on the ground or in the air. Mr. Ingalls had both of his hands on Mr. Parker's right leg: one hand on his right knee and one hand on his right ankle. In "a split second" Mr. Parker was in pain and scrambling across the mat. Mr. Pearson described it as "like instantaneous". He saw no resistance by Mr. Parker during the demonstration.

**14**  Mr. Pearson understood that Mr. Ingalls was a level 5 shoot-fighting instructor who had been trained by the person who adopted that technique. He thought that level 5 was the highest level.

**15**  Mr. Pearson continued his shoot-fighting classes with Mr. Ingalls for another two years after the incident. He agreed that he was aware that there was a possibility of being injured in class but not as a result of an instructor doing a demonstration.

***THE EVIDENCE OF MR. INGALLS:***

**16**  Mr. Ingalls testified that because the martial arts involve contact, he always discusses the possibility of injury with new students. He gives them a copy of a document that explains the costs of instruction and the risks of injury. He said that from the start he utilized a system that involved explaining both the contract and the risk of injury to new students.

**17**  Mr. Ingalls has been involved in martial arts since he was nine years old, when he saw his first Bruce Lee movie. He is presently working on his fifth degree black belt in Kenpo karate (there are ten degrees) and he engages in competitions and professional bouts. He has received training since 1994 from Mr. Bart Vale, the world's shoot-fighting champion.

**18**  Mr. Ingalls stated that he has received many injuries including torn muscles, crushed cartilage, and broken bones. In my opinion, it is obvious that competitions and professional bouts create a large risk of serious injury. In this case, the issue is the risk, if any, that is inherent to students during instruction, and specifically, the risk of injury from their instructors.

**19**  During Mr. Ingalls' testimony, I permitted him and a friend to demonstrate the subject manoeuvre in the courtroom. Mr. Ingalls was adamant that, at the material time, he had his left hand on Mr. Parker's right ankle, locking his right leg into position, and he had his right hand on Mr. Parker's left leg to position it for the "Achilles hook" technique that he was demonstrating. In response, Mr. Parker remained adamant that Mr. Ingalls had both hands on his right leg - one on his right ankle and one on his right knee - and then pushed his ankle. Mr. Pearson's recollection supports Mr. Parker's version of the incident.

***WAS THE DEFENDANT NEGLIGENT?***

**20**  The plaintiff's counsel, Ms. Gordon, submits that Mr. Ingalls was negligent by failing to take reasonable care in performing the demonstration and by failing to warn Mr. Parker of the possible dangers of performing such a manoeuvre. Mr. Sinnott denies that his client was negligent and points out that the fact of an injury is not sufficient evidence of ***negligence***.

**Did the Defendant Owe a Duty of Care to the Plaintiff?**

**21**  Mr. Sinnott admits that Mr. Ingalls owed a duty of care to Mr. Parker. That duty was to take reasonable care that Mr. Parker would not be injured during Mr. Ingalls' course of instruction. Mr. Sinnott notes, correctly, that Mr. Ingalls was not an "insurer" guaranteeing that Mr. Parker would not sustain an injury while training.

**What Was the Standard of Care?**

**22**  There is no question that Mr. Ingalls is an experienced and proficient martial arts instructor.

**23**  Mr. Sinnott submits that the plaintiff ought to have led opinion evidence as to the standard expected of a reasonably prudent martial arts instructor, either generally or in particular with respect to the "Achilles hook" manoeuvre. Mr. Ingalls has demonstrated the "Achilles hook" manoeuvre hundreds of times, both before and after Mr. Parker's injury, without incident. Mr. Sinnott submits that there is no evidence that Mr. Ingalls deviated from an accepted standard of conduct on the date in question. Accordingly, Mr. Sinnott submits that Mr. Parker has failed to establish the nature of the duty owed to him or that Mr. Ingalls was negligent.

**24**  Mr. Sinnott submits that the cases dealing with a determination of the standard of care in medical malpractice cases are useful. I do not agree. 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 para. 40, Mr. Justice Sopinka adopted the following passage from S.G. Fleming, *The Law of Torts,* 7th ed. (Sydney: Law Book Co., 1987):

Common practice plays its most conspicuous role in medical ***negligence*** actions. Conscious at once of the layman's ignorance of medical science and apprehensive of the impact of jury bias on a peculiarly vulnerable profession, courts have resorted to the safeguard of insisting that ***negligence*** in diagnosis and treatment (including disclosure of risks) cannot ordinarily be established without the aid of expert testimony or in the teeth of conformity with accepted medical practice. However there is no categorical rule. Thus an accepted practice is open to censure by a jury (nor expert testimony required) at any rate in matters not involving diagnostic or clinical skills, on which an ordinary person may presume to pass judgment sensibly, like omission to inform the patient of risks, failure to remove a sponge, an explosion set off by an admixture of ether vapour and oxygen or injury to a patient's body outside the area of treatment.

**25**  Karate and shoot-fighting are not comparable to medicine, either in terms of their inherent complexity or as vulnerable professions deserving of particular protection. Further, the standard of practice here is easily identifiable: the duty of an experienced karate instructor such as Mr. Ingalls when utilizing a student to perform a demonstration is not to inflict physical harm.

**Did the Defendant Breach the Standard of Care?**

**26**  It is clear that the injury to Mr. Parker occurred as a result of (1) excessive force sufficient to dislocate his knee, and (2) speed which prevented Mr. Parker from vocally telling Mr. Ingalls to stop or from tapping him, the protocol for indicating that the other person should discontinue the contact. I accept the evidence of Mr. Parker and Mr. Pearson that Mr. Ingalls had both of his hands on Mr. Parker's right leg. I infer from Mr. Ingalls' insistence that he held both legs, with only one hand on Mr. Parker's right leg, which I reject, that Mr. Ingalls failed on this occasion to use the proper technique for the Achilles hook.

**Was the Injury Foreseeable?**

**27**  The risk of injury was foreseeable to Mr. Ingalls who competes professionally as "the School Yard Bully". He has been injured in competitions - which involve aggressive physical contact - and willingly continues to assume that risk. He also testified that a student had previously been injured in the Studio. However, he conceded that his students did not assume the risk of being injured by him during a demonstration, when they are at their most vulnerable and permit him to manipulate their bodies.

**Causation:**

**28**  Approximately two weeks before trial, Ms. Gordon sought an adjournment of the trial. She had received a medical legal report from an orthopaedic surgeon, Dr. Botsford, dated May 4, 2005, which she served on Mr. Sinnott the following day. On May 8, Mr. Sinnott responded that the expert report was out of time and was inadmissible pursuant to Rule 40A. On May 15, Ms. Gordon brought an application to adjourn the trial. The Master who heard the application directed the issues of liability and quantum be severed and ordered that only liability proceed on the trial date. At that time, both counsel and the court assumed that Dr. Botsford's report was relevant only to the issue of damages.

**29**  At trial, Mr. Sinnott suggested that there was an issue of causation; that is, did Mr. Parker's knee injury result from the force applied by Mr. Ingalls or was there a pre-existing injury or condition? Accordingly, Ms. Gordon sought to enter Dr. Botsford's report, or at least the portion dealing with liability. She invoked Rule 40A(17) which permits the court to abridge the time and submitted there would be no prejudice to Mr. Ingalls.

**30**  Ms. Gordon tendered a portion of Dr. Botsford's report in which he stated under the heading "facts and assumptions": "I have assumed that Mr. Parker has had [sic] not had previous injuries to his right knee prior to his injury of January 23rd of 2003." He expressed the following opinion:

It is my opinion that Mr. Parker's right knee injury, which subsequently was definitively diagnosed as an anterior cruciate ligament tear and damage to the articular cartilage of the knee was caused from his incident of martial arts on January 23rd of 2003. The patient does not give a history of a significant knee injury prior to this date.

**31**  Mr. Sinnott says that the clinical records contain a letter dated April 25, 2003 from Dr. Botsford to Dr. Walker, the plaintiff's general practitioner, which refers to "evidence of previous damage to the knee." Mr. Sinnott said he did not give notice under Rule 40A(9) that Dr. Botsford would be required for cross-examination because he understood the medical legal report related only to the issue of damages. The simplest resolution would have been to call Dr. Botsford as a witness to clarify this issue. However, Ms. Gordon advised that he was in Toronto for a couple of weeks.

**32**  This unforeseen difficulty is but one of the many problems that inevitably attend the severance of liability and quantum. I advised counsel that the fairest resolution would be to adjourn the issue of causation, by itself or together with the issue of damages. Counsel proceeded on the basis that this trial would determine the remaining issues relating to liability. If the matter were resolved in favour of Mr. Ingalls, there would be no need to proceed further. If Mr. Ingalls is liable, then the issue of causation could be determined.

**33**  However, in his submissions, Mr. Sinnott concedes, as he must, that Mr. Parker sustained an injury to his right knee as a result of the demonstration performed by Mr. Ingalls. I conclude that causation, as an element of ***negligence***, has been proven: ***Athey v. Leonardi*** [*[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 real issue is whether the damages suffered by Mr. Parker resulted solely or partly from that ***negligence***. That issue, which arises from Mr. Ingalls' allegation that Mr. Parker had a pre-existing knee injury or condition relates to the quantum of his damages rather than to the issue of causation.

**Conclusion on Liability:**

**34**  I conclude that Mr. Parker was injured as a result of the ***negligence*** of Mr. Ingalls while he was performing the Achilles hook.

***DID THE PLAINTIFF WAIVE HIS LEGAL RIGHTS TO SUE THE DEFENDANT FOR INJURY?***

**35**  Mr. Sinnott submits that Mr. Parker's action cannot succeed because he waived his right to sue for damages incurred as a result of any injuries he suffered at the Studio.

**36**  Mr. Parker testified that he did not recall any discussion about his legal rights being waived either when he first enrolled in Kenpo karate classes in 1997 or when he and Mr. Parker commenced their shoot-fighting training in 2002. He denied any discussion with Mr. Ingalls about any health concerns or prior injuries.

**The "Student Enrolment Agreement":**

**37**  The Student Enrolment Agreement that Mr. Parker executed on February 8, 1997 is a one-page document with printing on both sides. Mr. Parker testified that he did not know there was writing on the back of the page and that he first saw it after these proceedings were started. Mr. Parker denied that Mr. Ingalls told him to read the back of the page and said that its contents were not explained to him. He understood the document to be a contract pursuant to which he would pay $700 over 12 months for the Kenpo karate instruction.

**38**  The first page of that document records the name of the student, his or her contact information, the financial terms of the contract, and the signatures of Mr. Ingalls and the student. In bold capitals it states:

**STUDENT ACKNOWLEDGES THAT HE/SHE HAS RECEIVED A FILLED-IN COPY OF THIS AGREEMENT AND THAT HE/SHE READ AND UNDERSTANDS THE CONTENTS THEREOF**.

Above the signature line, it also states in capital letters:

STUDENT HAS READ THE ENTIRE AGREEMENT AND UNDERSTANDS AND AGREES THERETO, INCLUDING THE REVERSE SIDE OF THIS AGREEMENT.

Mr. Parker testified that he did not read that provision.

**39**  On the reverse side of the document, there are nine paragraphs of what a student would surely characterize as "legalese" and be unlikely to read through. For example, the first sentence reads:

Studio agrees to at all times provide Student with a competent and qualified instructor, but it is understood and agreed by and between the parties hereto that Studio is under no obligation to provide any specific instructor desired or selected by Student.

**40**  The last sentence of the second paragraph is the only provision relating to a waiver of rights:

Student further acknowledges the existence of some risk of personal injury in participating in the prescribed course of instruction and expressly agrees to assume the risk of all injuries, death or property damage and agrees to indemnify and save harmless Studio from and against any and all liability, including all expenses, legal or otherwise, incurred by Studio in the defense of any claim or suit.

That provision is not highlighted or distinguishable from the rest of the material on that page.

**41**  Although Mr. Parker testified that he did not recall receiving a copy of the Student Enrolment Agreement, Mr. Ingalls subsequently produced a standard form of that document, which includes an original white page and a yellow copy that he stated is given to the students for their records.

**42**  The Student Enrolment Agreement was a contract for a 12-month course of instruction and expired on February 8, 1998. Mr. Parker was not required to make a further deposit. There is no evidence of any continuation of the terms of that time-limited contract and I find that it cannot apply to the incident in question that occurred some five years later.

**The Sign-in Sheets:**

**43**  In cross-examination, Mr. Ingalls was questioned about a document used as a sign-in sheet. It is headed "**PURE SELF DEFENCE STUDIOS**" and "**Liability Waiver**" and states:

In consideration of receiving instruction in the Martial Arts (Kung Fu, Karate, Jujitsu, etc.) and in other physical culture activities and being aware of the possibility of injury, I hereby, for myself, my heirs, executors and administrators, waive and forbear to exercise any and all rights and claims for damages against *Pure Self Defence Studios*, its officers, employees, instructors or their representatives or members of its classes or organizations for all damages, injuries or losses that I may sustain or incur, if any, while participating in activities or instruction sponsored completely, or in part, by *Pure Self Defence*. ...

Next to that wording, there is space for students to sign in and date.

**44**  Mr. Ingalls does not allege that Mr. Parker signed such a document on the date of the incident. Mr. Ingalls suggested that there may have been similar documents before that time but agreed that this form of document may have been introduced after the incident.

**45**  Mr. Parker testified that when the Studio first opened, students signed a sign-in sheet for class attendance, but he did not recall that it had any printed text on it. Mr. Pearson recalled signing some sign-in sheets when they did sparring classes. He described them as attendance sheets and said that practice started after Mr. Parker's injury. He was not asked to identify the form of sign-in sheet containing the waiver.

**46**  I conclude that while Mr. Ingalls may have used attendance sheets sporadically, the sign-in document containing the waiver was introduced after Mr. Parker's injury and not before that time.

**The Document Signed by Mr. Parker in 2002:**

**47**  Between 1997 and 2002, Mr. Ingalls changed his enrolment forms for new students to omit the contractual requirement to join. The document that was signed by both Mr. Parker and Mr. Pearson in December 2002 is the only document that bears on the waiver issues in this case.

**48**  The top 3 1/4 inches of the document contain the student's name; Mr. Ingalls' name; the student's contact information; boxes for checking off whether the student has a belt and the date he or she obtained it; and "contract terms". Under that information, there is a heading "**Liability Waiver**" and the following words in print so small that the paragraph occupies a mere 3/4 inch of the length of the page:

In consideration of receiving instruction in the Martial Arts (Kung Fu, Karate, Jujitsu, etc.) and in other physical culture activities and being aware of the possibility of injury, I hereby, for myself, my heirs, executors and administrators, waive and forbear to exercise any all [sic] rights and claims for damages against Pure Self Defence Studios, its officers, employees, instructors or their representatives or members of its classes or organizations for all damages, injuries or losses that I may sustain or incur, if any, while participating in activities or instruction sponsored completely, or in part, by Pure Self Defence. In the event that emergency medical care is needed, I authorize it to be provided understanding that any such care will be of the "First Aid" treatment type only. IF THE APPLICANT IS UNDER THE AGE OF 18, THIS RELEASED [SIC] AND CONSENT FORM MUST ALSO BE SIGNED BY A PARENT OR GUARDIAN.

To the right of that block of printing is a space for the signatures where both Mr. Parker and Mr. Pearson duly signed.

**49**  The bottom 6 1/2 inches of the document contains columns for noting the date, receipt number, name, description, charges, G.S.T., P.S.T., total charges, payment and balance.

**50**  Although the document contains the signatures of both Mr. Parker and Mr. Pearson, only Mr. Parker is named as the student and only his contact information is filled in.

**51**  The document does not have a second copy attached that could be given to the student.

**52**  Mr. Parker testified that he did not read the waiver. He understood that the purpose of the document was to ensure that he would be responsible for making the payments for him and Mr. Pearson and it was he, rather than Mr. Ingalls, who would be responsible for collecting Mr. Pearson's share. He said the transaction was brief and most of the discussion was between him and Mr. Ingalls. He denied that Mr. Ingalls told them that there was a greater chance of injury from shoot-fighting.

**53**  Mr. Parker testified that, since this incident, he signed a release before engaging in white-water rafting. He said it was made very clear to everyone that they were releasing the rafting company from liability: the information was carefully explained and highlighted in a lengthy orientation.

**54**  Mr. Pearson said that when he and Mr. Parker enrolled in late December 2002, they discussed the price with Mr. Ingalls but he did not recall any discussion about a liability waiver. He did not receive any safety brochures. He did not recall Mr. Ingalls asking him about the state of his health or whether he had had any injuries.

**55**  Mr. Pearson was asked if he had seen the December 2002 document. He said that he did not recall seeing it, although he had seen such documents behind Mr. Ingalls' desk and knew they were used to keep track of the students' payments. In cross-examination, he agreed that his signature appeared on that document, although he did not recall seeing the paragraph relating to a liability waiver. He agreed in cross-examination that it was possible that there might have been some discussion about waivers but he did not recall any. In re-examination, he stated emphatically that if he were in a situation where he was waiving his legal rights, he would give it "his full attention".

**56**  Mr. Ingalls said he explained that shoot-fighting had a higher level of risk than karate and that they responded, "whatever". He said he asked both men to read the waiver and they signed the form without any questions. He was satisfied that Mr. Parker understood the risks involved in shoot-fighting. He agreed that he did not warn students that he might hurt them.

**57**  I prefer the evidence of both Mr. Parker and Mr. Pearson to that of Mr. Ingalls with respect to their conversations when they enrolled for shoot-fighting. They were both credible and convincing witnesses and, in addition, Mr. Pearson was a neutral witness. Although he had been Mr. Parker's friend for a number of years, he respected Mr. Ingalls and his skills and continued as a student for some years after the incident. He subsequently moved to the Lower Mainland.

**The Law:**

**58**  In ***Karroll v. Silver Start 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=) (S.C.), Chief Justice McLachlin stated that the plaintiff was bound by a release unless she could establish:

1. that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the contents of the release to her attention.

**59**  In ***Smith v. Horizon Aero Sports Ltd****.* [*(1981), 130 D.L.R. (3d) 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X26N-00000-00&context=) (B.C.S.C.) ("***Smith***"), the defendants sought to rely on a "hold harmless" agreement whereby students undertook to "expressly waive any claim" in relation to parachute jumping. It purported to constitute a waiver and release for any injury to person or property or any liability arising from jumping. The agreement failed to refer to ***negligence*** on the part of those seeking the release. Mr. Justice Spencer noted that this type of agreement is strictly construed against the party making it and requiring its execution. He concluded that the wording should be construed to include fortuitous accidents arising from, e.g. the failure of equipment or the strenuousness of the course. "It is not, however, without clearer wording, to be referable to the defendants' neglect to do the very thing which they undertook to do, namely to use reasonable care to teach the plaintiff how to jump in safety...".

**60**  ***Smith*** was distinguished in ***Clarke v. Action Driving School Ltd****.,* [*[1996] B.C.J. No. 953*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3MJ-00000-00&context=), [1996] B.C.W.L.D. No. 1458 (S.C.) ("***Clarke***"). In ***Clarke***, the plaintiff signed a waiver of liability on an application to take the defendant's motorcycle course. The waiver provided that the plaintiff released the defendant from "all responsibility for bodily injury and claims of every nature and kind howsoever arising" from participation in the defendant's training courses. The waiver also acknowledged that there was a risk of injury in learning to ride a motorcycle. The trial judge held that although there was no express reference to "***negligence***", the use of the words "howsoever arising" included liability for ***negligence***. However, there is nothing in that case, which was a summary trial, to indicate that the accident occurred as a result of the defendant's ***negligence***.

**61**  In ***Clarke***, the judge found that having admitted that he "glanced over" the waiver, its terms were sufficiently brought to the attention of the plaintiff who was a mature professional and whose signature was witnessed. He had every opportunity to read the document carefully.

**62**  In ***Crocker v. Sundance Northwest Resorts Ltd.***, [*[1988] 1 S.C.R. 1186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23K3-00000-00&context=), the intoxicated plaintiff was badly injured in a race down a mogulled ski run. He had earlier signed a release that purported to release the defendant "from any and all damages sustained in consequence of loss, injury or damage to any person or property, and from any or all actions, causes of action, claims and demands of any nature ....". The trial judge found that the waiver provision had not been drawn to the plaintiff's attention and that he had not known of its existence. He believed that he was simply signing an entry form. The Supreme Court of Canada held that the defendant could not rely on the waiver clause.

**63**  The defendant submits that as long as a waiver is brought to the attention of a participant, the fact that he did not read it is immaterial: ***Mayer v. Big White Ski Resort Ltd.***, [*[1998] B.C.J. No. 2155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0RT-00000-00&context=) (C.A.). In that case, the plaintiff was injured while skiing when he collided with a snowmobile operated by an employee of the defendant. He had executed a release as part of the process to obtain a ski pass. The plaintiff said that he had neither read the release nor been told of its contents and he considered the document to be an administrative document kept by the defendant. The court held that the alleged ***negligence*** came within the scope of the release, which was binding.

**64**  The notice in that case was much different than the waiver in this case. It was in capital letters, in heavy black type and contained the following phrases:

**BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE**

and

**PLEASE READ CAREFULLY!**

Above the plaintiff's signature were the words

I HAVE READ AND UNDERSTAND THIS AGREEMENT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS AND ASSIGNS MAY HAVE AGAINST THE RELEASEES.

**65**  The release itself provided that the plaintiff agreed:

1. TO WAIVE ANY AND ANY CLAIMS that I have or may have in the future have against BIG WHITE SKI RESORT LTD., and its directors, officers employees, guides and representatives (all of whom are hereinafter collectively referred to as "the Releasees");
2. TO RELEASE THE RELEASEES from any and all liability from any loss, damage, injury or expense that I may suffer, or that my next of kin may suffer as a result of my use of or my presence on the skiing facilities 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, R.S.B.C. 1979, C. 303, ON THE PART OF THE RELEASEES.

**66**  Similarly, in ***Goodspeed v. Tyax***, [*[2005] B.C.J. No. 2515*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2KR-00000-00&context=), [*2005 BCSC 1577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2KR-00000-00&context=), a waiver agreement was held to bar the plaintiff's claims for ***negligence*** as a result of injuries sustained in an all-terrain vehicle ("ATV") accident. There the words "RELEASE AND WAIVER OF LIABILITY" were followed by: "Note: by signing this waiver you give up the right to sue." Above the plaintiff's signature were the words:

I declare that I have been adequately instructed on the use of the four wheeler, that I have inspected the four wheeler and that I am satisfied with its safety features and I have read and voluntarily signed this release and waiver of liability and indemnity agreement ....

**67**  In between those phrases were five paragraphs relating to the voluntary assumptions of risk taken by the rider in the operation of the ATV. The rider acknowledges the risk of serious injury and the fact that the vehicle has no damage or liability insurance. It also provides:

I am voluntarily requesting a ride, use or rental and I expressly agree to assume the entire risk of any and all accidents or personal injury, including death which I might suffer during my ride, use or rental, whether due to ***negligence*** or not.

I, in consideration of the opportunity to engage in a ride, use or rental of a four wheeler, on behalf of myself, heirs, personal representatives, successors and assigns, hereby forever agree to release, discharge and undertake not to sue the rental operator named below and each and all of its related companies, officers, directors and employees from any and all claims, demands, causes or [sic] action or liability of any kind whatsoever for injuries, property damage or death that I may now in the future have, known or unknown which in any way result from or arise out of during the course of my ride, use or rental of a four wheeler.

This agreement not to sue or release and discharge extends to any and all claims I may have, specially including but not limited to. Claims with the [sic] respect to design, manufacture, repair or maintenance of the vehicle which I will be riding, using or renting or with respect to the [sic] conditions, qualifications, instructions, rules or procedures under which the ride, use or rental is conducted, or from any other cause.

**Analysis:**

**68**  Mr. Ingalls submits that Mr. Parker is bound by the terms of the waiver unless he can show that he did not intend to agree to the release or that in the circumstances, Mr. Ingalls failed to take reasonable steps to bring the release to his attention.

**69**  Clearly this is not a case of *non est factum*: there was no fraud and Mr. Parker did not sign the document by mistake. Mr. Parker is a mature adult, who is clearly intelligent, and has a professional job. Further, Mr. Sinnott submits that, by signing the Student Enrolment Agreement, which contained a broader waiver, in 1997, Mr. Parker understood that there was a risk of injury and willingly undertook that risk.

**70**  I conclude that the liability waiver does not release Mr. Ingalls from liability. I do not accept the evidence of Mr. Ingalls that he brought the waiver to the attention of Mr. Parker and Mr. Pearson when they enrolled for shoot-fighting or that he warned them of the risks of injury in that activity. I have no doubt that Mr. Parker did not read the waiver "hidden" in the Student Enrolment Agreement in 1997 and that there was no discussion about any risk of injuries.

**71**  The cases that the defendant relies on are all distinguishable. The liability waiver itself constitutes a very small portion of the 2002 document. It appears in extremely small print with no emphasis to direct the reader to its importance or to the fact that he or she is giving up all rights to sue the Studio. It does not refer to ***negligence***. There is a space for the student to place his or her signature. There is no provision that draws the student's attention to the fact that by signing, he or she is waiving any legal rights.

**72**  In any event, I find that an injury such as that experienced by Mr. Parker does not fall within the scope of the waiver. In my opinion, Mr. Parker, by engaging in shoot-fighting lessons accepted certain risks of injury but he did not accept the risk of injury at the hands of his instructor whom he trusted not to harm him. It is reasonable for Mr. Ingalls to seek a waiver from accidents occurring in the case of a student injuring himself as a result of falling or doing a move incorrectly, or being injured by another student in the course of an exercise. However, it is not reasonable for Mr. Ingalls to seek to exclude himself from his own ***negligence*** where he is conducting a demonstration in which he has complete control over the safety of the student. Mr. Parker was not asked to consent that risk and he did not do so.

**73**  In this case, I find that Mr. Ingalls failed to take reasonable steps to bring the contents of the waiver to Mr. Parker's attention and that a reasonable person would have known that Mr. Parker did not agree to release Mr. Ingalls from negligently injuring him.

**74**  Accordingly, I conclude that the plaintiff has succeeded in establishing the defendant's ***negligence*** and that he did not waive his legal right to bring an action. Counsel should set down a hearing before me in Campbell River to determine the issues relating to the quantum of the plaintiff's damages at a date convenient to counsel, the court, and if he is to be a witness, Dr. Botsford.

ALLAN J.

**End of Document**

[***Rochon (Litigation Guardian of) v. British Columbia, [2007] B.C.J. No. 1634***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3PV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C. Lynn Smith J. (In Chambers)

Heard: April 27, 2007.

Further submissions: May 10 and 25, 2007.

Judgment: July 13, 2007.

Vancouver Registry No. S050220

**[2007] B.C.J. No. 1634** | 2007 BCSC 1060 | 160 A.C.W.S. (3d) 250

Between Jamie Christopher Rochon by his Litigation Guardian Rosanne Rachel Rochon, Plaintiff, and Her Majesty The Queen of the Province of British Columbia, The Attorney General of British Columbia, Defendants

(46 paras.)

**Case Summary**

**Civil procedure — Pleadings — Amendment of — Statement of claim — To raise additional issues — Application by plaintiff for order leave to add alleged perpetrator as defendant and for leave to amend claim — Plaintiff sued for damages arising from alleged sexual abuse suffered in a foster home and committed by another foster child — Application allowed — Plaintiff permitted to amend claim to allege direct *negligence* by Crown — Arguable that government could be directly liable in *negligence* for breach of duty of care — Proposed pleadings of *negligence* against Crown not improper or insufficiently clear to permit response — Pleading of "without good faith" might be relevant and necessary.**

**Government law — Crown — Actions by and against Crown — *Negligence* by Crown — Application by plaintiff for order leave to add alleged perpetrator as defendant and for leave to amend claim — Plaintiff sued for damages arising from alleged sexual abuse suffered in a foster home and committed by another foster child — Application allowed — Plaintiff permitted to amend claim to allege direct *negligence* by Crown — Arguable that government could be directly liable in *negligence* for breach of duty of care — Proposed pleadings of *negligence* against Crown not improper or insufficiently clear to permit response — Pleading of "without good faith" might be relevant and necessary.**

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| Application by plaintiff for order leave to add alleged perpetrator as defendant and for leave to amend claim -- Plaintiff sued for damages arising from alleged sexual abuse suffered in a foster home and committed by another foster child -- Plaintiff sought to amend claim by making Crown directly, rather than vicariously, liable in ***negligence*** for breach of duty of care owed to plaintiff -- Crown opposed amendments and argued that pleadings of ***negligence*** against Crown were improper and that allegation of "without good faith" in proposed amendments was improper -- HELD: Application allowed -- Leave to add alleged perpetrator allowed -- Plaintiff permitted to amend claim to allege direct ***negligence*** by Crown -- Not plain and obvious that plaintiff would fail in claim of direct ***negligence*** against government, given authorities and wording of applicable statutes -- Arguable that government owed duty of care to children in care and could be directly liable in ***negligence*** for breach of that duty -- Proposed pleadings of ***negligence*** against Crown not improper or insufficiently clear to permit response -- Legislation and jurisprudence indicated that pleading of "without good faith" might be relevant and necessary. |

**Statutes, Regulations and Rules Cited:**

Child, Family and Community Service Act, s. 101(a), s. 101(b)

Crown Proceeding Act, [*R.S.B.C. 1996, c. 89, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JG59-220C-00000-00&context=), s. 2

**Counsel**

Counsel for the Plaintiff: K.E. Jamieson.

Counsel for the Defendants: A.K. Fraser, D.J. Suntjens (articled student)

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| **C.L. SMITH J.** |

**Introduction**

**1**  The plaintiff in this action was born in 1992. He alleges that while he was in a government-approved foster home between August 2002 and October 2003, he was sexually assaulted by a male six years older than himself who was also in foster care in the same home. He claims that the Director of Child, Family and Community Service (the "Director") was the statutory authority responsible at the relevant times for child protection, apprehension and placement and for the provision of child care resources in British Columbia pursuant to the provisions of the ***Child, Family and Community Service Act***, *R.S.B.C. 1996, c. 46* and amendments thereto.

**2**  The Writ and Statement of Claim were issued on January 14, 2005 with the plaintiff's mother named as his Litigation Guardian. The Statement of Claim alleges that the Crown is vicariously liable for the acts and omissions of the Director and its servants and agents, including social workers employed by the Crown. It claims that the Director, on behalf of the Crown, assumed guardianship over the plaintiff and stood *in loco parentis*. Particulars of the sexual assault are alleged. The Statement of Claim says that "[a]t all material times, the Director and/or the Social Workers, all acting on behalf of the Crown, knew or should have known that Yann Giasson could not control his sexual impulses with younger children, including Jamie" and that "the Director and/or the Social Workers, all acting on behalf of the Crown, knew or should have known that Jamie was suffering, or at risk of suffering, the Sexual Assaults."

**3**  Paragraphs 20, 21 and 22 of the Statement of Claim read as follows:

1. The Crown, through the Director and/or the Social Workers, owed a duty of care duty [*sic*] to Jamie, which duties were non-delegable, and arose from its relationship of authority and trust with him as sovereign, guardian and employer, contractor and/or supervisor of the Director and/or the Social Workers, as well as the provisions of the Act, and included, *inter alia*, a duty to:
2. provide Jamie with a reasonably safe and adequate foster care placement;
3. provide Lynn and Buddy Sykes with appropriate guidance, support and instruction regarding the provision of reasonably safe and adequate foster care to Jamie;
4. protect Jamie from physical, sexual, mental, and emotional harm during his residence at the Sykes Foster Home;
5. protect Jamie from the commission, continuation or foreseeable risk of commission of the Sexual Assaults;
6. monitor and supervise adequately Jamie's physical, mental, and emotional safety and well-being while he was resident at the Sykes Foster Home;
7. monitor and supervise adequately the conduct of Lynn and Buddy Sykes in their provision of foster care to Jamie;
8. investigate adequately and on an on-going basis the credentials, qualifications, abilities, and foreseeable risks posed to Jamie by all persons resident at the Sykes Foster Home;
9. investigate, document and respond reasonably and adequately to all complaints and other information regarding Jamie's environment in the Sykes Foster Home; and
10. ensure that Jamie received appropriate and adequate treatment for the injuries he sustained as a result of the Sexual Assaults.

(together, the Crown Duties').

1. The Director and/or the Social Workers owed the Crown Duties to Jamie.
2. The Crown, the Director and/or the Social Workers breached their duty of care by, *inter alia*, failing to perform, or to perform adequately, the Crown Duties, which failures were committed negligently and without good faith.

**4**  The Statement of Claim then sets out the harm and injuries that are alleged to have resulted from the sexual assaults, ***negligence*** and breaches of duty and the types of damages that are claimed.

**Orders sought**

**5**  The plaintiff seeks the following orders:

1. to appoint the Public Guardian and Trustee of British Columbia as Litigation Guardian for the plaintiff in the place of his mother, Rosanne Rachel Rochon, and consequential amendment of the style of proceeding;
2. to remove the defendant The Attorney General of British Columbia from the style of proceeding and to add Jane Doe and John Doe in its place, and to amend the style of proceeding accordingly;
3. to add Yann Giasson as a defendant to this proceeding and to amend the style of proceeding accordingly; and
4. to amend the Amended Writ of Summons and Amended Statement of Claim in the form provided at the hearing.

**6**  The first two orders, which were unopposed, will be made.

**7**  With respect to the addition of Yann Giasson, the alleged perpetrator of the sexual assault, as a defendant, counsel for the plaintiff advised that Mr. Giasson was served and has not responded. He did not appear at the hearing. The Crown took no position with respect to this application. I note that section 3(4)(k) 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=), provides that there is no limitation period for actions based on misconduct of a sexual nature, including sexual assault, where the misconduct occurred while the person was a minor, and whether or not that person's right to bring the action was at any time governed by a limitation period. The addition of Yann Giasson as a defendant is allowed, pursuant to Rule 15(5)(a).

**8**  Some of the amendments reflected in the proposed Amended Statement of Claim referred to at the hearing were unopposed. Amendments to the pleadings reflecting the discontinuance of the action against the foster parents, Lynn Sykes and Buddy Sykes, and against the Attorney General of British Columbia, and the deletion of references to *parens patriae* in paragraphs 8 and 20 of the Statement of Claim will be allowed.

**Crown opposition to amendments**

**9**  Counsel for the Crown raises three issues with respect to the proposed Amended Statement of Claim.

**10**  First, Mr. Fraser objects to assertions that the Crown is directly liable rather than vicariously liable. Second, he argues that the pleadings of ***negligence*** are improper and should be recast. Third, he argues that the allegation of "without good faith" in paragraph 22 of the Amended Statement of Claim is improper.

**Test to be applied in permitting amendments**

**11**  Under Rule 24(1), the court has discretion to permit amendments. The Rule states:

A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court ...

**12**  Counsel for the plaintiff referred to ***Forliti (Guardian ad litem of) v. Woolley*** [*(2003), 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=), [*2003 BCSC 1082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22G1-00000-00&context=). There, Garson J. referred to some of the authorities, including ***Victoria & Grey Metro Trust Co. v. Fort Gary Trust Co.*** [*(1982), 30 B.C.L.R. (2d) 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6132-00000-00&context=) (S.C.) (rev'd [*(1982), 30 B.C.L.R. (2d) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6134-00000-00&context=) (C.A.) on the application of the test to the facts); ***Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.*** [*(1986), 6 B.C.L.R. (2d) 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-20T9-00000-00&context=) (S.C.) at 354; and ***Hunt v. T & N plc***, *[1990] 2 S.C.R. 959*, *74 D.L.R. (4th) 321*, and observed that the test on an application to amend a statement of claim is analogous to the test for allowing an application to strike a pleading under Rule 19(24). The test in that context is whether it is plain and obvious that no reasonable cause of action is disclosed: ***Odhavji Estate v. Woodhouse***, [*[2003] 3 S.C.R. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), [*2003 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=).

**13**  To the same effect, in ***McNaughton v. Baker*** [*(1988), 25 B.C.L.R. (2d) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=) (C.A.), McLachlin J.A. (as she then was) stated at p. 25:

As a general proposition, a party should not be required to adduce evidence in support of a pleading before trial .... It is sufficient that his pleading discloses reasonable cause of action or defence. The courts take a liberal approach to pleadings. Before the courts will strike out a pleading or refuse an amendment on the ground that it discloses no reasonable cause of action or defence the case must be perfectly clear.

**14**  The question is whether the claim is bound to fail, *i.e.* is it clear that it cannot succeed? If there is doubt, on either the facts or the law, the matter should go to trial.

**15**  In ***Carley Estate v. Allied Signal Inc.*** [*(1997), 35 B.C.L.R. (3d) 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-6106-00000-00&context=) (C.A.), Lambert J.A. stated at p. 57:

It seems to me that a relevant question on whether the amendment that is requested is one which raises an arguable issue, or whether on the other hand it is perfectly clear that it does not, can in appropriate cases and should in appropriate cases be looked at from a perspective not just of the Supreme Court of British Columbia but also of this Court and finally of the Supreme Court of Canada. If the point being raised is one where there is not perfect clarity about the view which would ultimately be taken by the Supreme Court of Canada then the amendment might properly be allowed even if the point was settled as far as the Supreme Court of British Columbia is concerned.

The Supreme Court of British Columbia Judge may be bound by a previous decision of this Court that may seem to the Supreme Court Judge to make the matter perfectly clear in the Supreme Court of British Columbia. In this Court on the other hand we have the opportunity, if we think it appropriate to do so, to sit in a Court of five judges and reconsider our own previous decisions. So perhaps an element is introduced at this level which imperils what may seem to be perfect clarity in the Supreme Court of British Columbia.

I do not propose to discuss the arguments which have been made about the substance of the issue or any of the questions which were said to be relevant. I consider that, viewed from the perspective I have mentioned, it is not perfectly clear that the point raised in this amendment is an invalid point. Accordingly, I would allow the appeal and grant the amendment that has been sought.

**16**  Those observations support the submission of Ms. Jamieson, for the plaintiff, that where the law is under development, the possibility that it may develop in a direction permitting the claim should be taken into account. See also ***McClelland v. Stewart*** [*(2003), 229 D.L.R. (4th) 342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20KK-00000-00&context=), [*2003 BCSC 1292*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20KK-00000-00&context=) (varied [*(2004), 245 D.L.R. (4th) 162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2RN-00000-00&context=), [*2004 BCCA 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2RN-00000-00&context=), leave to appeal refused [*[2004] S.C.C.A. No. 492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B3PV-00000-00&context=).)

**17**  I turn now to the Crown's specific objections to aspects of the proposed Amended Statement of Claim.

**Direct liability of the Crown**

**18**  Mr. Fraser argued that the only basis upon which the Crown can be directly liable in ***negligence*** is if Her Majesty the Queen herself has been negligent. Thus, he says, the proper pleading in a case such as this (which clearly does not involve allegations of any personal misconduct by Her Majesty) is that the Crown is vicariously liable for the acts of her servants and agents. He says that it is incorrect to plead that the Crown owes a duty of care, that the Crown breached that duty, or that someone (such as the Director) "acted on behalf" of the Crown.

**19**  The Respondent Crown's position flows, Mr. Fraser submitted, from the fact that the Crown is defined as the Queen, and the Queen is a corporation sole. Mr. Fraser argued that although the "directing mind" doctrine with respect to corporations allows the identification of the acts of individuals with those of the corporation, the Crown is like a sole proprietor. Thus, unless the plaintiff shows that agents or servants of the Crown are negligent, the Crown cannot be found liable.

**20**  The ***Crown Proceeding Act***, *R.S.B.C. 1996, c. 89*, provides as follows:

1. In this Act:

"agent", when used in relation to the government, includes an independent contractor employed by the government;

"Crown" means Her Majesty the Queen in right of British Columbia;

"officer of the government" includes a minister of the government and an employee of the government;

"order" includes a judgment, decree, rule, award and declaration;

"person" does not include the government;

"proceeding against the government" includes a claim by way of set off or counterclaim raised in proceedings by the government, an interpleader proceeding to which the government is a party, and a proceeding in which the government is a garnishee.

1. Subject to this Act,
2. proceeding against the government by way of petition of right is abolished,
3. a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,
4. the government is subject to all the liabilities to which it would be liable if it were a person, and
5. the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

...

1. In proceedings under this Act, the government must be designated "Her Majesty the Queen in right of the Province of British Columbia".

...

1. In proceedings against the government and proceedings in which the government is a party, if there are, in the rules of the court in which the proceedings are brought, rules relating to one or more of discovery and inspection of documents, examinations for discovery and interrogatories, those rules apply as if the government were a corporation.

...

1. In proceedings against the government and proceedings in which the government is a party, the rights of the parties must, subject to this Act, be as nearly as possible the same as in a proceeding between persons, and the court may
2. make an order, including an order as to costs, that it may make in proceedings between persons, and
3. otherwise give the appropriate relief that the case may require.

**21**  The ***Interpretation Act***, R.S.B.C., c. 238, sets out the following definitions relevant to the question:

1. In an enactment:

...

"government" or "government of British Columbia" means Her Majesty in right of British Columbia;

...

"Her Majesty", "His Majesty", "the Queen", "the King", "the Crown", or "the Sovereign" means the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth;

...

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;

**22**  Mr. Fraser argues that if this question arose in any other jurisdiction in Canada or in the United Kingdom, the answer would be clear because the legislation in other jurisdictions provides that the Crown will be vicariously liable in tort for the ***negligence*** of its servants or agents or will be liable where a form of strict liability, or non-delegable duty, is imposed on the Crown. For example, the ***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=), states:

1. In this Act,

"Crown" means Her Majesty in right of Canada;

2.1 For the purposes of sections 3 to 5, "person" means a natural person of full age and capacity other than Her Majesty in right of Canada or a province.

1. The Crown is liable for the damages for which, if it were a person, it would be liable

...

1. in any other province, in respect of
2. a tort committed by a servant of the Crown, or
3. a breach of duty attaching to the ownership, occupation, possession or control of property.

**23**  Ontario's legislation, the ***Proceedings Against the Crown Act***, *R.S.O. 1990, c. P. 27* states:

5(1) Except as otherwise provided in this Act, and despite section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

1. in respect of a tort committed by any of its servants or agents;
2. in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
3. in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
4. under any statute, or under any regulation or by-law made or passed under the authority of any statute.

**24**  However, Mr. Fraser submits that the question is not clear in this jurisdiction.

**25**  First, as has been seen in the extracts from the ***Crown Proceeding Act*** and the ***Interpretation Act*** set out above, the British Columbia statutes equate "government" with "Her Majesty" and state that the government is subject to the liabilities of a person.

**26**  Second, Supreme Court of Canada authority seems to indicate that the "government" can be directly liable in these very circumstances. In ***K.L.B. v. British Columbia***, [*[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=), [*2003 SCC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y8-00000-00&context=), the majority of the Court, per McLachlin C.J.C., found that the government could be liable to children who suffered harm in foster care on the basis of direct ***negligence***. At para. 12, McLachlin C.J.C. wrote:

1. Direct ***Negligence*** by the Government

This ground of liability requires a finding that the government itself was negligent. Direct ***negligence***, when applied to legal persons such as bodies created by statute, turns on the wrongful actions of those who can be treated as the principal organs of that legal person. Both courts below held that the government had a duty under the *Protection of Children Act*, R.S.B.C. 1960, c. 303, to place children in adequate foster homes and to supervise their stay, and that this duty had been breached.

**27**  Mr. Fraser argued that in ***K.L.B.***, the Court was not referring to "government" in the technical sense as defined in the ***Interpretation Act***. He submitted that the context and other references show that the Court must have been referring to the government exercising statutory functions or to the Director, and not to the Crown. He urged that in context, the judgment in ***K.L.B.*** used the term "direct ***negligence***" to differentiate the basis for liability found by the Court from the vicarious liability which the plaintiff was claiming the Crown bore for the actions of the foster parents.

**28**  Mr. Fraser referred to ***Arishenkoff v. British Columbia*** [*(2005), 47 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B21X-00000-00&context=), [*2005 BCCA 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B21X-00000-00&context=), (application for leave to appeal dismissed [*[2005] S.C.C.A. No. 556*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M41S-00000-00&context=)) where Southin J.A. stated that in passing the ***Crown Proceeding Act*** in 1974, the legislature did not intend to abrogate, for wrongs committed by a servant of the Crown before the proclamation of the ***Act*** in 1974, the doctrine that no cause of action would lie against the Crown for the wrong of its servants. Southin J.A. referred to the longstanding common law rule that "The King can do no wrong". Mr. Fraser argued that the objective of the ***Crown Proceeding Act*** was to permit actions based on vicarious liability, that is, actions against the Crown for the wrongs of its servants, and ***Arishenkoff*** makes clear that the effect of that reform is limited to actions occurring after the legislation came into effect.

**29**  Upon the request of the Court, counsel looked further into the legislative history of the ***Crown Proceeding Act***, specifically, the recommendations of the Law Reform Commission of British Columbia which preceded that legislation. In its ***Report on Civil Rights: Part 1 - Legal Position of the Crown***, (1972), the Law Reform Commission reviewed the common law of Crown immunity, analyzed various options, and made a number of recommendations.

**30**  With respect to the identity of the Crown, the Commission wrote at page 9:

The word "Crown" may be confusing to some. In law the Crown is a term of art, the meaning of which bears little resemblance to the chattel that sits in the Tower of London to be gazed at by sightseers. The "Crown" is a description for Her Majesty Elizabeth II in her legal personage as Sovereign. The expression describes ". . . the corporate legal entity to which the law ascribes the legal rights and obligations of the various semi-sovereign units of government created by the *British North America Act*." It is necessary to speak of the Crown in the right of "the particular unit of government." Therefore, the Crown for our purposes is Her Majesty in the right of British Columbia. It is sometimes said that the Crown is "one and indivisible", but this notion must be reconciled with the fact that there are 11 "semi-sovereign units of government" or "Crowns" in Canada. It is important to emphasize that the "Crown" is really synonymous with the "government." Lord Diplock held that the "Crown" connotes the "government of the state." There is nothing mysterious about the "government." As Laski wrote: "Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the State behind them." The study of the Crown is then a study of the government. For this reason the two words are used interchangeably in this Report.

**31**  The report considered the models in place in the United Kingdom and other Canadian provinces and recommended a different model, at page 54:

The exemption of the Crown from nonvicarious liabilities has been uniformly criticised by commentors on the problem. There appears to be no justification for the exception, which seems more of an anomaly than a deliberate policy decision.

The Commission recommended legislation providing that the Crown be liable in tort to the same extent as its subjects.

**32**  The plaintiff submits that both the reasons of the Supreme Court of Canada in ***K.L.B.*** and the wording of s. 2 of the ***Crown Proceeding Act*** provide a basis in law for the proposed amendments that claim the government owes a duty of care to children in care and can be directly liable in ***negligence*** for breach of that duty. The plaintiff submits that the question that counsel for the Crown raises can be argued at trial, but that by no means is it clear that the claim based on direct ***negligence*** fails to disclose a cause of action.

**33**  I have concluded that the proposed amendments should be permitted in the form provided by plaintiff's counsel. It is not plain and obvious that the plaintiff will fail in his claim of direct ***negligence*** against the government, given the authorities and the wording of the statutes.

**Pleadings of *Negligence***

**34**  The Crown also argues that the plaintiff's pleadings of ***negligence*** are improper and should be recast. Mr. Fraser argued that paras. 20, 21 and 22, purporting to describe "Crown Duties", do not actually do so; instead, he says, they set out particulars of ***negligence***.

**35**  The Crown argues that the pleaded relationship between the plaintiff and the Crown does not give rise to a number of discrete duties of care, the breach of any of which will give rise to a cause of action. The Crown's position is that there is a general duty to take reasonable care to prevent certain kinds of injury. The Crown concedes that the relationship between the Director and a child in the care of the Ministry is such that there may be a duty of care owed by the Director and his or her delegates to prevent foreseeable harm of physical injury including sexual assault.

**36**  With respect to the definition of the duty of care in para. 20 of the Statement of Claim, plaintiff's counsel pointed to the reasoning of the court in ***K.L.B.*** At para. 14 of that judgment, McLachlin C.J.C. referred to the predecessor legislation of the ***Child and Family Services Act***, namely the ***Protection of Children Act***, in order to determine the context of the duty of care on the superintendent. The relevant passages from the judgment are as follows (at paras. 14-17):

Turning first to the duty of care, the Act stipulates, in s. 8(12), that the Superintendent of Child Welfare must make such arrangements for the placement of a child in a foster home "as will best meet the needs of the child". (The relevant legislative provisions are reproduced in the Appendix.) This imposes a high standard of care. In most contexts, the law of ***negligence*** requires reasonable care, not perfection: ***Challand v. Bell*** [*(1959), 18 D.L.R. (2d) 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93B1-F4GK-M3X6-00000-00&context=) (Alta. S.C.); ***Ali v. Sydney Mitchell & Co.***, [1980] A.C. 198 (H.L.). In the case of those exercising a form of control over a child comparable to that of a parent, however, the law imposes a heightened degree of attentiveness. The "careful parent test" imposes the standard of a prudent parent solicitous for the welfare of his or her child (***Durham v. Public School Board of Township School Area of North Oxford***[*(1960), 23 D.L.R. (2d) 711*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M023-00000-00&context=) (Ont. C.A.), at p. 717; ***McKay v. Board of Govan School Unit No. 29 of Saskatchewan***, [*[1968] S.C.R. 589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22T9-00000-00&context=); ***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=)). This is the test that governs the placement and supervision of children in foster care under the ***Protection of Children Act***. It does not make the government a guarantor against all harm. But it holds it responsible for harm sustained by children in foster care, when, judged by the standards of the day, it was reasonably foreseeable that the government's conduct would expose these children to harm of the sort that they sustained.

It is reasonably foreseeable that some people, if left in charge of children in difficult or overcrowded circumstances, will use excessive physical and verbal discipline. It is also reasonably foreseeable that some people will take advantage of the complete dependence of children in their care, and will sexually abuse them. To lessen the likelihood that either form of abuse will occur, the government must set up adequate procedures to screen prospective foster parents. And it must monitor homes so that any abuse that does occur can be promptly detected.

This appeal and the appeals in the two companion cases stand to be judged by the standards of the day for placement and supervision, in other words the standard of a prudent parent at that time. The standards prevailing in the 1960s and early 1970s were lower than those of today, because there was less awareness of the risk of abuse in foster homes. The trial judge did not apply today's standards, but proceeded on the basis that the standards of the time required proper assessment of the proposed foster parents and whether they could meet the children's needs; discussion of the acceptable limits of discipline with the foster parents; and frequent supervisory visits in view of the fact the foster homes were "overplaced" and had a documented history of breach. She found that the government negligently failed to meet this standard (para. 74), and that this ***negligence*** was causally linked to the physical and sexual abuse suffered by the children and their later difficulties (para. 143). It is clear from these conclusions that the government failed to put in place proper placement and supervision procedures, as required by the Act. The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems.

It follows that the government is liable to the appellants on the basis of direct ***negligence***, subject to the defence of the limitation period, discussed below.

**37**  Ms. Jamieson says that the plaintiff is not limited (as the Crown suggests) to pleading a duty of care only to protect a child from injury. Rather, she submitted, the duty can extend to what is stipulated in the current legislation.

**38**  Counsel did not refer to specific provisions of the ***Child, Family and Community Services Act***, but I note that it provides in s. 2, "guiding principles" as follows:

This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

1. children are entitled to be protected from abuse, neglect and harm or threat of harm;
2. a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
3. if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
4. the child's views should be taken into account when decisions relating to a child are made;
5. kinship ties and a child's attachment to the extended family should be preserved if possible;
6. the cultural identity of aboriginal children should be preserved;
7. decisions relating to children should be made and implemented in a timely manner.

**39**  It also provides in s. 71(1) that when deciding where to place a child, the Director must consider the child's best interests. Section 4 provides:

1. Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
2. the child's safety;
3. the child's physical and emotional needs and level of development;

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|  |  | (c) the importance of continuity in the child's |  |
| care; |  |  |  |

1. the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
2. the child's cultural, racial, linguistic and religious heritage;
3. the child's views;
4. the effect on the child if there is delay in making a decision.
5. If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

**40**  While I think that the pleadings as drafted do somewhat conflate the definition of the duty of care with the specification of particulars of ***negligence***, I do not think they are improper or insufficiently clear to permit response. I have concluded that these proposed amendments should be permitted, and that arguments about the precise duties of the Director should be left for trial, when they may be decided in the context of the evidence and full argument.

**Pleadings of "without good faith"**

**41**  Third, the Crown argues that the allegation of "without good faith" in para. 22 is improper. Mr. Fraser argued that to say someone acted without good faith does not disclose a cause of action, and that allegations of bad faith should not be made without foundation.

**42**  Ms. Jamieson submitted in response that "without good faith" is not necessarily the same as "with bad faith" and that where the pleading is in response to legislation, it is sufficient to plead "without good faith". She submits that s. 101 of the ***Child, Family and Community Service Ac***t gives rise to the need to address the issue. Section 101 provides:

|  |  |  |  |
| --- | --- | --- | --- |
| 101 |  | No person is personally liable for anything done or omitted in good faith in the exercise or performance or intended exercise or performance of |  |

1. a power, duty or function conferred by or under this Act, or
2. a power, duty or function on behalf of or under the direction of a person on whom the power, duty or function is conferred by or under this Act.

**43**  Counsel for the plaintiff also referred to ***M.B. 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=) (varied, [*2002 BCCA 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1JF-00000-00&context=), appeal allowed [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=)). In that case, the plaintiff sued the defendant Crown for damages for ***negligence*** and breach of fiduciary duty in connection with her placement in a foster home where she was sexually abused. The Crown argued that if a statutory duty of special diligence applied, then that standard governed what are ultimately discretionary decisions and that the Crown was not liable because the officials had acted in good faith in exercising their statutory discretion. The Court held that the standard of special diligence and the defence of good faith do not impose mutually inconsistent or incompatible standards of care on the Crown. At para. 169 the Court noted:

Notably, in every case referred to by the Crown where the good faith defence arose, the plaintiff specifically challenged the Ministry's judgment concerning the placement or removal of the child-in-care.

And at para. 173, Levine J. stated:

In this sense, the duties of "special diligence" and "good faith" are complementary. The Crown cannot claim that its servants possess an honest belief that a decision was reasonable or made in good faith if they do not at least reasonably supervise and monitor the circumstances of a child-in-care to reveal facts the decision maker ought to know. Similarly, once Crown officials are put on inquiry, the defence of good faith will be of no assistance unless they actually consider the matter and make a decision consistent with the exercise of the Crown's duty.

**44**  The legislation and the jurisprudence thus indicate that a pleading of "without good faith" may be relevant and necessary.

**45**  The proposed amendments may be made.

**Conclusion**

**46**  In conclusion, the plaintiff's proposed amendments are necessary in order to permit the issues between the parties to be determined. The applications are granted.

C.L. SMITH J.

**End of Document**

[***Fatin v. Watson, [2018] B.C.J. No. 354***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RTY-1871-JCBX-S0T0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J.C. Grauer J.

Heard: February 5-7, 2018.

Oral judgment: February 8, 2018.

Docket: 162886

Registry: Victoria

**[2018] B.C.J. No. 354** | 2018 BCSC 306

Between Neil Andrew Fatin, Plaintiff, and Adam Watson and Canada Joint Ocean Sea Management Co. Ltd., Defendants

(88 paras.)

**Case Summary**

**Civil Litigation — Civil procedure — Costs — Assessment or fixing of costs — Considerations — Particular orders — Special orders — Increase in scale of costs — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed — Defendant was 75 per cent liable for accident — Plaintiff was awarded total damages of $113,574 — Plaintiff made offer to settle just before trial of $100,000 — Plaintiff entitled to double costs for three days of trial — Plaintiff awarded costs of $11,625 — *Negligence* Act, s. 3.**

**Damages — Physical and psychological damages — Arm injuries — Wrist — Considerations impacting on award — Age of claimant — Future treatment required — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed — Only significant injury to plaintiff was to right wrist — Wrist injury was permanent — Only potential treatment was wrist replacement operation — Plaintiff awarded total damages of $113,574.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Expenses and expenditures — Medical — Medications — Housekeeping services — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed — Defendant was 75 per cent liable for accident — Plaintiff suffered permanent injury to right wrist — Only potential treatment was wrist replacement operation — Injury affected plaintiff's recreational activities and ability to renovate homes — Plaintiff awarded non-pecuniary damages of $85,000, damages for loss of homemaking capacity of $55,000, costs of future care of $4,504, and special damages of $4,929 — Total damages after deduction of 25 per cent were $113,574.**

**Transportation Law — Motor vehicles and highway traffic — Liability — Civil actions — Breach of rules of the road — Defences — Apportionment of fault — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed — Defendant attempted to pass several vehicles of highway, including plaintiff's vehicle — Plaintiff was turning left into turnout — Defendant struck plaintiff's vehicle on left rear quarter — Defendant was in best position to avoid collision but was speeding — Defendant was 75 per cent liable for accident and plaintiff was 25 per cent liable — Motor Vehicle Act, ss. 159, 160, 166.**

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| --- |
| Action by the plaintiff Fatin for damages for injuries suffered in a 2014 motor vehicle accident. The defendant Watson was the driver of a truck that collided with Fatin. Watson was attempting to pass vehicles, including Fatin's van. He pulled out into the eastbound lane and accelerated, but Fatin was turning left into a turnout on the south side, crossing the eastbound lane. Watson's truck struck Fatin's van on its left rear quarter. Fatin suffered a blow to his head and his left shoulder, but neither caused any lasting injury. The significant injury was to his right wrist. As a result of the wrist injury, Fatin, who was retired, could no longer participate in recreational activities such as golf and bocce. He was unable to lift any heavy objects, preventing him from performing renovations and landscaping to homes and recreational properties, which he had done up to the accident. Fatin claimed non-pecuniary damages, damages for loss of homemaking capacity, damages for the cost of future care and special damages. The defendants denied liability for the accident and contested the quantum of Fatin's claim.  HELD: Action allowed.  Watson was in the best position to avoid the collision but was unable to do so because of his speed and his failure to respond to what was obviously happening ahead of him. Given that he was passing a number of vehicles at speed, and had advance warning of problems ahead, fault was apportioned 75 per cent to Watson and 25 per cent to Fatin. The accident caused Fatin's pre-existing osteoarthritis to become symptomatic to the point where it became disabling. He would not have suffered that degree of disability but for the accident. There was no doubt that his wrist injury was permanent. The only potential treatment was a wrist replacement operation. Fatin's claim for non-pecuniary damages was assessed at $85,000. Fatin's claim for loss of homemaking capacity, past and future, was assessed at $55,000. He was entitled to future care costs of $4,504 for splints, corticosteroid injections and post-operative services. Special damages were assessed at $4,929. The total damage award of $149,433 was reduced by 25 percent to $113,574. Fatin made an offer to settle for $100,000 just prior to trial. Watson should have accepted that offer. Fatin was entitled to double costs for the three days of trial. The total costs awarded were $15,500 and Fatin was entitled to 75 per cent of that amount or $11,625 and 75 per cent of his disbursements. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 159*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GN-00000-00&context=), s. 160, s. 166

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B068-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Donald D. McKnight.

Counsel for the Defendants: Emma Thomas.

**Oral Reasons for Judgment**

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| **J.C. GRAUER J. (orally)** |

**1.0 INTRODUCTION**

**1**  The plaintiff, Dr. Fatin, 78, claims damages for injuries and losses suffered because of a motor vehicle collision that occurred on July 25, 2014. The defendant Adam Watson was the driver of a truck that collided with Dr. Fatin. Mr. Watson was attempting to pass vehicles, including Dr. Fatin's van, heading west on the Pacific Rim Highway, near Sproat Lake. He pulled out into the eastbound lane and accelerated, but Dr. Fatin was turning left into a turnout on the south side, crossing the eastbound lane. Mr. Watson's Dodge Ram truck struck Dr. Fatin's van on its left rear quarter. Both vehicles were badly damaged, the van being written off.

**2**  The defendants deny liability and contest the quantum of Dr. Fatin's claim. Dr. Fatin's wife, Maureen Fatin, was also injured in the collision, but is pursuing her claim separately because of the liability complications. My findings of liability in this case will also apply in hers.

**2.0 LIABILITY**

**3**  For traffic heading westbound, the portion of the Pacific Rim Highway where the collision occurred is a straight stretch that follows a lengthy winding portion. The centreline was a double line, consisting of a solid line with a broken line on the side of westbound traffic. As a result, it was open to westbound traffic to cross the centreline to pass.

**4**  Sections 159 and 160 of the *Motor Vehicle Act*, *RSBC 1996, c 318*, govern passing on the left:

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

**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.

**5**  Section 166 governs turning left other than at an intersection:

**166** A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless

1. the driver causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,
2. the vehicle is in the position on the highway required by paragraph (a), and
3. the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.

**6**  From this, it follows that both Dr. Fatin and Mr. Watson were under an obligation to proceed cautiously. As the Court of Appeal observed in *Samograd v Collison*, [*1995 CanLII 708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=) (BCCA), the law does not impose a greater obligation on the passing vehicle or on the left-turning vehicle. The obligations of both are to be assessed in relation to the circumstances they face, and a relevant consideration is which of them had the better opportunity to see the potential for a collision before it occurred.

**7**  Dr. Fatin testified that he came into the straight stretch at the head of a string of six or seven vehicles, and was aware that they would shortly reach the turnout where he wanted to turn. As they approached the turnout, he slowed down, put on his left turn signal, looked behind him, started to turn, looked back, and then saw a grey Jeep coming on fast in the eastbound lane to his left. The Jeep appeared to be fairly far back, and Dr. Fatin thought it would duck back into the line of traffic, but it did not. As a result, Dr. Fatin abandoned the turn and the Jeep passed him at considerable speed.

**8**  With this rather close call in mind, Dr. Fatin said that he then checked carefully again. His signal was still on. He was nearly stopped. He saw nothing in the eastbound lane and so made his turn. His front wheels were just into the gravel area of the turnout, off the highway, when there was a sudden loud bang. His van spun through 180degree and careened backwards. He never saw the truck that hit him until after the collision. The photographs indicate that the point of impact on his van was immediately behind the left rear wheel.

**9**  Mrs. Fatin was in the passenger seat beside Dr. Fatin. She was looking to the left to identify the turnout where they proposed to turn, and so, she testified, saw her husband check for approaching traffic, and turn on his signal.

**10**  According to Mr. Watson, he was three cars back of Dr. Fatin when they emerged into the straight section. The speed limit increased from 80 km/h to 90 km/h, and they were travelling a little below the speed limit. He was anticipating the opportunity to pass. In front of Mr. Watson was the grey Jeep.

**11**  Mr. Watson said that the grey Jeep pulled out to pass, and accelerated into the eastbound lane. Mr. Watson waited two or three seconds, and then pulled out behind the Jeep, in order to pass with him. He said that there were two car lengths between them. I observe that if he had in fact waited two or three seconds before pulling out behind the Jeep, there would likely have been rather more than two car lengths between them.

**12**  From his position in the eastbound lane behind the Jeep, Mr. Watson saw Dr. Fatin's vehicle move left into the eastbound lane very close to the Jeep. The Jeep had to pull to its left, its left side moving across onto the south hard shoulder, while Dr. Fatin pulled right, back into the westbound lane. Shortly after that, Dr. Fatin's vehicle moved left again to make its turn. Mr. Watson testified that he applied his brakes hard, but could not avoid the collision. His brakes were fully locked up when they collided, and remained so while his truck continued nearly 100 feet beyond the point of collision.

**13**  Mr. Watson could not say whether or not Dr. Fatin had his signal on, but agreed that his manoeuvre was likely related to a proposed left turn as he did not recall there being any vehicles ahead of Dr. Fatin. I am satisfied on the basis of the evidence of Dr. Fatin and Mrs. Fatin that van's left turn signal was engaged throughout the relevant time.

**14**  I found Dr. Fatin, Mrs. Fatin and Mr. Watson all to be credible witnesses, trying to recount what happened to the best of their respective recollections. It is not at all surprising that their memories differ concerning unexpected and traumatic events that occurred over the space of a few seconds nearly four years ago.

**15**  I accept that Mr. Watson pulled into the eastbound lane with a view to passing the line of traffic, behind the Jeep. But it seems to me he must have been much further behind the Jeep than he remembered. Otherwise, he would have been right beside Dr. Fatin's van by the time the Jeep sped ahead of it; instead, he collided with the back of Dr. Fatin's van, which had almost completed its turn from a nearly stopped position after the Jeep passed.

**16**  I infer from the nature of the impact and the distance he travelled with his brakes locked after the impact that Mr. Watson was travelling at a significant speed, likely comfortably above the speed limit of 90 km/h. That would not be surprising. It is not uncommon for motor vehicles to accelerate above the speed limit for the purpose of completing a passing manoeuvre and returning to the safety of their home lane as quickly as possible.

**17**  I further conclude that it is because Mr. Watson's truck was further behind the Jeep than two car lengths, that Dr. Fatin did not note him when he checked before starting his second attempt at a turn. I find, however, that Mr. Watson's truck was in the eastbound lane following the Jeep.

**18**  The plaintiff submits that, in the circumstances, Mr. Watson should be found fully liable. He relies on cases such as *Vance v Servine*, [*1992 CanLII 339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61G1-00000-00&context=) (BCCA), *Willett v Rose*, [*2017 BCSC 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NCX-HXM1-JWR6-S2KM-00000-00&context=), *Ali v Fineblit*, [*2015 BCSC 1494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-N221-JW5H-X0MH-00000-00&context=), and *Tabori v Renaud*, [*2016 BCSC 1242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K7J-N351-F2TK-20FB-00000-00&context=). In each of these the passing driver was found 100% at fault after colliding with the left turning driver. In my view, however, these cases are all distinguishable.

**19**  In *Vance*, the collision occurred on an urban road where the speed limit was 60 km/h, and the turning driver was attempting a left turn into a driveway. *Willett* was not truly a passing case. The collision occurred at an intersection of two roads. The plaintiff was intending a left turn at the intersection, and was struck by the defendant who was immediately behind her. In *Ali*, the collision occurred at a city intersection where the plaintiff had stopped before turning left. The defendant attempted to pass the plaintiff's vehicle at the intersection. *Tabori* similarly involved a collision at a city intersection, this time, a T-intersection. As the plaintiff started a left turn at the T, the defendant attempted to pass on the left.

**20**  The defendants submit that fault should be apportioned 40% against Mr. Watson, and 60% against the plaintiff. They rely on *Samograd*, (fault apportioned 40% against of the left turning driver and 60% against the overtaking driver), *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=), (fault apportioned 60% against the left turning driver and 40% against the overtaking driver), *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=) (fault apportioned 80% against the left turning driver and 20% against the overtaking driver), and *Erkel v Brietzke*, [*[1997] B.C.J. No. 1601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0RY-00000-00&context=) (SC) (fault apportioned 60% against the lane changing driver, 40% against the overtaking driver).

**21**  I find *Pipe* and *Erkel* to be readily distinguishable. In *Pipe*, the left-turning vehicle failed to signal. The left turn signal was broken. The judge found this to be the principal cause of the accident. *Erkel* was a different type of case altogether. There, the plaintiff and defendant were travelling in the same direction in parallel lanes of a four-lane highway. The plaintiff changed lanes and collided with the defendant. I do not find the analysis of liability helpful in the present context.

**22**  *Eccleston* involved circumstances similar to those that arise here, but once again, the turn signal of the left-turning driver was not working. That was not the case here. In *Samograd*, the court found that the left-turning driver's rearview check was less than thorough. But as I noted above, the obligations of each driver are to be assessed in relation to the particular circumstances of the case, with a view to determining who had the better chance to avoid the accident.

**23**  In this case, we have a provincial highway with the speed limit of 90 km/h, and a vehicle attempting to turn left into an unmarked turnout-not at an intersection. Vehicles passing on the left were to be expected, as Dr. Fatin acknowledged, and the obligation on him to proceed with caution was high. Indeed, he had the specific warning of the close call with the Jeep. While I accept that he checked again after the Jeep passed, I am bound to conclude that he did not check thoroughly enough because I am satisfied that the truck was in the eastbound lane at the time, although much further back than Mr. Watson testified. It is, I suspect, for this reason that Dr. Fatin did not notice him. In addition, because of the aborted turn, the angle of his mirrors may have changed.

**24**  But the obligation on Mr. Watson to proceed with caution was also high. He had pulled out behind another vehicle to pass several vehicles at once, increasing the potential risk. And just as Dr. Fatin was "warned" by the near miss with the Jeep, so Mr. Watson was warned by the first turning manoeuvre he witnessed, the one that Dr. Fatin aborted because of the Jeep, and by Dr. Fatin's left turn signal.

**25**  By the time the Jeep passed Dr. Fatin's van, I find, the van must have come virtually to a stop, otherwise the turn would have become impossible. Given that Dr. Fatin was the lead car and was signalling a left turn, this added to the warnings that should have alerted Mr. Watson. The fact that the collision point was with the back of the van indicates that there was time for the van to proceed from its nearly stopped position almost all the way through its turn before the collision happened at what can only have been a high speed.

**26**  In these circumstances, I find that Mr. Watson was in the best position to avoid the collision, but was unable to do so because of his speed and his failure to respond to what was obviously happening ahead of him. Given that he was passing a number of vehicles at speed, and had advance warning of problems ahead, I would apportion 75% of the fault to him, and 25% to Dr. Fatin.

**3.0 DAMAGES**

**27**  Dr. Fatin claims non-pecuniary damages, damages for loss of homemaking capacity, damages for the cost of future care and special damages.

**28**  Dr. Fatin suffered a blow to his head and his left shoulder, but neither of these caused any lasting injury. The significant injury was to his right wrist. He suffered, and continues to suffer, from a condition called "SLAC wrist". SLAC is the medical short form for scapholunate advanced collapse, and comprises injury to the right scapholunate ligament leading to intercarpal and radialcarpal osteoarthritis.

**29**  This injury has had a marked effect on Dr. Fatin's lifestyle. Although retired from medicine for some years, he has been very active in carrying out extensive renovations and landscaping to the homes and recreational properties in which he and his family have lived, and was active in activities such as golf and bocce. He can no longer lift a heavy item, wield a hammer, drive a screw, swing a golf club or put a backspin on a bocce ball. He wears a brace on his right wrist to minimize the pain that comes with movement.

**30**  The injury itself and the wrist osteoarthritis were not caused by the motor vehicle accident, but were pre-existing degenerative conditions that were asymptomatic. It is not contested that the collision caused the osteoarthritis to become symptomatic, and that he will have a permanent disability in the form of pain, decreased wrist movement and decreased strength in the right upper limb.

**31**  No one can say whether or when it would have eventually become symptomatic but for the accident. His treating plastic surgeon, Dr. Slobodan Djurickovic, who has a special interest in hand and wrist surgery, wrote in his report:

It is impossible to know whether or not he would have had significant wrist pain had he not been involved in an accident. It is my opinion that he likely would not have developed severe wrist pain. He had significant arthritic changes and no pain into his 75th year and was able to golf etc. As a result I feel he would have likely had only mildly painful wrist arthritis at the most if it weren't for the motor vehicle accident.

**32**  I accept Dr. Djurickovic's opinion. It is consistent with the opinion of the defence orthopedic surgeon, Dr. Brenda Markland, who wrote in her report:

It is likely that Dr. Fatin would eventually have become aware of the osteoarthritis in his right wrist, but it is difficult to predict exactly when that would have happened. After all, he made it to the age of 75 years without any symptoms, and might have lived out the rest of his life without knowing that the problem existed. However, a fall on the outstretched hand or the strenuous activity involved in renovations might have brought out the symptoms earlier, or the progression of the degenerative changes over time might have given him gradually increasing pain.

**33**  Accordingly, I find that the motor vehicle collision caused Dr. Fatin's pre-existing osteoarthritis to become symptomatic to the point where it became disabling, and that he would not have suffered that degree of disability but for the accident.

**34**  The only potential treatment is surgical: either a wrist fusion, which would likely relieve pain but completely limit movement, or a wrist joint replacement (arthroplasty), from which, according to Dr. Djurickovic, Dr. Fatin could expect a reasonable result, with reduction in pain, increased range of motion, and more comfort in activities of daily living, lighter duties and hobbies. It is not clear that Dr. Fatin would be able to resume golf or undertake renovations, and he would be advised to continue wearing a splint for anything more than light activities.

**35**  Given Dr. Fatin's age and physical demands, as well as the fact that he is right hand dominant, it is Dr. Djurickovic's recommendation that he undergo the wrist replacement procedure. Dr. Fatin is still considering his options.

**3.1 Non-pecuniary damages**

**36**  As is well known, the assessment of non-pecuniary damages involves consideration of a number of factors, the list of which is non-exhaustive, and includes the age of the plaintiff, the nature of the injury, the severity and duration of pain, the degree of disability, the extent of emotional suffering, loss or impairment of life, impairment of relationships, the impairment of physical and mental abilities, and loss of lifestyle. A plaintiff is not to be penalized for stoicism. See, for instance, *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=), and *Cheema v Khan*, [*2017 BCSC 974*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NV2-HBS1-JJ6S-63BV-00000-00&context=).

**37**  Dr. Fatin submits that an appropriate award for non-pecuniary damages would be in the range of $90,000-$95,000, relying on three decisions involving wrist injuries, amongst other things: *Burtwell v McCaffrey*, [*2013 BCSC 886*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20KV-00000-00&context=) ($80,000), *Ackermann v Pandher*, [*2017 BCSC 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NPW-RDN1-JXG3-X2B3-00000-00&context=) ($90,000) and *Burke v Schwetje*, [*2017 BCSC 2098*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R32-47Y1-F2TK-220D-00000-00&context=) ($95,000). I note that the award in *Burke* included an amount for loss of homemaking capacity, which I will be assessing separately.

**38**  Contextually, Dr. Fatin further relies on those authorities which acknowledge that in some respects, an impairment of movement may be more serious in a person of advancing years than it is with a younger person; see, for instance, *Pingitore v Lum*, [*1994 CanLII 1050*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S316-00000-00&context=) (BCSC) at pp 11-12, and *Bardua v Han*, [*2016 BCSC 861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JW3-TKC1-JGPY-X4P7-00000-00&context=) at para 43. But that is not always the case. For instance, in *Ackermann*, the wrist injury prevented the younger plaintiff not only from engaging in the extensive range of physical activities that made up his life outside of work, but also made it impossible for him to continue with his employment, a most serious consequence.

**39**  The defendants argue that a more appropriate range would be between $60,000 and $80,000. They rely on cases such as *Burtwell* ($80,000), *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=) ($80,000), *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=) ($75,000), and *Zigawe v Rance*, [*2009 BCSC 1816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-2510-00000-00&context=) ($60,000). I find it noteworthy that *Jang, Jackson* and *Zigawe* all involved injuries to the non-dominant hand, and were generally less disabling. In *Burtwell*, the wrist injury had less serious long-term effects, although there were other injuries as well.

**40**  Dr. Fatin is a man who took great satisfaction from his ability to carry out manual tasks at which he was very good. These included, as I have noted, renovating his several houses, extensive maintenance, repair work, landscaping and gardening. He engaged in these all his life, including in his retirement. He has been considerably more active than many of his age. All of this has been greatly impaired by his injury. In addition, the leisure activities he has enjoyed in retirement have also been affected, particularly golf. For him, the loss of independence that we all face as we age has been greatly accelerated. Dr. Fatin has faced this stoically, but not without real frustration.

**41**  There is no doubt that his injury is permanent. It is possible that wrist replacement surgery would improve things, but it would not cure the condition. Dr. Fatin has expressed some reluctance to proceed with such surgery because of experience he has had from procedures in the past where he has suffered side effects usually limited to 1% or so of the population. There nevertheless remains, I find, a real and substantial possibility that he will choose to undergo such a procedure, if for no reason other than to reduce pain and relieve frustration, and I assess the likelihood at 50%.

**42**  Taking all of these factors into account, I assess Dr. Fatin's claim for non-pecuniary damages at $85,000.

**3.2 Loss of homemaking capacity**

**43**  Dr. Fatin advances a claim for past and future loss of homemaking capacity, based upon the severely limiting effect his wrist injury has had upon his ability to carry out home maintenance, renovations, landscaping, gardening, and other activities around the house.

**44**  I have already noted that, before the accident, Dr. Fatin was very active, and skilled, in carrying out renovations and maintenance, and in gardening and landscaping. He did far more in this regard than most, and continued to be active right up to the time of the accident, when he was 74. I am satisfied that he is not able to carry out most of these activities now. He has made some accommodations. He has a rider mower, which allows him to mow his lawns. His property has been landscaped in a manner that reduces, but does not eliminate, the need for maintenance. His house has been fully updated, apart from the kitchen. Updating the kitchen is something he would have done largely on his own; he will need help with that, and with routine home maintenance and with landscaping tasks such as seasonal heavy work, and trimming his many hedges.

**45**  Dr. Fatin also advances a claim for the cost of providing assistance in these areas as part of his claim for the costs of future care. He argues that the two claims are distinguishable and not duplicative.

**46**  I agree that a claim for loss of homemaking capacity is analytically different from a claim for the cost of future care, but I disagree with the proposition that in this case, they are not duplicative.

**47**  An award of damages for loss of homemaking capacity is intended to compensate the plaintiff for the lost value of work that the plaintiff would have undertaken, but is now incapable of performing. It recognizes the value of the loss of an asset. Future care costs, on the other hand, are to compensate the plaintiff for the value of services that are to be rendered to the plaintiff: see the discussion 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=) at para 74. Consequently, a plaintiff may be awarded damages for loss of homemaking capacity even if there is no expectation of using replacement services: *McTavish v MacGillivray*, [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) at para 43. Thus in *Aleen v Parkeh*, [*2018 BCSC 126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RJG-2PN1-FJDY-X35V-00000-00&context=), Voith J. awarded $5,000 for loss of "housekeeping capacity" where the evidence did not establish a requirement of external assistance. In *Ackermann*, where it remained possible for the plaintiff to do his own vacuuming and gardening but at a slower pace, Russell J. considered that the loss of housekeeping capacity was adequately covered by the award of non-pecuniary damages, and awarded nothing further.

**48**  A case closer to this one is *Chappell v Loyie*, [*2016 BCSC 1722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KT4-DY51-JW5H-X0HM-00000-00&context=), where the plaintiff, a 52-year-old firefighter, claimed a loss of past and future housekeeping capacity as a result of his inability to manage outside yard work, some interior work, home maintenance, repair and renovation work. He also advanced a claim for future care costs that included the costs for gardening and yard care, heavier and seasonal housecleaning functions, home renovations and maintenance. In the result, Fisher J., then of this court, considered that an award of $50,000 provided fair compensation for the past and future loss of housekeeping capacity, including home maintenance, repairs and renovations, and awarded nothing for those items as future care costs.

**49**  I conclude that in the circumstances of this case, as in *Chappell*, it would be duplicative to award both damages for loss of homemaking capacity, including the ability to carry out gardening, landscaping, maintenance and renovations, and damages for the cost of the future provision of those services.

**50**  The cost of the future provision of those services was assessed by Claudia Walker, an occupational therapist. Ms. Walker assessed Dr. Fatin, and reviewed the medical opinion of Dr. Djurickovic. It is her opinion, which I accept as reasonable, that Dr. Fatin is currently restricted in relation to the heavier aspects of his domestic responsibilities, and requires assistance. Ms. Walker recommended three hours of household cleaning every four weeks, to deal with the heavier aspects of housekeeping for which Dr. Fatin was responsible before the accident, three hours of house maintenance per week, and three hours of yard services per week for 30 weeks a year. She recommended that all of the services continue until Dr. Fatin is 85. Ms. Walker noted that according to Canadian time use statistics, the performance of heavier yard and maintenance work tends to drop after age 75 due to the normal aging process. In Ms. Walker's assessment, however, with which I agree, Dr. Fatin had already demonstrated by the time of the accident that he was performing at a level well above that of the average 75-year-old.

**51**  Ms. Walker costed the services at $25-$28 per hour for housecleaning, $60 per hour for house maintenance, and $40 per hour for yard maintenance. I note that the yard maintenance assistance that Dr. Fatin hired on his own before trial cost $15 per hour, admittedly a bargain that may not be available in the future.

**52**  The future value of these services, as assessed by Dr. Geoffrey Young, including GST, comes to $80,000. But Ms. Walker would reduce these services by 30% in the event that Dr. Fatin undergoes arthroplasty surgery.

**53**  I consider the assessment of three hours per week for maintenance to be excessive given the condition of Dr. Fatin's house. There are, however, tasks to be accomplished, including remodelling the kitchen and repairing the deck. These cannot properly be assessed on an "hours per week" basis.

**54**  Because of these aspects, including the potential effect of future surgery, the variability of the cost of services, and the potential for the need for services in any event as Dr. Fatin proceeds into his eighties, I consider it preferable to assess this aspect of the claim as a loss of capacity, both past and future (taking into account that past gardening costs are included in the claim for special damages and are not contested). In carrying out this exercise, I find that Ms. Walker's assessment and Dr. Young's calculations provide helpful information concerning the value of the kind of services we are talking about, subject to the contingencies I have discussed.

**55**  The defendants argue that because it was Dr. Fatin's choice to move into the property he now occupies, with its extensive grounds, he ought not to charge them with the cost of maintaining those grounds. I do not think that analysis applies in the circumstances of this case. Dr. Fatin explained that he and his wife moved from the previous residence because of a number of factors, principally relating to his wife's health. The prime motivation was that the house was on three floors and far from the nearest hospital. Their new house is a rancher, and although its grounds are more extensive, they are landscaped in a manner that requires less maintenance, and he is able to manage the lawns himself.

**56**  In my view, Dr. and Mrs. Fatin's decision to move, and their choice of new residence, were entirely reasonable in all of the circumstances, including prevailing market conditions. I therefore reject the defendants' submission in this regard.

**57**  The defendants also argue that any claim relating to domestic cleaning limitations should be minimal, because before the accident, those were mainly performed by Mrs. Fatin, and should properly form part of her claim, not his. There is logic to this position, but I note that the assistance recommended by Ms. Walker of three hours every four weeks related only to the heavier housekeeping tasks, and those were the province of Dr. Fatin before the accident. I therefore reject this submission as well.

**58**  Taking all of the factors I have discussed into account, I assess Dr. Fatin's claim for loss of homemaking capacity, past and future, at $55,000.

**3.3 Future care costs**

**59**  The defendants take little exception to this part of the claim once the costs of homemaking assistance, maintenance and gardening are backed out, as discussed above. They agree with the costs relating to custom leather wrist braces and corticosteroid injections, and also with the potential for postoperative services in the event that Dr. Fatin undergoes an arthroplasty. In this regard, taking the present value calculations from Dr. Young's report, I allow $1,766 for the splints, and $274 for corticosteroid injections. The postoperative services cost out at $3,171.05 or $4,928.56 depending on the level of service. In my view, Dr. Fatin is entitled to the higher level, but the amount should be reduced by 50% to take into account what I have found to be the likelihood of his undergoing the procedure. I therefore allow $2,464.28. The total award for the cost of future care, then, comes to $4,504.28.

**3.4 Special damages**

**60**  Dr. Fatin claims $189 for the cost of wrist supports, and $4,740 for gardening assistance. The defendants do not contest these amounts.

**61**  Dr. Fatin also claims a little over $7,000 for the cost of moving, and the cost of storage lockers. The storage was required because the Fatins sold their former residence before finding a new residence. This had little to do with the accident, and fortuitously allowed them to realize them an unexpectedly high return due to the fall of the market in the meantime. I do not accept that the storage costs are claimable.

**62**  The moving cost is claimed on the basis that before the accident, Dr. Fatin would have been in a position to accomplish most of the moving on his own without professional help. The evidence about past moves supports this only in part. The Fatins have retained professional movers in the past, though they have ended up moving much of the furniture and contents themselves due to unforeseen circumstances. While I accept that the moving cost would have been less had Dr. Fatin not been injured, I consider that the difference is covered by the award for Dr. Fatin's past and future loss of homemaking capacity.

**63**  In addition, Dr. Fatin claims some flight costs incurred in returning from Mexico for the trial, and parking fees relating to attendances on his lawyers. The defendants do not particularly dispute these costs, but they should be claimed as disbursements, not as special damages arising from the injuries.

**64**  The claim for special damages, then, is assessed at $4,929.

**4.0 CONCLUSION**

**65**  I find that fault for the collision should be apportioned 75% to the defendants, and 25% to Dr. Fatin.

**66**  I assess Dr. Fatin's damages as follows:

non-pecuniary damages: $85,000.00 damages for loss of homemaking capacity: $55,000.00 future care costs: $4,504.28 special damages: $4,929.00 TOTAL: $149,433.28 Less 25% -$37,358.32 NET TOTAL $113,574.96

**67**  Dr. Fatin is accordingly entitled to judgment against the defendants for $113,574.96 plus Court Order interest on the special damages. The parties may now speak to costs.

[SUBMISSIONS]

**68**  **THE COURT:** Following my Reasons for Judgment this morning, the parties have addressed the matter of costs. They have raised two issues, both of which engage the discretion of the court.

**69**  The first issue relates to section 3 of the ***Negligence*** *Act*, *RSBC 1996, c 333*. In essence, that section provides for a party's liability for costs to be in the same proportion as that party's liability to make good the damage or loss. Here, I divided liability 75% against the defendant and 25% against the plaintiff. If I followed the usual course under the ***Negligence*** *Act*, then the defendant would be liable to pay 75% of the plaintiff's costs.

**70**  The plaintiff argues that this is a case where I should depart from that course, and the section certainly gives me the discretion to do so. In the plaintiff's submission I should award the plaintiff 100% of his costs (subject to the second area of discretion, which relates to settlement offers and whether the costs should be double costs, but I wish to deal first with apportionment).

**71**  The plaintiff relies in particular on the judgment of my colleague Mr. Justice G.C. Weatherill in *Ekman v Cook*, [*2015 BCSC 1863*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H6V-87H1-JCJ5-245H-00000-00&context=). In that case, the very badly injured plaintiff went to trial on the issue of liability only. Weatherill J. apportioned fault 25% to the defendant, and 75% to the plaintiff. Notwithstanding that apportionment, Weatherill J. gave the plaintiff 100% of his costs.

**72**  To me the circumstances of that case are very different from the circumstances here, and I stress what the judge said at paragraph 32:

Had the plaintiff taken the position that he was not contributorily negligent to a significant degree, or had the defendants conceded the possibility of some ***negligence*** on their part, it is possible that I would have exercised my discretion in a different fashion.

**73**  Now in this case, at least in the positions taken before me, the plaintiff's position was that the defendant was 100 percent liable. There was no concession of contributory ***negligence*** at all.

**74**  The defendant on the other hand conceded essentially between 40% and 60% liability. So this is a different kind of case.

**75**  Viewed retrospectively, it seems to me that both sides ought to have appreciated that there would be some contributory ***negligence*** found in this case. The question was the degree.

**76**  I do not think it was unreasonable, therefore, for the defendants to take the position they did and I do not see any reason to depart from the provision of section 3 of the ***Negligence*** *Act*. Accordingly, the defendant is liable for 75% of the plaintiff's costs.

**77**  The next question is, just what are those costs of which the defendant must pay 75%? That turns on settlement offers.

**78**  The parties exchanged offers at virtually the same time, about a week before trial. The plaintiff offered to accept $100,000 plus costs.

**79**  The defendant offered $75,000 and 75 percent of costs and disbursements, evidently envisioning a 75/25 split in liability, which is in fact what I found.

**80**  In the end I assessed damages at just under $150,000, which after deducting the contributory ***negligence*** came to $113,574.96. The amount I awarded was thus in excess of the offer that the plaintiff submitted by some $13,000. That offer would have required the defendant to pay full costs as opposed to 75% of costs, but the total would still have been less than what I have awarded.

**81**  The only real question here is whether this was a case where the defendants ought reasonably to have accepted the plaintiff's offer.

**82**  The offer was not broken down into its constituent parts, but I note that there were not very many heads of damage.

**83**  The plaintiff, Dr. Fatin, was a man who was almost 75 at the time of the accident, 78 at the time of trial. There was no claim for loss of income earning capacity or loss of income of any kind.

**84**  The medical evidence was *ad idem* as between the plaintiff and defendant experts, so there was no real doubt about the nature of the injuries.

**85**  The way forward to assessing non-pecuniary damages was pretty clear. The parties were very close to each other at trial, so that the difference between their positions was relatively modest. The real issue came down to future care costs and loss of housekeeping capacity. I gave a total award of $55,000 for housekeeping capacity and limited the claim for future care costs to medical expenses.

**86**  In my view, this was not one of those cases where the complexities made it difficult to assess the offer. As counsel for the defendants noted, the range for non-pecuniary damages went up to $90,000 or so, very close to the plaintiff's offer to accept a total of $100,000. The defendants could then assess the amounts claimed in addition to non-pecuniary damages on a risk basis.

**87**  I conclude that this was an offer that the defendants ought reasonably to have accepted at the time it was presented. It follows that the plaintiff is entitled to double costs, but, given the timing of the offer, only for the three days of trial.

**88**  Under Rule 15, I attribute $6,500 of the permissible costs to the pretrial period, and those costs will not be doubled. I attribute $4,500 in costs to the three days of trial, and those costs will be doubled to $9,000. The total costs, then, come to $15,500. The plaintiff is entitled to 75% of that total, which comes to $11,625, and to 75 percent of his disbursements.

J.C. GRAUER J.

**End of Document**

[***Lafond v. Mandair, [2017] B.C.J. No. 623***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N8X-PSB1-JCRC-B3MJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

S.D. Dley J.

Heard: March 7-10, 13-14, 2017.

Judgment: March 30, 2017.

Docket: 51172

Registry: Vernon

**[2017] B.C.J. No. 623** | [*2017 BCSC 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P57-HY21-FJTD-G276-00000-00&context=)

Between Larry Lafond, Plaintiff, and Sachan Mandair, Arif Dhalia and Khrys McArdle, Defendants

(151 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Psychological injuries — Depression — Assessment of damages for personal injuries sustained by Lafond in a motor vehicle accident — Lafond was 57 years old — In July 2011, Lafond was leaning into a parked vehicle when another vehicle drove into the back of it — Liability was admitted by the defendants — Prior to the accident, Lafond was extremely active — As a result of the accident, Lafond suffered soft tissue injuries to his neck, shoulder, and back — He also suffered from depression and anxiety, and was less capable of earning income — Lafond awarded $343,529 in damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Retroactive loss of income — Special damages — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Affecting recreational activities — Assessment of damages for personal injuries sustained by Lafond in a motor vehicle accident — Lafond was 57 years old — In July 2011, Lafond was leaning into a parked vehicle when another vehicle drove into the back of it — Liability was admitted by the defendants — Prior to the accident, Lafond was extremely active — As a result of the accident, Lafond suffered soft tissue injuries to his neck, shoulder, and back — He also suffered from depression and anxiety, and was less capable of earning income — Lafond awarded $343,529 in damages.**

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| Assessment of damages for personal injuries sustained by Lafond in a motor vehicle accident. Lafond was 57 years old. In July 2011, Lafond was leaning into a parked vehicle when another vehicle drove into the back of it, causing a significant collision. Liability was admitted by the defendants. Prior to the accident, Lafond was extremely active and spent much of his time with his children doing outdoor activities. He was seeking an award of $120,000 for pain and suffering as well as awards under other heads of damages.  HELD: Lafond awarded $343,529 in damages.  As a result of the accident, Lafond suffered soft tissue injuries to his neck, shoulder, and back. He also suffered cognitive deficits, including depression and anxiety. His pre-existing degenerative condition in his spine was not a serious issue. Lafond's fall from a ladder after the accident was not causally connected to the accident. Lafond's injuries limited his recreational activities. He had become short tempered and withdrawn, and his family relationships had suffered as a result. He could no longer do all of his duties at work and he was less capable of earning income from all types of employment. There was no doubt that he had suffered a loss of housekeeping capacity. Lafond was awarded $100,000 in non-pecuniary damages for pain and suffering, $10,000 for past income loss, $175,000 for loss of future earning capacity, $27,000 for the cost of future care, $20,000 for loss of housekeeping capacity, and special damages of $11,529. |

**Counsel**

Counsel for the Plaintiff: J. Cotter, L. Volkers.

Counsel for the Defendants: S. Driver.

**Reasons for Judgment**

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| --- |
| **S.D. DLEY J.** |

**Introduction**

**1**  Mr. Lafond was injured in a motor vehicle accident for which liability has been admitted. Before the accident, Mr. Lafond had experienced back pain. After the accident, Mr. Lafond fell from a ladder and injured his back.

**2**  The issue in this quantum assessment is whether pre-existing disc degeneration or the intervening event of falling from the ladder affects the amount of the damage award.

**3**  For the reasons that follow, I award the following:

1. non-pecuniary damages for pain and suffering: $100,000
2. past income loss: $10,000
3. loss of future earning capacity: $175,000
4. cost of future care: $27,000
5. loss of housekeeping capacity: $20,000
6. special damages: $11,529.58

**TOTAL: $343,529.58**

**Background Facts**

**4**  Mr. Lafond is 57 years old. He and his spouse, Cheryl Folkadahl, live and work in Sicamous, B.C. Mr. Lafond had worked in the pipeline industry, operated a forklift and ran his own body shop and tow truck business. Mr. Lafond rebuilt and customized travel trailers and RVs.

**5**  Mr. Lafond moved to Sicamous in 1999. He had various jobs, including being a marine mechanic and manufacturing houseboats.

**6**  Mr. Lafond started working for Mr. Olde at Riverside Docks ("Riverside") in 2008. Riverside manufactured and installed docks and pilings. Mr. Lafond was hired to captain Riverside's self-propelled barge that was used to haul docks and machinery for placing pilings and transporting construction materials to various sites around Shuswap Lake. Mr. Lafond also operated a smaller barge and boat.

**7**  Mr. Lafond installed the docks that were anchored to the shore on his own. The installation of docks that were affixed to pilings required a second person to assist. Mr. Lafond also attached the decking to the dock bases.

**8**  Mr. Lafond was intimately familiar with Shuswap Lake. He was able to provide rescue services during lake storms.

**9**  Mr. Lafond was highly thought of and Mr. Olde valued his reliability, knowledge and dedication.

**10**  Mr. Lafond was happy-go-lucky. He loved living in Sicamous, where he had ready access to the lake and back country. Mr. Lafond was extremely active. He spent much of his time with his children doing outdoor activities, which included waterskiing, seadooing, tubing, quadding, and camping. Mr. Lafond was socially active and energetic.

**11**  Mr. Lafond and Ms. Folkadahl lived on her parents' acreage. He kept the property well-maintained; he mowed the grass, kept up with the debris from the willow trees and tended to a garden.

**12**  Prior to July 25, 2011, Mr. Lafond was not restricted in his recreational activities or his employment duties.

**Motor Vehicle Accident: July 25, 2011**

**13**  On July 25, 2011, Mr. Lafond had finished work for the day and was intending to go on a motorcycle ride with a friend. Mr. Lafond was leaning into the passenger side of a Chevrolet Tahoe that was parked in a parking lot adjacent to a residential thoroughfare. The defendant was driving a Lincoln Aviator and drove into the back of the Tahoe. The collision between the two large SUVs was significant.

**14**  Mr. Lafond's left shoulder was struck by the door pillar; he was spun about and ended up on the ground.

**Medical Evidence**

***Dr. Theron***

**15**  As a result of the collision, Mr. Lafond experienced pain in his right shoulder, neck and back. He has also experienced headaches and has suffered from anxiety and depression. He saw his own doctor, Dr. Theron, a week after the accident and has continued to see her on a regular basis since.

**16**  Mr. Lafond has received numerous massage treatments and has been given exercises to treat his injured areas. He has been examined by physiatrists and a neurologist.

**17**  Dr. Theron had treated Mr. Lafond for complaints of low back pain in August 2005. She also noted that he complained then of numbness and burning pain in the area encompassing his hip and knee. In 2002, it had been noted that Mr. Lafond had a bulging disc at L4-5. A 2005 CT Scan of his lumbar spine was normal.

**18**  There were no other complaints of back pain until after the accident.

**19**  Dr. Theron dismissed the notion that Mr. Lafond had back issues leading up to the accident.

***Dr. Laidlow***

**20**  Dr. Laidlow is a physiatrist who, at the request of the defence, examined Mr. Lafond. Dr. Laidlow referred to imaging scans taken from October 2012 through October 2014, which showed signs of degenerative changes to Mr. Lafond's spine.

**21**  Dr. Laidlow concluded that Mr. Lafond had not sustained any type of traumatic brain injury in the accident and did not attribute his memory concerns to the collision.

**22**  Dr. Laidlow concluded that because Mr. Lafond had not suffered from significant neck pain prior to the accident, his current symptoms with respect to his neck and shoulders were attributed to the accident.

**23**  Dr. Laidlow believed that Mr. Lafond had suffered a muscular strain to his lower back in the accident, but thought that it was "probable that he had significant mechanical pain prior to the accident over the years". Dr. Laidlow felt that the majority of Mr. Lafond's lower back pain related to his pre-existing degenerative disc disease and joint osteoarthritis.

***Dr. Foti***

**24**  Dr. Foti specializes in neurology with a subspecialty in behaviour neurology and neuropsychiatry. On January 12, 2016, he examined Mr. Lafond at the request of the defence.

**25**  Dr. Foti confirmed that there was no evidence of a traumatic brain injury arising out of the accident. He found that Mr. Lafond was experiencing emotional difficulties following the accident, but that he had significant pre-accident anxiety and depression problems. The pre-accident difficulties arose in 2002 when Mr. Lafond suffered a mild traumatic brain injury and mood disorder (a rock was flung through his windshield, striking Mr. Lafond in the head). Mr. Lafond had also experienced ongoing anxiety and stress symptoms through 2005, 2008, 2010 and early 2011. Dr. Foti concluded that the prior traumatic brain injury and mood symptoms predisposed Mr. Lafond to greater symptoms in times of stress.

**26**  Dr. Foti said:

Mr. Lafond has persisting symptoms of mild anxiety, lower mood, frustration and irritability, primarily related to chronic pain in his neck and back. He had more significant depression symptoms in 2012 and 2013, which are milder presently. He had more significant posttraumatic stress disorder symptoms with re-experiencing and disturbed sleep, with PTSD symptoms now infrequent and he would not meet criteria for PTSD.

He does not presently have a major depressive disorder, rather an adjustment disorder with depressed mood and anxiety. He is struggling to deal with his chronic pain, but unfortunately pain is also strongly influenced by low mood, which is further worsening and protracting his experience of pain.

**27**  Dr. Foti opined that the chronic degenerative findings and the disc bulge were unlikely to account for Mr. Lafond's back pain. Dr. Foti was of the view that Mr. Lafond had recovered from his 2005 back injury and was fully participating in all employment and recreational activities prior to the accident.

**28**  Dr. Foti was aware of Mr. Lafond falling from his ladder in October 2012. Dr. Foti indicated that the fall had exacerbated the back symptoms, but had not resulted in any new neurological findings or fractures. Dr. Foti concluded that there "are no persisting new deficits as a result of this fall in 2012, which is unrelated to the MVA of July 2011".

**29**  Dr. Foti concluded that Mr. Lafond's complaints of poor concentration, reduced memory and slow decision-making were unlikely to be directly related to his accident injuries. Dr. Foti was of the view that those symptoms were most likely related to other factors including mood disorder, anxiety, chronic pain, pain medications and sleep disruption. Dr. Foti opined that the symptoms were not related to a traumatic brain injury.

**30**  Dr. Foti noted that Mr. Lafond had "persisting symptoms of mild anxiety, lower mood, frustration and irritability, primarily related to chronic pain in his neck and back".

**31**  Dr. Foti believed that Mr. Lafond's recovery had plateaued, saying that Mr. Lafond had not received adequate therapy to address his sleep disorder, mood and anxiety issues that were perpetuating many of his symptoms.

**32**  Dr. Foti recommended a more aggressive management of Mr. Lafond's pain. He recommended a trial of anti-depressants and other pain medications to provide some relief for the chronic pain in Mr. Lafond's neck and back. Supportive psychological counselling might provide some assistance to Mr. Lafond in managing his mood and anxiety issues. Dr. Foti agreed that Mr. Lafond should receive support for home maintenance, garden and home renovation tasks.

**33**  Dr. Foti was hopeful that with increasing activity tolerance, reduction in pain and improved sleep, Mr. Lafond would see a gradual improvement in his ability to perform physical tasks.

**34**  Dr. Foti acknowledged that Mr. Lafond received some accommodation from his employer in terms of heavy lifting. Dr. Foti was of the view that there was no "meaningful decline" in Mr. Lafond's occupational abilities.

**35**  Dr. Foti's observations and opinions are generally consistent with the other caregivers who were not retained specifically for this litigation. His comments with respect to further treatments are reasonable and logical.

**36**  However, I do not accept Dr. Foti's view that Mr. Lafond's working abilities were not affected in a meaningful way. That view conflicts sharply with the evidence given by Mr. Olde.

***Dr. McKee***

**37**  Dr. McKee is a physiatrist who examined Mr. Lafond in October 2016. Dr. McKee opined that Mr. Lafond's neck and back pain were caused by the accident. Dr. McKee did not place any significance on the fall from the ladder.

***Dr. Stewart***

**38**  Dr. Stewart is a specialist in physical medicine and rehabilitation. He examined Mr. Lafond on July 4, 2012 and December 10, 2013. Dr. Stewart's opinion was that Mr. Lafond had sustained soft tissue injuries to his neck and back as a result of the accident.

**39**  Dr. Stewart addressed the issues of degenerative changes:

The degenerative changes noted on imaging of his cervical and lumbar spine represent incidental findings, neither resulting from the July 2011 accident nor contributing significantly to his symptoms arising from that accident. Those degenerative changes would have been present prior to his injury when he was not experiencing neck or back pain.

**40**  Dr. Stewart recommended counseling for anxiety and depression. He also recommended stretching exercises and the engagement of a personal trainer.

**41**  Dr. Stewart was of the view that Mr. Lafond's injuries were chronic and would likely continue to limit his work, household and leisure activities.

***Dr. Pirolli***

**42**  Dr. Pirolli is a psychologist who provided a neuropsychological assessment report based on her examinations of Mr. Lafond on September 4 and October 2, 2012.

**43**  Dr. Pirolli did not find it likely that Mr. Lafond had suffered a concussion in the accident. She concluded that Mr. Lafond's cognitive difficulties were likely as a result of ongoing pain, medications, sleep deprivation, fatigue, anxiety and depression. She acknowledged that his prior mild traumatic brain injuries in 2001 and 2002 may also be contributing factors. Dr. Pirolli opined that Mr. Lafond had developed a moderate range depression as a result of his ongoing pain, physical limitations and concerns about his cognitive capabilities. She also found that Mr. Lafond had developed anxiety, some of which was related to his ongoing concerns about his physical limitations and ongoing pain. Dr. Pirolli attributed the anxiety and depression to the accident.

**44**  Dr. Pirolli was of the view that Mr. Lafond's depression and anxiety were exacerbating his pain while at the same time the pain was likely exacerbating his depression and anxiety.

**45**  I accept Dr. Pirolli's opinion over that of Dr. Foti on the issue as to whether there is a connection between the accident and Mr. Lafond's cognitive symptoms. Dr. Pirolli's report is more detailed and analytical on this issue. Her report is consistent with the observations made by witnesses who have reported Mr. Lafond's cognitive decline after the accident.

***Findings Regarding the Medical Evidence***

**46**  Contrary to Dr. Laidlow's thought that Mr. Lafond had suffered significant back pain prior to the accident, there is simply no reliable evidence to confirm that view.

**47**  Mr. Lafond conceded that his back was stiff at times after a long day of physical work. However, he did not complain of significant pain, nor was he treated for such. Mr. Lafond's history with Dr. Theron would indicate that if he did have back pain, he would have likely consulted with her. The complete absence of any such symptoms noted by Dr. Theron lends reliability to Mr. Lafond's denial of back pain in the six years prior to the accident. It is also noteworthy that Dr. Laidlow's assertion of "significant mechanical pain" did not limit or interfere with Mr. Lafond's employment or recreational activities.

**48**  Dr. Theron saw Mr. Lafond continually after his complaint of back pain in 2005. She did not attribute his present pain to any pre-existing condition. I prefer her opinion over that of Dr. Laidlow.

**49**  I, therefore, decline to accept Dr. Laidlow's opinion that Mr. Lafond's back pain is as a result of a pre-existing condition.

**50**  Dr. Laidlow's assertion that Mr. Lafond suffered from back pain for years is concerning and noteworthy. There is no reasonable basis upon which such a finding could be made.

**51**  It is no secret that the relationship of the accident to the back pain is a central issue to this litigation. It was required that Dr. Laidlow's opinion be objective in order to be helpful to the court. He has failed in that respect, and that taints the entirety of his report. As a result, where Dr. Laidlow's opinion conflicts with those of other practitioners, I place no weight on his opinions.

***Mr. Lafond's Credibilty***

**52**  Much of Mr. Lafond's reporting of his symptoms was subjective. If I did not believe Mr. Lafond, there might be some question as to the nature and consequence of the injuries sustained in the accident. However, that question does not arise, because I accept the reliability of Mr. Lafond's evidence with respect to his injuries.

**53**  There were times, when Mr. Lafond was uncertain of certain dates and timing of events. In the circumstances, that would not be unusual given Mr. Lafond's memory difficulties and the constant and chronic nature of his pain.

**54**  Mr. Lafond "under-reported" pre-accident symptoms of depression, back pain and cognitive issues to Dr. Foti. However, I do not view that as an attempt to mislead or deceive the physician. Instead, that is consistent with Mr. Lafond's personality of talking about significant matters and otherwise simply soldiering on with life. Mr. Lafond did not hide pre or post-accident matters. The fact that he may have viewed the significance of those events differently than medical practitioners does not alter the fact that Mr. Lafond was reliable and credible.

**Causation**

**55**  The defence concedes that it is not excused from liability "merely because other causal factors for which they are not responsible also helped to produce the harm" where it is found the defendants' ***negligence*** is a cause of the harm. If the injuries sustained in the accident caused or contributed to the injury, the defendants are fully liable for the damages that flow: *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. 19 and 41.

**56**  The onus is on the plaintiff to establish that the wrongdoer was the "cause in fact" of the damage and a "proximate cause" of the damage. Those concepts have been summarized in *Brewster v. Li*, [*2013 BCSC 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CN-00000-00&context=) at paras. 77-83:

[77] In cases of ***negligence***, the plaintiff must establish: (1) that the defendant was the "cause in fact" of the damage suffered and (2) that the defendant was a "proximate cause" of the damage, "in other words, that the damage was not too remote from the factual cause. ... The remoteness inquiry assumes that but for the defendant's wrongful act, the plaintiff's loss would not have occurred, but places legal limits on the defendant's liability" (*Hussack v. Chilliwack School District No. 33*, [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=) at para. 54, [*19 B.C.L.R. (5th) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=)).

[78] The plaintiff must establish causation for both injury *and* loss. If a defendant did not cause an injury, (s)he is not liable for the losses flowing from that injury. Even if a defendant did cause an injury, (s) he is not liable for any losses or damages that were not caused by the injury. In *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, [*93 B.C.L.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=) [*Blackwater BCSC* ], Chief Justice Brenner, as he then was, adopted the following dichotomy between "injury" and "loss":

"injury" refers to the initial physical or mental impairment of the plaintiff's person as a result of the [defendant's act], while "loss" refers to the pecuniary or non-pecuniary consequences of that impairment.

[79] The basic principle of tort law is that the defendant must put the plaintiff back in the position she would have been in had the defendant's tortious act not occurred (*Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 32). The corollary of this principle is that the defendant need not compensate the plaintiff for any loss not caused by his/her ***negligence*** or for "debilitating effects of [a] pre-existing condition which the plaintiff would have experienced anyway" (*Athey* at para. 35).

[80] Since the burden is on the plaintiff to prove causation, she must establish that the defendant's tortious act caused *both* an injury (*i.e*. her pain disorder and/or her depression) and a resulting loss (*e.g*. non-pecuniary loss or lost wages). "The former is concerned with establishing the existence of liability; the latter with the extent of that liability" (*Blackwater BCSC* at para. 363). In the case at hand, if the plaintiff cannot establish that one of her injuries was *caused* by the MVA, then she cannot recover from the defendant for the losses that flowed from that injury. Additionally, if the plaintiff cannot establish that the injury caused by the defendant, in turn, caused a certain loss, then she cannot recover from the defendant for that loss.

[81] The test for causation in Canada is the "but-for" test (*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. 37, [*8 B.C.L.R. (5th) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&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=) at paras. 21-22, [*[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=); *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, [*[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=) [*Blackwater SCC* ]; *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, [*[2012] 2 S.C.R. 181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=)). To assess whether the defendant caused an injury, the trial judge asks if, without the defendant's tortious act, the injury would have resulted. If the answer is "yes", the defendant is not liable for the injury or the losses flowing from it (*Athey* at para. 41). If the answer is "no", the defendant is liable to the plaintiff for the *whole* of the losses flowing from the injury (*Athey* at paras. 22 and 41).

[82] Once causation for an injury is established, the defendant is liable to the plaintiff for *all* of the loss(es) flowing from that injury. The losses "flowing" from an injury are those losses which the plaintiff proves, on a balance of probabilities, would not have occurred "but-for" the defendant's act (*Blackwater SCC* at para. 78; *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. 26, [*33 B.C.L.R. (4th) 76*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=)).

[83] It is also necessary to recognize that this case engages both "thin skull" and "crumbling skull" principles. Both these principles were succinctly summarized in *Athey*:

[34] ... The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but reed not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. 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: *Graham v. Rourke*, [*[1990] O.J. No. 2314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JCJ5-22YM-00000-00&context=), *supra*; *Malec v. J.C. Hutton Proprietary Ltd.*, 169 C.L.R. 638, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Emphasis in original.]

**57**  Where the defence raises the issue that a plaintiff's post-accident symptoms would have occurred at some point in the future even in the absence of the accident, the standard of proof is not a balance of probabilities, but rather an examination of the contingency according to its relative likelihood. 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. 48 the Court said:

... 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.

**58**  Based on the evidence of all of the physicians (other than Dr. Laidlow), it is clear that Mr. Lafond's injuries to his neck, shoulder and back were caused by the accident. There is no acceptable evidence that would show that the pre-existing degenerative condition in his spine was a serious issue.

**59**  The evidence to show that Mr. Lafond's pre-existing condition might realistically cause or contribute to his loss has such little weight that it would be wrong to discount or reduce the assessment of damages.

**60**  Mr. Lafond's memory and mood difficulties began after the accident. I have accepted Dr. Pirolli's opinion that Mr. Lafond's cognitive difficulties are causally linked to the accident.

**61**  Additionally, I do not accept that the fall from the ladder was causally connected to the accident. Mr. Lafond told Ms. Perkins that he had lost his balance. That explanation is as plausible as the assertion that his leg went numb and that deficit caused him to fall.

**62**  Dr. Foti was unable to make a diagnostic finding connecting the leg numbness to the injuries arising out of the accident. At best, the evidence is neutral with respect to the reason for the numbness. The onus is on the plaintiff to prove a link to the defendant's ***negligence***. I am not satisfied that a link has been made in this instance, and do not count the approximately three months of increased back pain (from October 2012 to January 2013) in the assessment of damages.

**63**  Taking into account all of the evidence, I conclude that Mr. Lafond suffered the following injuries caused by the accident:

1. chronic soft tissue injuries to his neck, shoulder and back; and
2. cognitive deficits, including depression and anxiety.

**Impact of Injuries**

**64**  Mr. Lafond's injuries have changed and limited his abilities. He cannot do most of the recreational activities that he used to enjoy and share with his family. He has become short tempered and withdrawn. His relationship with his daughter has become somewhat distant. His relationship with his wife has become strained. He can no longer do all of his duties at work.

**65**  Mr. Lafond's evidence was consistent with the observations made by other witnesses.

**66**  The evidence of Mr. Olde was impressive and compelling. He provided a stark contrast of Mr. Lafond's behaviour and capabilities before and after the accident.

**67**  Before the accident, Mr. Olde described Mr. Lafond as a very reliable employee; consistent, accommodating and dedicated. He was able to work without restriction and could be trusted to do the task that he was assigned. Since the accident, Mr. Lafond remained dedicated, but his abilities have declined.

**68**  Following the accident, Mr. Lafond could not be relied upon to work independently. Mr. Lafond's ability to navigate Shuswap Lake was significantly curtailed. Working conditions had to be modified (such as having the dock bases lifted onto sawhorses so that Mr. Lafond could affix the decking) to accommodate Mr. Lafond's disabilities.

**69**  Mr. Olde noted that Mr. Lafond's neck bothered him when he was doing the decking. Additionally he noted that Mr. Lafond's neck pain was apparent when he looked up at pilings during the installation process.

**70**  Although Mr. Lafond still tries to do the decking, he has been unable to sustain the activity. Mr. Olde hired another employee to assist Mr. Lafond with the decking and also to accompany him on trips up the lake because Mr. Lafond would forget where he was going.

**71**  Mr. Olde commented that Mr. Lafond's constant absences for medical treatments have affected the company's ability to carry out work on the lake.

**72**  Mr. Olde noted several instances when Mr. Lafond "blew up" - he had not behaved that way prior to the accident.

**73**  Mr. Olde is loyal to Mr. Lafond and, despite his employee's limitations, he endeavours to work around and accommodate the deficits. However, Mr. Olde conceded that knowing of his physical limitations, he would not hire Mr. Lafond.

**74**  Mr. Lafond's family confirmed his limitations, which heavily contrast with the energetic, fun-loving and devoted husband, father and friend that he was before the accident.

**75**  Before the accident, Mr. Lafond had been able to maintain the acreage and do renovations to the accommodations on the property. He now requires assistance from his daughter and son-in-law to keep the property in some semblance of repair, but it is not kept to the pristine condition as he had done prior to the accident. Mr. Lafond is now limited in the renovations that he does.

**76**  Mr. Butler is Mr. Lafond's brother-in law and is ten years older. Before the accident, when the pair were working on a project, Mr. Lafond would jokingly say "let me get that old man". Since the accident, Mr. Lafond's condition has declined to the extent that the roles have reversed and Mr. Butler now uses the same phrase back at his brother-in-law to describe how much Mr. Lafond has slowed.

**77**  Ms. Folkadahl has lost the partner that she had known and enjoyed before the accident.

**Non Pecuniary Damages**

**78**  In assessing damages for pain and suffering, I am instructed by the following factors as set out 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:

1. Mr. Lafond's age;
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. a stoic plaintiff is not to be penalized for failing to complain of injuries.

**79**  It is now going on six years from when Mr. Lafond was injured. He continues to have pain in his neck, shoulder and back - the pain is chronic. The pain has significantly curtailed his ability to live life to the fullest as he had prior to the accident. His cognitive functions have suffered.

**80**  There is some optimism that with proper treatment and counselling, Mr. Lafond may learn to adapt to his condition and regain some of his functioning. However, there is no cure that will rid him of all the deficits caused by the accident.

**81**  The defence relies on the following cases: *Smith v. Evashkevich*, [*2016 BCSC 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-9V81-JJ1H-X44N-00000-00&context=) - $50,000; *Adkin v. Grant*, [*2014 BCSC 1304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B176-00000-00&context=) - $70,000; *Chenier v. Szili*, [*2015 BCSC 675*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60VJ-00000-00&context=) - $90,000; and *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.

**82**  The defence concedes that if Mr. Lafond's injuries are causally connected to the accident, then the appropriate award for pain and suffering would be at the higher end of the range reflected in the cases cited.

**83**  Mr. Lafond relies on the following cases: *Truong v. Lu*, [*2016 BCSC 2043*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M5T-3BP1-F22N-X09K-00000-00&context=) - $100,000; *Hooper v. Nair*, [*2009 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S09W-00000-00&context=) - $110,000; and *Maldonado v. Mooney*, [*2016 BCSC 558*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JH9-BW81-F22N-X484-00000-00&context=) - $110,000.

**84**  Mr. Lafond submits that his injuries are more serious than those in the cases that have been cited and that an appropriate award should be $120,000.

**85**  The cases are helpful in setting a range of damages and provide guidance to assess damages in similar circumstances. However, no two cases are identical.

**86**  If there was no realistic likelihood that Mr. Lafond's condition might be improved through further treatments and counselling, then the award would be at the upper end of the range as set out in the cases submitted on his behalf.

**87**  I will be awarding Mr. Lafond those costs of future care that are expected to improve his present condition. Therefore, it would be an error to assess non-pecuniary damages based on his present condition continuing without an adjustment for some aspect of relief.

**88**  In these circumstances, the range of damages is $95,000-$110,000. As a result of the reasonable likelihood that Mr. Lafond will see some improvement in his symptoms, I award $100,000 as damages for pain and suffering.

**Past Income Loss**

**89**  The parties differ sharply in their treatment of Mr. Lafond's past income loss.

**90**  Mr. Lafond has tracked what he says are hours he would have worked and hours that he had banked in lieu of overtime. He says that the lost hours due to his injuries total $16,550, plus an additional $12,097 of lost wages while he was collecting Employment Insurance. He, therefore, claims a loss of $28,647.

**91**  The defence argues that Mr. Lafond's past income loss is insignificant. It is argued that Mr. Lafond had no appreciable difference in the hours worked before the accident as compared to after.

**92**  Mr. Olde testified that whenever his employees worked overtime, they were credited those hours which were taken in time off. The employees typically took the time off in close proximity to when the overtime was earned.

**93**  Mr. Olde also testified that it was not until 2013 that the business had increased to a level that meant there was work all year round. Before that, Mr. Lafond collected Employment Insurance during the slower winter months.

**94**  Although Mr. Lafond has attempted to quantify his loss by setting out hours that he says were lost due to the injuries, I do not have sufficient confidence in those numbers to assess the past income loss as simply a calculation of lost hours. There were times that Mr. Lafond would not have worked because there was no work available.

**95**  I am also not convinced that the entirety of the banked hours as claimed is accurate, particularly since Mr. Olde testified that those hours were taken shortly after the overtime was accrued.

**96**  I do not award any income loss for the period that Mr. Lafond missed from work after his fall from the ladder (i.e. October 2012 - January 2013).

**97**  It is clear that Mr. Lafond's ability to earn income was impaired as a result of his injuries. He has, therefore, suffered a loss of earning capacity. The question, therefore, is whether Mr. Lafond has proved that there is a real and substantial possibility that he has suffered a loss of earning capacity: *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.

**98**  The manner in which to assess pre-trial earnings loss is as set out 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.

**99**  Mr. Lafond was not able to take on all of the heavy work associated with deck installations. He was not able to attend work on those occasions when he was absent for medical treatments. Mr. Lafond likely would not have been able to work some of the overtime that were available and would have lost the benefit of those banked hours.

**100**  Doing the best that I can on the evidence, I award $10,000, post tax for past income loss.

**Loss of Future Earning Capacity**

**101**  Mr. Lafond has suffered a loss of earning capacity. Without his injuries, Mr. Lafond possessed valuable skills that made him an attractive employee in the Sicamous area.

**102**  It is unlikely that Mr. Lafond will have the same security blanket provided by Mr. Olde with respect to future employment. Mr. Olde is likely to sell Riverside. It is doubtful as to whether Mr. Lafond will continue to benefit from the kindness, patience and accommodation exhibited by Mr. Olde. In a competitive market, Mr. Lafond is not employable at his present employment.

**103**  Mr. Olde had numerous skills such as his knowledge of the lake and ability to install docks. However, his abilities are now limited because of his deficits and he is restricted in the use of his skills.

**104**  The restrictions will keep him from being a full-time employee. Mr. Lafond will still be able to earn income - it is unlikely that he will be able to earn income at the same level he enjoyed prior to the accident, and his ability to earn income from all types of work has been curtailed.

**105**  Mr. Lafond had all of the credentials to deliver mail for Canada Post. That was an occupation that he would have enjoyed, working alongside Ms. Folkadahl. However, he was unable to keep up the pace required as result of his chronic condition. That opportunity was foreclosed.

**106**  The assessment of a loss of future earning capacity has been conveniently 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. 153-61:

[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*, [*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.

[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=).

**107**  Ms. Ruggerio, an occupational therapist, has opined that Mr. Lafond's functional capacity is at the upper end of the light physical demand level. He is "significantly limited" in his ability to do work that requires work above shoulder level, bending or stooping or heavy lifting. Mr. Lafond's job at Riverside requires him to do all of those activities.

**108**  It is apparent that Mr. Lafond is less capable of earning income from all types of employment, he is less marketable or attractive to potential employers, he has lost the ability to take advantage of all job opportunities that might be open to him and he is less valuable to himself to earn income in a competitive job market. There is a real and substantial possibility that Mr. Lafond will lose future income.

**109**  Mr. Lafond's continued ability to earn income had depended on the good graces of Mr. Olde. Mr. Olde is going to sell his business. Knowing of Mr. Lafond's condition, even Mr. Olde would not hire him.

**110**  It is, therefore, likely that when Mr. Olde sells his business, Mr. Lafond will not be able to continue in that industry. He will need to find other work. Mr. Lafond's condition will pose significant obstacles in securing other employment. The result is that Mr. Lafond should be compensated for the loss that arises between what he would have earned without the accident and what he will be able to earn because of the accident.

**111**  In these circumstances, the capital asset approach is the appropriate manner by which to assess Mr. Lafond's damages.

**112**  Mr. Carson, an economist, has provided a number of tables that provide assistance in assessing future losses. Mr. Carson has calculated that Mr. Lafond would lose earnings of $386,152 if he was unable to work until a retirement age of 67. If Mr. Lafond was able to secure work requiring light or medium physical demands, his wages would be reduced by 29 to 33%. A 33% reduction would result in a present value of future earnings of $127,430.

**113**  Mr. Carson's calculations are based on a loss from the date of the trial. However, Mr. Lafond is still employed and it may be that he will continue to earn his present level of income for at least a portion of this year. Therefore, the future loss cannot commence with the trial date.

**114**  Mr. Lafond had said that he intended to work until he was at least the age of 70. Ms. Folkedahl had discussed retirement with Mr. Lafond and he had indicated his reticence to fully retire. However, as the years mount there is a reasonable likelihood that Mr. Lafond would have reduced his working hours to spend more time with his spouse, doing his recreational activities and enjoying his grandchildren.

**115**  It is not a given that Mr. Lafond will be able to find work that caters to his reduced capacity. It may very well be that once Riverside ceases to be an employer, Mr. Lafond will not be able to secure other work.

**116**  Those are factors that need to be included in balancing all of the contingencies in order to assess damages that are fair to both parties.

**117**  If Mr. Lafond does not find any work until a retirement age of 70, his loss would be $490,260; to age 67 his loss would be $386,152. If he secures a lower paying job requiring light to medium physical functioning, his loss to age 70 would be $161,785; to age 67 his loss would be $127,430. Thus the range of possible losses is $127,430 - $490,260.

**118**  I am confident that Mr. Lafond will continue to earn income from Riverside for a period of time until Mr. Olde sells his business. Thereafter, I am also confident that Mr. Lafond will be able to secure another job, albeit at a lower wage resulting in a future less secure than it would have been with his full abilities, as they were before the accident.

**119**  Taking all factors into account, I assess the loss of future earning capacity to be $175,000.

**Cost of Future Care**

**120**  An award for the cost of future care is meant to restore the plaintiff to the position he would have enjoyed had the accident not occurred. The award is based on what is reasonably necessary to promote the mental and physical health of the injured party: Gignac v. Insurance Corporation of British Columbia, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras 29-30.

**121**  The defence argues that the cost of future care should be dramatically reduced from the amounts claimed because the medical evidence does not support the need for some of the care, and because not all of the ongoing symptoms are causally connected to the accident.

**122**  The defence arguments on causation have not been successful. Nor does the defence receive any support from the views of Dr. Laidlow, whose opinions I do not accept.

**123**  The analysis is thus to assess those costs that are medically justifiable and reasonable.

**124**  Mr. Lafond has said that he will take whatever treatments are recommended. He has been reluctant in the past to seek out counselling. I accept that he will do as the various practitioners have recommended. Mr. Lafond now understands that his relationships with his spouse and family are contingent upon management of his cognitive issues and behaviour, which are triggered by his medication and chronic pain.

**125**  I, therefore, conclude that it is likely Mr. Lafond will use the recommended services going forward.

**126**  I accept the opinion of Ms. Ruggiero that occupational therapy in the amount of $1,600 is appropriate to assist Mr. Lafond's rehabilitation. I accept Dr. Pirolli's recommendation that Mr. Lafond will benefit from psychological counselling at a cost of $3,500.

**127**  Ms. Ruggiero has recommended that Mr. Lafond continue with his massage treatments. The annual cost is $780 with the present day value to the age of 70 being $8,232.

**128**  Dr. McKee has viewed a future prolonged course of physiotherapy as benefiting Mr. Lafond. Ms. Ruggiero recommended physiotherapy during the time Mr. Lafond continues to work. The present day value of physiotherapy treatments to the age of 70 is $13,298.

**129**  It is reasonable for Mr. Lafond to have a snow plow kit, since he can no longer shovel his lengthy driveway. The snow plow is a one-time expense of $599.

**130**  The total of the recommended treatments and snow plow is $27,229.

**131**  I must adjust the amount for contingencies. There is a possibility that Mr. Lafond will need the annual treatments for massage and physiotherapy beyond the age of 70. There is also the possibility that Mr. Lafond will not use all of the treatments that have been recommended.

**132**  In *Gignac*, the Court took notice of the plaintiff not being entirely convinced that counselling would be of assistance. The Court reduced the cost of future care by 20%.

**133**  Although I am confident that Mr. Lafond will take the counselling that has been recommended, his reluctance to do so in the past requires that a modest contingency be applied. I would therefore, reduce the cost of counselling by a maximum of 10%. This is an assessment and not a mathematical calculation. I have, therefore, rounded off the cost of future care to $27,000.

**Loss of Housekeeping Capacity**

**134**  An award for the loss of housekeeping capacity is to compensate an injured person for a loss of capacity to perform home maintenance activities. It is not intended to be assessed on an item by item basis. The plaintiff is not required to prove that someone was hired to do a particular task or that actual expenses were incurred: *Hartnett v. Leischner & ICBC*, [*2008 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2WW-00000-00&context=) at para. 107.

**135**  The plaintiff must prove there is a real and substantial possibility that he will not be able to perform all of his usual and necessary household services in the future. The plaintiff must show that he will need to hire someone or have someone do his usual and necessary household services: *Hartnett* at para. 109.

**136**  Contingencies must also be taken into account. An assessment must factor in such variables as Mr. Lafond's symptom improvement and relocating to a home where outdoor maintenance is reduced and home renovations are no longer required.

**137**  Care must be taken to ensure there is no duplication of damages awarded under this heading with those damages to be awarded under other heads of damage.

**138**  There is no doubt that Mr. Lafond has suffered a loss of housekeeping capacity.

**139**  After the accident, Mr. Lafond's daughter and son-in-law moved onto the acreage, rent free. In exchange, they have assisted Mr. Lafond with the acreage maintenance.

**140**  Ms. Ruggiero has confirmed that Mr. Lafond requires assistance to do household services. She has set out the annual costs for those areas where he needs help. The present value of those losses to the age of 80 is $21,000.

**141**  If the award was limited to an assessment based on the present value, there would be no compensation for the services that have been provided by Mr. Lafond's family. Nor does a present value amount take into account the costs that Mr. Lafond will incur to have his vehicle serviced or to complete renovations.

**142**  Damages for loss of housekeeping capacity must be assessed with restraint. 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=) at para. 77, the Court referred to the cautions expressed by Gibbs, J. A 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=):

... 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.

**143**  Recognizing that these damages are causally connected to the accident and taking into account the contingencies that adjust an award, I conclude that a cautionary approach sets $20,000 as a fair assessment of Mr. Lafond's loss of housekeeping capacity.

**Special Damages**

**144**  The defence takes no issue with the special expenses claimed for physiotherapy and travel for massage therapy up to October 22, 2012, being the date of the fall from the ladder. Thereafter, the defence says that the special expenses incurred were not caused by the accident.

**145**  The defence again relies on the opinion of Dr. Laidlow to support its argument; an opinion that I do not accept.

**146**  As I have stated earlier, the fall from the ladder increased Mr. Lafond's symptoms for a period of about three months. As a result, there will be a reduction in the special expenses allowed from October 22, 2012 to January 15, 2013.

**147**  Generally, Mr. Lafond had been attending for massage treatments an average of four times per month in the preceding six months. In November, Mr. Lafond attended massage treatments on ten occasions. He went once in December, and not again until March 2013. Based on the increased number of November visits from his prior average, I infer that six visits were in addition to those that likely were required for accident related symptoms. I will, therefore, reduce the claim for massage expenses by six visits. The deduction for six visits, including the accompanying mileage, is $513.

**148**  Mr. Lafond has also claimed $1,323.86 for the cost of a new bed. There is no evidence that connects the purchase of a new bed to the accident. That claim is not allowed.

**149**  Mr. Lafond had claimed $13,366.44. After making the necessary deductions, I award special expenses of $11,529.58.

**Costs**

**150**  Unless there are further submissions to be made with respect to costs, Mr. Lafond shall be awarded costs at Scale B.

**151**  If there is an application for costs, it must be made within 30 days of this judgment.

S.D. DLEY J.

**End of Document**

[***Bern v. Jung, [2010] B.C.J. No. 980***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-220N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.E. Powers J.

Heard: May 3 and 4, 2010.

Judgment: May 25, 2010.

Dockets: M083910, M095703

Registry: Vancouver

**[2010] B.C.J. No. 980** | 2010 BCSC 730 | 189 A.C.W.S. (3d) 264 | 2010 CarswellBC 1300

Between Edgar Bern, Plaintiff, and Alfred Jung, Defendant And between Edgar Bern, Plaintiff, and Margaret Mazurkewich, Defendant

(48 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Action for damages for injuries suffered by the plaintiff in two motor vehicle accidents with two separate defendants, allowed — First accident occurred in 2007 and resulted from the plaintiff suddenly stopping his bicycle when he encountered the defendant who drove the wrong way in a parking garage — Defendant claimed that the plaintiff was contributorily negligent but the defendant was found to be fully liable — Second accident occurred in 2009 and resulted when the plaintiff's vehicle was rear-ended by the defendant's vehicle — Defendant admitted liability — Plaintiff suffered soft tissue injuries from the first accident and had problems with his shoulder, neck and back — Significant injuries resulted from the first accident — Second accident aggravated the symptoms from the first accident and prolonged recovery from them — Plaintiff was awarded general damages of $50,000 — Second defendant was liable for $15,000 of that amount — Plaintiff was awarded past wage loss of $6,750, which was attributed to the first accident — Future income loss of $10,000 was apportioned between the two accidents. Damages — Types of damages — For personal injuries — Calculation — Considerations — Aggravation of pre-existing injury — Loss of earning capacity — Retroactive loss of income — Special damages — Past loss of income — Employment income — Non-pecuniary loss — Pain and suffering — Action for damages for injuries suffered by the plaintiff in two motor vehicle accidents with two separate defendants, allowed — First accident occurred in 2007 and resulted from the plaintiff suddenly stopping his bicycle when he encountered the defendant who drove the wrong way in a parking garage — Defendant claimed that the plaintiff was contributorily negligent but the defendant was found to be fully liable — Second accident occurred in 2009 and resulted when the plaintiff's vehicle was rear-ended by the defendant's vehicle — Defendant admitted liability — Plaintiff suffered soft tissue injuries from the first accident and had problems with his shoulder, neck and back — Significant injuries resulted from the first accident — Second accident aggravated the symptoms from the first accident and prolonged recovery from them — Plaintiff was awarded general damages of $50,000 — Second defendant was liable for $15,000 of that amount — Plaintiff was awarded past wage loss of $6,750, which was attributed to the first accident — Future income loss of $10,000 was apportioned between the two accidents.**

**Tort law — *Negligence* — Causation — Causal connection — Contributory *negligence* — Apportionment of liability — Proof of — Duty of care — Motor vehicles — Motor vehicles — Cyclists — Liability of driver — Action for damages for injuries suffered by the plaintiff in two motor vehicle accidents with two separate defendants, allowed — First accident occurred in 2007 and resulted from the plaintiff suddenly stopping his bicycle when he encountered the defendant who drove the wrong way in a parking garage — Defendant claimed that the plaintiff was contributorily negligent but the defendant was found to be fully liable — Second accident occurred in 2009 and resulted when the plaintiff's vehicle was rear-ended by the defendant's vehicle — Defendant admitted liability — Plaintiff suffered soft tissue injuries from the first accident and had problems with his shoulder, neck and back — Significant injuries resulted from the first accident — Second accident aggravated the symptoms from the first accident and prolonged recovery from them.**

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| Action by Bern against the defendants Jung and Mazurkewich for damages sustained in two motor vehicle accidents. The first accident occurred on June 21, 2007 and involved Jung. Jung claimed that Bern was contributorily negligent and questioned the amount of damages. The second accident occurred on January 18, 2009 and involved Mazurkewich driving into the rear of Bern's vehicle while he stopped at an intersection. Mazurkewich admitted liability but questioned the quantum of damages. Bern worked as a security guard at the time of the first accident. The accident occurred when he drove his bicycle out of an underground garage when he encountered Jung who drove out of the garage in the wrong direction. Bern immediately applied his brakes but he lost control of his bicycle and fell over the handlebars. Bern was born in January 1973. He was in good health before the first accident.  HELD: Actions allowed.  Bern was not contributorily negligent. Jung was fully liable. Bern was entitled to assume that Jung would drive properly. The sole cause of the first accident was Jung's decision to take a short cut and travel against the direction in which traffic was supposed to flow. Bern lost control of his bicycle because of the sudden and unexpected presence of Jung's vehicle. He was physically active before the first accident and made an honest effort to attempt to return to work. He also attempted to exercise. He had some difficulty because of the soft tissue injuries that he sustained and because of problems he had with his shoulder, neck and back from the first accident. It was likely that as time passed Bern's symptoms would be reduced. General damages were assessed at $50,000. The sum of $15,000 was apportioned to the second accident. Past wage loss was assessed at $6,750 and it was attributed solely to the first accident. Future income loss was determined to be $10,000 and it was apportioned between the two accidents. The significant injuries caused by the first accident resulted in pain and suffering and in the future income loss. The second accident aggravated the symptoms from the first accident and prolonged recovery from them. |

**Counsel**

Counsel for the Plaintiff: M.C. Soronow.

Counsel for the Defendant: K.N. Affleck, Q.C.

**Reasons for Judgment**

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| **R.E. POWERS J.** |

**1**   The plaintiff, Mr. Bern, was involved in an accident on June 21, 2007, and commenced action number M083910 against the defendant, Mr. Jung. Mr. Jung argues that Mr. Bern was contributory negligent and questions the amount of damages.

**2**  Mr. Bern was involved in a second accident January 18, 2009 and commenced action number M095703 against Ms. Mazurkewich. Ms. Mazurkewich admits liability, but raises issues with regard to the quantum of damages.

**3**  The trial commenced late in the morning of May 3, 2010 and completed in the morning of May 4, 2010.

**4**  Mr. Bern and Mr. Jung gave evidence. Mr. Bern filed three medical/legal reports from his general practitioner, Dr. Cadesky. The defence filed a medical/legal report from Dr. Loomer, an orthopaedic surgeon. Mr. Bern's income tax returns for 2006, 2007 and 2008 were filed. The parties agreed to the admission of a security videotape which shows the accident of June 21, 2007.

**5**  The issues are whether Mr. Bern was contributorily negligent in the first accident involving Mr. Jung. If he was contributorily negligent, to what extent? The second issue is: what is the appropriate measure of damages and how should that be apportioned between the first and second accident?

**Liability for the First Accident**

**6**  On June 20, 2007, Mr. Bern was working as a security person. His shift was from 4:00 p.m. to midnight. He was responsible for patrolling by bicycle several locations in downtown Vancouver, including the underground parking lot at 401 West Georgia Street. He completed his shift and had returned his helmet to the security office. He was then returning the bicycle to its storage area. Mr. Bern went to the entrance of the underground parking. The gate was down at that time of day. He had a pass or a key which allowed him to open the gate. The parking lot, at this location, is entered on the left side as a person looks down the entrance ramp. To the right is the exit lane. The two lanes are separated by a low concrete curb. Looking down the ramp, traffic which is entering the lot proceeds down the left side and turns to the left. Traffic that wishes to exit would approach the ramp from the right side of the ramp turning left and up the ramp. There are arrows on the roadway marking the flow of traffic. Therefore, Mr. Bern would simply ride his bicycle down the ramp, turn left and proceed to the storage area.

**7**  Mr. Jung worked in the area. He parked his car in the underground lot that day. His shift also ended at midnight. When he was leaving the parking area, he decided to travel against the prescribed direction that traffic was to move in because it was a shortcut. He said that he had seen other people do the same thing. When Mr. Bern was riding down the entrance ramp, Mr. Jung was proceeding in the wrong direction in the entrance lane towards the ramp area. The lights of Mr. Jung's vehicle were reflected off the concrete road surface. Mr. Bern saw the lights and realized that a vehicle was coming in the wrong direction. He immediately applied his brakes, losing control of his bicycle and falling over the handlebars. He fell out into the roadway. Fortunately Mr. Jung was able to avoid striking Mr. Bern and bring his vehicle to a stop. Mr. Jung backed up and then turned and drove around Mr. Bern towards the ramp area and up the ramp. Mr. Bern was able to get Mr. Jung's attention, asking him to call 911. Mr. Jung drove out of the parking lot, parked on the street, went to his place of employment and had someone call 911. Mr. Jung waited for the police and emergency people to arrive.

**8**  Mr. Jung agrees that his ***negligence*** in driving in the wrong direction was a contributing cause to the accident. However, he argues that Mr. Bern was contributorily negligent because he was not exercising sufficient caution as he drove down the entrance ramp. Mr. Jung argues that he was travelling too quickly or not exercising enough caution to be alert to the potential of other vehicles or pedestrians in the area. Mr. Jung argues that if Mr. Bern had been travelling at a slower rate, he could have avoided the need to suddenly brake, which resulted in the loss of control of his bicycle and his fall. Mr. Jung argues that Mr. Bern should be found 50% contributorily negligent.

**9**  The onus is on Mr. Jung to prove contributory ***negligence*** on the balance of probabilities (*Morris v. Moddejonge* et al, [*2004 BCSC 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3BV-00000-00&context=)).

**10**  Each case must be decided on its own facts. Mr. Bern argues that he did not have to anticipate somebody travelling the wrong way in the entrance lane (*Hasse 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=); *Rajacich v. Potter*, [*[1976] 21 B.C.L.R. (2d) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-JTNR-M1S4-00000-00&context=)). In both of those cases, the plaintiff was injured when the operator of another vehicle lost control and entered the plaintiff's lane. The court recognized that the plaintiff's only obligation was to drive using reasonable care having regard to all of the circumstances and was not be required to guard against the possibility of somebody crossing into a lane unexpectedly or even negligently. (para. 10 *Rajacich* and *Beaudoin v. Winder*, [*[1990] B.C.J. No. 1583*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X272-00000-00&context=), (May 10 and 11, 1990) Vancouver B884450 (S.C.)).

**11**  Mr. Bern was unable to say precisely how fast he might have been travelling. It is difficult to judge his speed from simply looking at the video. The video shows Mr. Jung's vehicle approaching the ramps and then Mr. Bern's bicycle entering the picture with Mr. Bern suddenly braking and tumbling over the handlebars onto the ground. The video does not provide sufficient opportunity to judge Mr. Bern's speed with any accuracy. However, I note from the video that the ramp does not appear to be very long. There certainly is a downhill slope to the ramp. Mr. Bern had to stop his bicycle outside the ramp and cause the gate to the entrance and exit to be opened. He then got on his bicycle and proceeded down on the ramp. It is unlikely that he achieved much speed in that short distance. It is true that had he been walking his bicycle the accident would not have occurred. It is also true that if he had been riding his bicycle at a much slower speed, that he probably would not have lost control in attempting to break. However, the question is whether or not he was required to anticipate that somebody might be driving the wrong way in his lane of traffic and, therefore, should have been riding slower or walking his bicycle?

**12**  Mr. Jung says that he had seen other people use this shortcut by travelling in the wrong direction. He used the same shortcut that he had seen others use in order to save time. Mr. Bern said that although he had been working for the security company for seven years, he had not seen anybody drive in the wrong direction towards the entrance and exit ramp. The accident occurred shortly after midnight. There is no direct evidence as to how much traffic could be expected at that time.

**13**  I find that the defendant has not proven that Mr. Bern was contributorily negligent. Mr. Bern was entitled to assume that other people would be acting properly. The evidence does not establish that his speed was excessive to the extent that it was negligent. I find that the sole cause of the accident was Mr. Jung's decision to take a shortcut and travel against the direction in which traffic was supposed to flow and could reasonably be expected to flow.

**14**  Mr. Bern lost control of his bicycle and fell because of the sudden and unexpected presence of Mr. Jung's vehicle travelling in the wrong direction. Mr. Bern was forced to act quickly and to apply his brakes forcefully. He essentially acted in the agony of the collision and should not be found contributorily negligent because he did so.

**15**  I find that Mr. Jung is 100% liable for the accident on June 21, 2007.

**16**  The accident of January 18, 2009, which is the subject matter of the action against Ms. Mazurkewich is the sole responsibility of Ms. Mazurkewich. Mr. Bern was driving his motor vehicle. He was stopped at an intersection when his vehicle was struck from behind by the vehicle owned and operated by Ms. Mazurkewich.

**Damages**

**17**  The defendant says that the appropriate way to assess damages in this case is to make a global assessment. The defendant says I should then determine how much of the damages were caused or aggravated by the second collision and deduct that from the total award. The damages would then be distributed between the two defendants based on that assessment. The plaintiff agrees with that method.

**Mr. Bern's Background in Pre-Accident**

**18**  Mr. Bern was born January 22, 1973 in Hungary. He completed what he described as "elementary school" when he was 14 years of age. He then went to what he referred to as "college". He said that he studied to become a building engineer, a chef, a baker and a manager.

**19**  Mr. Bern worked in Hungary as a chef in a hotel for a couple of years. He also worked as a manager for a printing company for approximately six years.

**20**  Mr. Bern came to Canada in March of 2006 when he was 33 years of age.

**21**  He obtained work within four days of arriving in Canada. He worked as a labourer for a sign company. He worked supervising children at a Richmond school, in what he described as daycare. He worked as a labourer for a turf company that was building baseball fields. His English was limited when he came to Canada, but he was able to give his evidence in English.

**22**  Mr. Bern began work at Kanaf Security Group Inc. ("Kanaf"), about seven months before the 2007 accident. He worked 40 to 50 hours a week, five days a week. He also worked one day a week for Genesis Security Inc. His work for Kanaf required him to ride a bicycle throughout his shift, carrying out his functions as a security person. He estimates that he would ride 30 kilometres per day in his employment.

**23**  Mr. Bern was physically active as he grew up. He participated in a number of sports beginning at the age of five or six. These included wrestling, soccer, rowing, judo, karate, boxing and kick-boxing. He won a gold medal in national competitions in rowing. He was approximately 13 years old at that time. His evidence is that between the ages of 14 and 25, he trained two or three times a day. He said that after age 25 he trained once a day, but four or five times a week. Prior to the accident, while living in Canada, he rode his bicycle three-quarters of an hour each way to a gym and work out for about one and a half hours. He spent his time in Canada working or training. He had very little social life. He was in good physical condition and had no complaints. He was approximately 34 1/2 years of age at the time of the first accident and approximately 36 years of age at the time of the second accident.

**The First Accident**

**24**  The video clearly shows Mr. Bern falling over the handle bars of his bicycle, landing on the concrete road surface and tumbling. Immediately after the accident, he had pain in his neck, shoulder, upper back, elbow, wrist, finger, hip, knees and feet. He said that his whole body hurt. He was taken to the St. Paul's emergency ward shortly after the accident. There is some discrepancy between the medical reports about the extent of the injuries. This is more than a mere difference of assessment. Dr. Cadesky, Mr. Bern's general practitioner, stated in his medical report of November 13, 2008 that the x-rays taken at Richmond hospital revealed a fracture of the left radial head and several rib fractures and a right clavicle fracture. The CT scan on June 28, 2007 also revealed a displaced fracture of the right triquetrum (hand); this is a small bone on the outside portion of the back of the hand. Dr. Loomer also reviewed the x-rays from the Richmond hospital. Dr. Loomer said that the x-rays are reported as showing what appears to be a fracture involving the fifth rib laterally and possibly also the sixth rib, although this was not certain. This is in Dr. Loomer's February 23, 2010 report. This is significantly different than several rib fractures. Dr. Loomer does confirm that there was a diagnosis of a fracture of the left radial head and a fracture of the dorsum of the right triquetrum. Dr. Loomer could not find anything in the medical records to support Dr. Cadesky's statement that there had been a right clavicle fracture. On the balance of probabilities, I find that Mr. Bern suffered a pain in the area of his clavicle, but not that it was fractured. I also find that he fractured one rib, possibly a second one, but not several ribs. He did fracture the right triquetrum. He did suffer some facial trauma and as a result lost or broke three right upper tooth crowns. He did require dental work for the repair of these crowns and did require two root canals.

**25**  The fractures were treated conservatively with pain medication. Mr. Bern was off work for approximately ten weeks from the time of the accident until the end of August, 2007. He was then working again in security at a casino. He had a conflict with his employer or other employees with regard to wearing his religious headwear known as a kippa. He left work suffering anxiety and was pursuing an alleged workplace bullying with the Human Rights Tribunal.

**26**  In Dr. Cadesky's November 13, 2008 report he made the following diagnosis:

1. adjustment disorder, active;
2. major depressive episode, active;
3. medical epicondylitis, resolving;
4. later (this is probably "lateral" not "later") epicondylitis, resolving;
5. metatarsalgia, resolving;
6. iliotibial band weakness, active;
7. right dorsal triquetral [fracture], resolved;
8. clavicle fracture, resolved;
9. left radial head fracture, resolved;
10. rib fractures, resolved.

**27**  Dr. Cadesky noted that the treatment was conservative and included physiotherapy and home exercise for the soft tissue injuries. He referred to Mr. Bern's psychological symptoms. He said that Mr. Bern experienced emotional changes and that he was anxious and depressed. He mentioned somatic symptoms. I had the impression defence was referring to these as psychosomatic symptoms. However, somatic symptoms are simply symptoms relating to the soma or trunk of the body; that is the wall of the body cavity or body in general. That is consistent with his description about tension paraesthesia and chest pain. Apparently Dr. Cadesky thought there was some psychological element to the symptoms and referred Mr. Bern to a psychologist. Dr. Cadesky noted that there was improvement.

**28**  Based on the evidence before me, any psychological issues that Mr. Bern had were also as a result of the discrimination issue he experienced at work, and the fact that his grandmother had passed away. There is no medical report from Dr. James, the psychologist. Dr. Loomer did not comment on the psychological issues because he said they were beyond his expertise. Dr. Cadesky is a general practitioner and would have some training with regard to psychological issues that people may suffer from, but I am not satisfied he is qualified to give a definitive opinion on that matter. I do accept that Mr. Bern was somewhat depressed and anxious about the physical effects of the motor vehicle accident and how it impacted on his life.

**29**  I do not place much weight on Dr. Cadesky's opinion about the prognosis and the long-term effects of an overall decrease in Mr. Bern's conditioning. That is really speculation in my opinion. I also note that Dr. Cadesky, in his initial report, indicated that Mr. Bern was not suitable for employment, but in fact did return to work in September of 2007. Dr. Cadesky was informed that Mr. Bern was on unemployment insurance. This was because of the workplace dispute. Certainly Mr. Bern is presently working. He is doing security work, but does not patrol on foot or by bicycle but uses a car.

**30**  Dr. Cadesky's second opinion of December 9, 2009 repeats much of what was contained in the first letter and then deals with the second motor vehicle accident. His diagnosis list those things referred to in para. 26 and adds the following:

1. pelvic asymmetry disorder;
2. left rotator cuff tendonitis;
3. biceps tendonitis;
4. migraine headache;
5. temporomandibular joint syndrome.

**31**  He does not indicate whether any of the injuries have resolved, are resolving or are active in his diagnosis. He confirms Mr. Bern's evidence that his pain is worse since the second accident. In his treatment plan, he indicates that a return to a less physically demanding job is a possibility, but in fact, Mr. Bern is presently working.

**32**  Dr. Cadesky's third report of March 2, 2010 again repeats what was said in the first two reports, and talks about a treatment plan including further psychological counselling.

**33**  Dr. Loomer's report of is consistent with Mr. Bern's evidence at trial about the pain which he suffers. In other words, Dr. Loomer confirms that Mr. Bern made the same complaints to him. Dr. Loomer confirmed that Mr. Bern is taking medication on an "as required" basis for pain and that he takes this two or three times per week. He confirmed that Mr. Bern is continuing with physiotherapy treatments intermittently.

**34**  Mr. Bern reported tenderness to Dr. Loomer on February 23, 2010, but Dr. Loomer could not find evidence of spasm and noted that Mr. Bern had a full range of motion in the areas affected, and that his reflexes appeared to be normal. He noted there was no tenderness in the elbows, and noted a slight tenderness between the index and long finger on his hand. He also noted some tenderness in the knees. His opinion is that Mr. Bern has made an excellent recovery from his fractures, but likely has soft tissue injury to his neck and back. He noted the lateral epicondylitis appears to have cleared. The early diagnosis of "later" epicondylitis was probably incorrectly spelled and should be "lateral".

**35**  Dr. Loomer is of the opinion that Mr. Bern's injuries and the symptoms will certainly heal within time. He encourages Mr. Bern to be as active as he can be in order to hasten recovery. Dr. Loomer confirmed that:

He probably will have some long-term symptoms from the soft tissue injury, although I cannot determine objectively any specific physical injury today.

**36**  I find that Mr. Bern indeed was a physically active and motivated individual before the first accident. He made an honest effort to attempt to return to his prior physical active state, but is continuing to have some difficulty because of the soft tissue injuries, leaving him with lingering symptoms. The second accident aggravated those injuries and probably extended the time in which they will affect Mr. Bern. The second accident aggravated the problems he had with his shoulder, neck and back. The aggravation of his pain and problems he is suffering in attempting to exercise also added to his depression and anxiety. I accept that on occasion he is anxious about driving and that this results from the second motor vehicle accident, but that it does not prevent him from driving.

**37**  There may be some language problems, but I do not accept Mr. Bern's evidence that he always has problems with his shoulder, neck and feet. I do accept that he does have a pain in his right foot if he walks for more than ten or fifteen minutes, and that he does occasionally have problems with his neck and shoulders and that is ongoing. I also accept that he occasionally has migraine headaches. His own doctor's evidence is that he takes pain medication two or three times per week. That was his evidence as well. He is unable to bicycle the way he did in the past or do his patrols on foot.

**38**  He has had dental surgery for the three crowns and two root canals. His evidence is that his mouth feels very bad and he has pain all of the time all day. Again, those are the words he used, and perhaps there is some language difficulty. However, there is no evidence from his dentist indicating these ongoing complaints. His own doctor has not mentioned these ongoing complaints. I am satisfied that he has had some problems with his mouth, but certainly not to the extent that he complains of.

**39**  I do accept that when he has gone back to the gym to attempt to continue with his physical training that his soft tissue injuries have compromised his ability to do so. He gets some tingling in his arms when he attempts to lift weight and I am satisfied that his back and neck bother him.

**40**  I do find, however, that on the balance of probabilities, in other words that it is more likely than not, that those symptoms will be reduced over time.

**General Damages**

**41**  The plaintiff suggests that the appropriate quantum of general damages for Mr. Bern would be $50,000.00, or somewhat more. The defence suggests $40,000.00 to $45,000.00 is more appropriate. The plaintiff referred to a number of cases, including *Netter v. Baas*, [*[1995] B.C.J. No. 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M221-00000-00&context=) in which the award for general damages was $55,000.00 for a previously active individual who said they suffered pain when they attempted to exert themselves after the injury. The court said they suffered pain when they attempted to exert themselves after the injury. The court said the plaintiff had a fairly severe soft tissue injury to his lower back which lasted close to three years and was still persistent.

**42**  The plaintiff referred to *Cash v. Wong*, 1996 BCD Civ. 3336-16, [*[1996] B.C.J. No. 1311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1S9-00000-00&context=). Non-pecuniary damages were allowed in the amount of $50,000.00. The plaintiff continued to suffer a soft tissue injury for approximately five years or more after the accident. Her evidence was that she lived with considerable pain, although she continued to work and be active. Her level of participation had dropped considerably from the pre-accident condition.

**43**  I am satisfied that the impact of the injuries has been significant on the plaintiff, but that on the evidence that I have he should show improvement in the future and make a substantial recovery. I find that an appropriate level of general damages in this case is $50,000.00.

**44**  I find that general damages should be $50,000.00. I apportion $15,000.00 of that amount to the second accident. I am satisfied that the second accident aggravated the existing injuries and contributed to some additional injuries. However, the significant injuries and pain and suffering arise from the first accident.

**Past Wage Loss**

**45**  The plaintiff has proven a ten-month wage loss of $6,750.00 and I allow that amount. This is attributed entirely to the first accident.

**Special Expenses**

**46**  For special expenses, I do allow the amount of $6,099.00. The only item really in dispute was for psychological treatment of $450.00. There is no report from Dr. James and there is evidence that the psychological issues that Mr. Bern was dealing with were not related directly to the accident. I am not satisfied that he has demonstrated that his need for psychological treatment was caused by the accident, and not actually a result of the other issues he was dealing with in his life. I do accept there was some psychological impact as a result of his injuries, but I have considered those when fixing the amount for the general damages. I have not apportioned these between the two accidents. The evidence does not allow me to do so. Therefore, I have simply treated it as damages from the first accident.

**Future Income Loss**

**47**  I am satisfied there is medical evidence that Mr. Bern will continue, at least for some time in the future, to suffer some of the symptoms from his injuries, particularly related to the soft tissue injuries. I am satisfied that there is a real and substantial probability that these may impact on his ability to do physical work. He presently is able to continue to work as a security person, but only because he is able to do that by the use of an automobile rather than being required to walk or ride a bicycle during his job. In addition, I am satisfied that his injuries could well have a negative impact on him if he were required to carry out more physically demanding work. This is certainly a case where to some extent he is rendered less capable overall of earning income, and while he is suffering from his soft tissue injuries would be less marketable or attractive as an employee performing a physical job such as a labourer. I also conclude that to a limited extent, or at least from time to time, this may affect his ability to take advantage of job opportunities that require physical work, and to that extent is less valuable to himself as a person capable of earning income in a competitive labour market (*Reed v. Steele*, [*1997 94 BCAC 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61HS-00000-00&context=), [*36 B.C.L.R. (3d) 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61HS-00000-00&context=) (B.C.C.A.) and *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=)). The plaintiff suggested that a reasonable assessment would be perhaps as much as two year's income. I do not agree. I accept that there has been some diminished earning capacity, but that it will not be long-term. I cannot measure it precisely or calculate it, but as an assessment I fix the amount at $10,000.00. I have apportioned this between the two accidents. The significant injuries were caused by the first accident and those are the injuries which lead to the future income loss. The second accident merely aggravated the symptoms from the first accident and prolonged the recovery from them.

**48**  The parties did not address the issue of costs and there may have been some reason not to. If they are unable to agree on the issue of costs they are at liberty to address that issue.

R.E. POWERS J.

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[***Clemas v. Gabrlik, [2013] B.C.J. No. 1719***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B26X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: June 17-21, 24 and 25, 2013.

Judgment: August 7, 2013.

Docket: M104222

Registry: Vancouver

**[2013] B.C.J. No. 1719** | 2013 BCSC 1412

Between Michael Clemas, Plaintiff, and Rose Gabrlik and Ronald Gabrlik, Defendants

(185 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Fibromyalgia or chronic pain — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Pre-existing injury — Future treatment required — Action by plaintiff for damages resulting from motor vehicle accident allowed — Liability was not in issue — Plaintiff was likely to continue to experience ongoing low back pain with occasional flare-ups — Pain caused diminishment in plaintiff's enjoyment of life, including recreational pursuits — Non-pecuniary damages were reduced by 15 per cent, as plaintiff might have experienced similar symptoms in future in any event — Plaintiff awarded $63,750 non-pecuniary damages, $72,995 for past income loss, $205,000 for loss of future earning capacity, $5,500 for future care costs, and special damages of $2,500 — Total damages awarded $349,745.**

**Damages — Types of damages --- General damages — Categories of — Loss of income — For personal injuries — Considerations — Employment status — Extent of incapacity — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Retroactive loss of income — Special damages — Pre-trial pecuniary loss — Expenses and expenditures — Medical — Medications — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action by plaintiff for damages resulting from motor vehicle accident allowed — Liability was not in issue — Plaintiff was likely to continue to experience ongoing low back pain with occasional flare-ups — Pain caused diminishment in plaintiff's enjoyment of life, including recreational pursuits — Non-pecuniary damages were reduced by 15 per cent, as plaintiff might have experienced similar symptoms in future in any event — Plaintiff awarded $63,750 non-pecuniary damages, $72,995 for past income loss, $205,000 for loss of future earning capacity, $5,500 for future care costs, and special damages of $2,500 — Total damages awarded $349,745.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Liability of owner — Action by plaintiff for damages resulting from motor vehicle accident allowed — Liability was not in issue — Plaintiff was likely to continue to experience ongoing low back pain with occasional flare-ups — Pain caused diminishment in plaintiff's enjoyment of life, including recreational pursuits — Non-pecuniary damages were reduced by 15 per cent, as plaintiff might have experienced similar symptoms in future in any event — Plaintiff awarded $63,750 non-pecuniary damages, $72,995 for past income loss, $205,000 for loss of future earning capacity, $5,500 for future care costs, and special damages of $2,500 — Total damages awarded $349,745.**

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| Action by the plaintiff for damages resulting from a motor vehicle accident. The plaintiff was struck from behind by a car driven by one defendant and owned by the other defendant, causing the plaintiff to suffer chronic low back pain. Liability was not in issue. The plaintiff was unable to continue working for his family's plumbing business because of his pain. After the accident he was employed as a lead journeyman plumber, and later in a job installing siding. The plaintiff then obtained employment at a Home Depot store. The plaintiff testified that he could no longer do maintenance on his home, and that he was limited in the recreational pursuits that he used to enjoy. Prior to the accident, the plaintiff was active in sports and activities with his children. The plaintiff tendered expert evidence that the prognosis for resolution of his pain was poor. The expert accountant's report tendered by the defendant concluded that it was not possible to assess whether any income loss actually occurred in the years following the accident or to determine potential future income losses due to the inadequacy of financial information available. The expert orthopaedic surgeon who examined the plaintiff on behalf of the defendants concluded that the plaintiff had shown steady improvement and that the plaintiff could return to work as a plumber.  HELD: Action allowed.  While there were flaws in the report of the defendant's expert accountant, taken in its entirety, it did not cross the line from opinion into advocacy. The court declined to draw an adverse inference from the fact that the plaintiff did not call his primary treating physician. The court preferred the evidence of the plaintiff's medical experts, in particular that of the doctor who had a treating relationship with the plaintiff. The plaintiff's condition had improved over time, but he was likely to continue to experience ongoing pain as well as occasional flare-ups of greater severity. The plaintiff likely had a pre-existing back condition at the time of the accident. His pain was triggered by the accident and accordingly the defendants were liable for the damages suffered. The plaintiff's pain caused a diminishment in his enjoyment of life, including his participation in recreational pursuits. An award of $75,000 for non-pecuniary damages was reasonable. That award was reduced by 15 per cent on account of the risk that plaintiff would have experienced similar symptoms without the accident, resulting in net award of $63,750 for non-pecuniary damages. The plaintiff was able to function after the accident in jobs that required a significant amount of physical work. The plaintiff's current employment at Home Depot did not represent his maximum earning potential. Using the plaintiff's average net income from the four years prior to the accident, it was reasonable to assume that the plaintiff would have earned $80,000 annually as a plumber. The plaintiff was awarded $72,995 for past income loss. $60,000 reasonably reflected what the plaintiff could be expected to earn from alternate employment after the accident. The plaintiff's net past income loss totaled $72,995. Using the earnings method of calculation, the plaintiff would suffer a future income loss of $205,000 until age 60. The cost of future care for treatments that were not recommended by a treating physician was not recoverable from the defendants. The plaintiff was awarded future care costs of $5,500. $2,500 was recoverable as special damages for the cost of pain medication. There was no significant impact on the plaintiff's involvement in house or yard maintenance. No damages were awarded under this head. The total amount of damages awarded was $349,745. |

**Counsel**

Counsel for the Plaintiff: T.J. Delaney and A.J. Ritchie.

Counsel for the Defendants: S. Hood and L.H. Leung.

**Reasons for Judgment**

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| **R.A. SKOLROOD J.** |

**Introduction**

**1**  This is a claim for damages for personal injuries suffered as a result of a motor vehicle accident that occurred on September 16, 2008 at the intersection of 176th Street and 32nd Avenue in Surrey, British Columbia (the "accident"). Liability is not in issue.

**The Accident**

**2**  The accident occurred at approximately 4:00 p.m. The plaintiff, Michael Clemas, was heading north on 176th Street and had stopped at the traffic light at 32nd Avenue. He was driving a 1995 Pontiac Transporter minivan. His vehicle was the first in line at the traffic light and he estimated that he was stopped for approximately 15 seconds when his vehicle was struck from behind by a vehicle driven by the defendant Rose Gabrlik and owned by the defendant Ronald Gabrlik. Mr. Clemas testified that the force of the collision compelled his vehicle six to eight feet into the intersection where it came to rest. As will be discussed below, the defendant driver testified that the force of the impact was, in fact, minimal.

**3**  No police or ambulance attended the accident scene. No independent witnesses were called to give evidence about the accident.

**4**  Mr. Clemas testified that he contacted the Insurance Corporation of British Columbia ("ICBC") following the accident and that ICBC paid him $1,500.00 in respect to the damage sustained to his vehicle. In cross-examination, Mr. Clemas agreed that in fact the damage to his vehicle, as identified by ICBC, totalled just over $1,000.00 ($1,046.93). Photos of the rear of Mr. Clemas' vehicle tendered in evidence did not reveal any significant damage to the vehicle. Indeed it was difficult to discern any damage in the photos.

**The Parties' Positions**

**5**  It is the plaintiff's position that as a result of the accident, he has suffered a significant ongoing injury to his lower back that has caused him, and continues to cause him, damages which he quantifies as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a) | Non-Pecuniary Damages | $100,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b) | Past Income Loss | 110,000 - 160,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | c) | Loss of Future Earning Capacity | 600,000 - 750,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d) | Cost of Future Care | 23,900.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | e) | Special Damages | 2,903.19 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | f) | Diminished Housekeeping Capacity | 20,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $856,803.19 - $1,056,803.19 |  |

**6**  The defendants concede that the plaintiff was injured in the accident, however they take issue with both the severity and duration of his injuries. The defendants submit that the following damages are appropriate in this case:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a) | Non-Pecuniary Damages | $50,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b) | Past Income Loss | 10,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | c) | Loss of Future Earning Capacity | 50,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d) | Cost of Future Care | 3,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | e) | Special Damages | 2,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | f) | Diminished Housekeeping Capacity | 0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $115,000.00 |  |

**The Plaintiff's Evidence**

**7**  Mr. Clemas was 44 years old at the time of the accident and 49 years old at the time of trial. At the time of the accident, he was a single father with shared custody of his two children with his former common law spouse. Mr. Clemas has since married and currently resides with his spouse and stepson.

**8**  Mr. Clemas is a plumber by trade. Following his graduation from high school in 1982, he commenced employment with R.C. Installations, a plumbing business operated by his father, and in 1985 or 1986, he obtained his journeyman plumber's certificate. In 1988, he left R.C. Installations and moved to Montreal with the hope of making the Canadian Olympic team in the sport of judo. As a result of an injury to his wrist suffered in training, Mr. Clemas returned to British Columbia in 1990 and resumed his employment with R.C. Installations.

**9**  In 1990, R.C. Installations had three employees: Mr. Clemas, his father and his brother. Mr. Clemas' mother did the books for the business. At some point after his return from Montreal, Mr. Clemas' brother left the business and it continued with Mr. Clemas and his father. In the early 2000s, Mr. Clemas' father began to work less for health reasons and he effectively retired from the business in 2006. From 2007 to the date of the accident, Mr. Clemas operated R.C. Installations on his own, albeit with ongoing bookkeeping assistance from his mother. He testified that his intention was to continue in the business until retirement and that hopefully at some point his son would join him as he had his own father.

**10**  Mr. Clemas testified that as a result of the force of the accident, his right shin struck the dash board. Following the accident, he experienced pain in the back of his head, neck, left shoulder and lower back. The headaches, neck pain and shoulder pain resolved within approximately six weeks of the accident, but the back pain has persisted and is the primary basis for his claim for damages in this action. The severity and duration of his alleged back problems, and their impact on his life and his ability to earn income, are the central issues in the case.

**11**  Following the accident, Mr. Clemas was away from work for approximately two weeks. During that period, his brother assisted with some service calls and he also enlisted the help of his nephew. Approximately two to three weeks after the accident, his father returned to the business to help as well. Mr. Clemas attempted to ease back into work, starting with two hours per day and then increased to four hours per day. However, when he tried to work six hours per day he says that he found it too painful and he was unable to continue. Mr. Clemas never returned to work full time at R.C. Installations.

**12**  Mr. Clemas testified that in or about November or December, 2008 he had a falling out with his father over R.C. Installations. According to Mr. Clemas, his father did not appreciate the pain he was in and did not understand why he was not able to work more. From Mr. Clemas' perspective, his father was not doing enough to maintain the business while Mr. Clemas was unable to work. For example, Mr. Clemas thought that his father was favouring his historical customers and was not providing adequate service to new customers that Mr. Clemas had developed.

**13**  According to Mr. Clemas, the result of this dispute was initially a threat by Mr. Clemas' father to sell the business, which Mr. Clemas supported on the expectation that he would receive money from the sale. Instead, however, his father gave Mr. Clemas what he described as a "severance payment" comprised of four cheques for $1,500.00 spread over a few months.

**14**  Following his departure from R.C. Installations, Mr. Clemas testified that he applied for in excess of 30 plumbing jobs. He was eventually hired by E & P Construction which was doing plumbing installation work in a new townhouse development. Mr. Clemas testified that while he was hired as a plumber, he essentially functioned as a foreman because he was the senior plumber on the site and had a number of apprentices under him. The foreman duties involved answering to the site supervisor and solving problems as they arose. He also did plumbing work on the site with the assistance of the apprentices. He agreed that he was able to fulfill the physical requirement of the plumbing work.

**15**  Mr. Clemas' employment with E & P Construction was terminated just shy of three months after it commenced following a confrontation with another employee. Mr. Clemas thought his termination was unfair but there was little he could do to challenge it.

**16**  Mr. Clemas was cross-examined at some length on his description, provided to various medical and other professionals, of his position at E & P Construction as a "foreman." It was put to him that he used that term to disguise the fact that he was doing, and was able to do, plumbing work. Mr. Clemas testified that he described himself as a foreman because that was essentially the role that he performed, even though he was hired as a plumber. I accept his evidence that while he did perform plumbing work at the job site, as the senior person on site he also performed a number of supervisory or foreman-like functions. I do not believe that his description of the job as being a foreman was intended to mislead. However, the fact that Mr. Clemas was able to function in a job that involved both plumbing and supervisory duties, and the fact that the extent of the physical requirements of that position were not fully disclosed to the medical experts, is relevant to his claim for loss of income which will be addressed below.

**17**  Mr. Clemas applied for a number of other jobs and was ultimately hired in June 2009 by PRL Pacific Reconstruction Ltd. ("PRL"), a company owned and operated by a friend of his. According to Mr. Clemas, his friend was aware of Mr. Clemas' limitations and was prepared to accommodate them, primarily by hiring an assistant to work with Mr. Clemas to do most of the heavy work. PRL is engaged in the business of building envelope repair work. Mr. Clemas' particular responsibility was to cut and install Hardie board which is a form of siding.

**18**  Mr. Clemas stayed employed at PRL for about three years but left in July 2012. Mr. Clemas said that he quit because his assistant had been laid off and he found the work too difficult. In May of 2012, Mr. Clemas had an incident with his back when his back "locked up" and his regular treatment regime was not working to relieve the pain. The ongoing pain, together with the loss of his assistant, led him to quit PRL. He testified, as well that, the owner of PRL wanted him to renew his Workers Compensation Board registration and that he did not want to incur approximately $1,700 cost to do so.

**19**  In October 2012, Mr. Clemas obtained employment at a Home Depot store in White Rock in the plumbing department where he continued to be employed at the time of trial. While he continues to experience pain and occasional spasms, he is able to function at that job. Mr. Clemas testified that there is no heavy lifting involved in the position.

**20**  Summaries of Mr. Clemas' taxable income were introduced into evidence and revealed net income in the years preceding the accident as follows:

|  |  |  |
| --- | --- | --- |
| 2008 | $63,875 |  |

|  |  |  |
| --- | --- | --- |
| 2007 | $107,854 |  |

|  |  |  |
| --- | --- | --- |
| 2006 | $48,458 |  |
| 2005 | $39,902 |  |
| 2004 | $43,366 |  |
| 2003 | $39,712 |  |

**21**  Mr. Clemas testified that the increase in income in 2007 was due to the fact that by that time he had taken over sole operation of R.C. Installations. His income in 2008 reflects the fact that he did not return to work at R.C. Installations in any meaningful way after the accident in September of that year. Mr. Clemas estimated that he had approximately $50,000.00 in work lined up for the balance of 2008 that he was unable to perform. No documents or other corroborating evidence was adduced to substantiate that figure

**22**  Mr. Clemas testified that he has not filed income tax returns for the years after 2008 due to an outstanding income tax bill owing to the Canada Revenue Service as well as a significant GST debt. However, he agreed in cross-examination that his earnings from PRL were approximately $55,000 in 2010 and $60,000 in 2011.

**23**  Mr. Clemas' current position at Home Depot pays $14.00 per hour. He is not classified as a full time employee but he said that he works full time hours. He would like to ultimately be promoted into the position of designated supervisor which pays $18.00 per hour.

**24**  Mr. Clemas testified that the problems with his back have negatively impacted his life in a number of respects. He and his wife currently live in a house located next door to his parents that they rent from his parents. Mr. Clemas testified that he relies on his father to do much of the home maintenance. The situation has improved somewhat in recent times and he now is able to cut the lawn approximately 60% of the time. He said that his wife does the majority of the housework.

**25**  Mr. Clemas testified that he is now limited in a number of recreational pursuits that he used to enjoy. Mr. Clemas' father owns a judo club and prior to the accident, Mr. Clemas used to teach judo. As part of the teaching he would demonstrate judo moves to students and would occasionally spar with students. He has recently returned to teaching judo at the club but is no longer able to demonstrate or spar. Rather, he teaches students through verbal direction.

**26**  Prior to the accident, Mr. Clemas was quite involved in paintball. In the late 1990s he participated at a competitive level. Later, he played on a more recreational basis, playing every week or two when the weather permitted. After the accident, Mr. Clemas stopped playing paintball due to the physical demands and he sold his paintball equipment.

**27**  Prior to the accident, Mr. Clemas also played tennis with his son a couple of times per week. He has not played tennis since the accident as he believes the motion of hitting the tennis ball would cause problems with his back. Mr. Clemas also used to play golf. He testified that he would go to the driving range once or twice per week and would try to play once per week depending on friends' availability. Since the accident, he has gone to the driving range a few times and has played one round of golf on a par 3 course with his son.

**28**  Also prior to the accident, Mr. Clemas and his wife enjoyed taking dance lessons together. As he described it, this was an attempt to develop a hobby that they could participate in together. Mr. Clemas said that they have not resumed dance lessons since the accident, although his evidence was vague as to why that is.

**29**  Mr. Clemas also testified that he used to enjoy throwing a baseball or football with his son but he does not do that anymore. He also has not gone to a movie with his children since the accident for fear that he could not sit still for the duration of the film.

**30**  Mr. Clemas denied that he had any pre-existing injuries of any significance. Specifically, he testified that while he had tweaked his back from time to time while engaging in judo, he had no significant prior back issues. He had orthoscopic surgery on one knee and separated both shoulders, again in relation to his judo activities, but he does not consider this material to his current complaints. He also experiences occasional problems with the wrist he injured in judo.

**31**  In cross-examination Mr. Clemas admitted that he was involved in four subsequent motor vehicle accidents after the accident, all of which appear to have been very minor. He denied that he was injured in any of these subsequent accidents or that they have any bearing on his current claim. No independent evidence was adduced about these accidents. Counsel for the defendants cross-examined various expert witnesses called by Mr. Clemas about the fact that he did not disclose to them these subsequent accidents. However, in the absence of any evidence of the severity of these accidents (which might be more accurately described as incidents) I find that they are not material to my consideration of Mr. Clemas' claims in this case. For the same reason, I do not find that his failure to disclose them to the medical and other professionals undermines his credibility or in any way negatively impacts on the experts' reports.

**32**  Mr. Clemas also testified that he has in the past received treatment and counselling for cocaine use. He was cross-examined on a number of entries in his family doctor's clinical notes that refer to occasional relapses. Mr. Clemas was forthright about the issue and did not attempt to hide from the fact that he once had a problem with the drug. Counsel for the defendant cross-examined a number of the witnesses on this issue, including a number of experts who were not aware or had not been told by Mr. Clemas about his past drug problem. The defendants did not lead any evidence to suggest an ongoing problem or to indicate that drug use was a factor in Mr. Clemas' job performance. Absent such evidence, I do not consider it relevant to the claims being advanced in this case.

**33**  Mr. Clemas describes his current condition as experiencing a dull pain in his back every day with the intensity of the pain varying from day to day. He experiences sharp pains from time to time, sometimes twice per day and other times he will go a couple of days without such pain. He treats the pain with over the counter medication.

**The Plaintiff's Lay Witnesses**

**Laurie Cummings**

**34**  Laurie Cummings is Mr. Clemas' former common law spouse and the mother of his two children. Ms. Cummings met Mr. Clemas in late 1988 or early 1989 in Montreal when he was training there in pursuit of his Olympic judo aspirations. Ms. Cummings moved to British Columbia for a period in 1990 then moved here permanently in 1991. She maintained a common law relationship with Mr. Clemas until they separated in May 2004. Their daughter was born in 1996 and their son in 1997.

**35**  Ms. Cummings testified that prior to the accident Mr. Clemas was a very active father to his children. They lived near the beach and Mr. Clemas regularly took them on hikes and played on the beach. Their son was active in sports and Mr. Clemas would often throw a football or baseball with him.

**36**  Pursuant to a separation agreement entered into at the time of separation, Mr. Clemas paid approximately $550 to Ms. Cummings in child support. She testified that before the accident, Mr. Clemas made the payments on time and was very generous to the children, often paying for extras over and above the required amount. Mr. Clemas did not pay spousal support.

**37**  Since the date of the accident, Ms. Cummings testified that Mr. Clemas has occasionally struggled to make the child support payments and has sometimes had to borrow money from her between pay cheques.

**38**  Mr. Clemas' activity level with the children has decreased, for example he no longer throws balls with their son. Since the accident, he has seen the children less frequently. Their daughter no longer regularly attends scheduled weekend visits due to medical issues she has experienced. Their son also does not see Mr. Clemas as frequently given that Mr. Clemas no longer engages in the same level of activity with him.

**39**  Ms. Cummings testified that when she first met Mr. Clemas and up until the time of the accident, he was always a big, strong and athletic man who was very outgoing. Since the accident, Ms. Cummings' impression is that he has "aged beyond his years" and is more of an introvert. On occasion she has witnessed him display apparent stiffness in his back and a limp.

**40**  In cross-examination, Ms. Cummings agreed that since their separation she has seen less of Mr. Clemas although she said that they would continue to see each other two to three times per week because of child exchanges, pick-ups and drop-offs etc. Her only knowledge of the accident is through Mr. Clemas and things that her children have told her. She testified that occasionally Mr. Clemas would cancel a visit with the children or would bring their son home early from a visit because he was not feeling well. She understood this to mean that he was having back problems.

**41**  It was suggested to Ms. Cummings in cross-examination that she was sympathetic to Mr. Clemas and supportive of him. While Ms. Cummings agreed that she wished him well, I did not find that she in any way tailored her evidence to assist Mr. Clemas in his current claim. That said, her evidence is of minimal assistance in determining the extent and severity of Mr. Clemas' ongoing difficulties with his back.

**Richard Clemas**

**42**  Richard Clemas is Michael Clemas' father and the founder of R.C. Installations. He is currently 73 years old and has been a plumber since the age of 21. He and his wife have two sons: Michael Clemas and his brother Steve. Both sons followed Richard Clemas into the plumbing business and both apprenticed with him.

**43**  R.C. Installations has always operated as a sole proprietorship. It has never been incorporated and there are no shareholders.

**44**  Both sons worked with R.C. Installations in the 1980s but at some point Steve left to pursue other opportunities. Michael continued to work at R.C. Installations through until 2008. Richard Clemas testified that he started to slow down in 2005 and then in 2006 he was diagnosed with prostate cancer. Due to his illness he was largely away from the business in 2006-2007 during which time Michael ran the business on his own. In the words of Richard Clemas, Michael kept the business going.

**45**  Richard Clemas returned to the business in the fall of 2008 following Michael's accident. He wasn't looking to return to work at that time but Michael asked for his help. After a period of time, Michael came back to work and would follow him around to jobs, although Michael would direct him on what needed doing as the work at that time was all on jobs that Michael had generated. According to Richard Clemas, Michael worked until mid-November 2008 at which time he left and did not return. On December 15, 2008, Michael announced to Richard Clemas that he was quitting.

**46**  There was some inconsistency between Michael and Richard Clemas' version of events surrounding Michael's departure from R.C. Installations. For example, in cross-examination, Richard Clemas denied that there was any dispute between the two or that he had threatened to sell the business. He agreed that he made payments to Michael in December 2008 but said that the money was money that Michael had earned on jobs that he had done. He did not agree with Michael's characterization of these payments as severance.

**47**  Following Michael's departure from R.C. Installations, Richard Clemas kept the business going for some time. Initially, he worked on completing jobs for which Michael had signed contracts. He continued on with R.C. installations through 2011 and brought his other son Steve back on a full time basis for a year in 2010-2011. He has since slowed down again and is currently working on a reduced hourly/daily basis servicing two historical clients.

**48**  Richard Clemas expects that when he steps away permanently from the business, R.C. Installations will simply be folded. He does not see hiring an apprentice or an experienced plumber as an option to continue the business. In his view, the only option would be for a family member to take it over. Steve is employed elsewhere and isn't interested and, according to Richard Clemas, Michael is not capable of doing so due to his condition.

**49**  Richard Clemas testified that in his estimation the average annual income earned by R.C. Installations over the past three years is approximately $130,000. No financial statements or other documents were produced to substantiate this figure.

**Julie Clemas**

**50**  Julie Clemas is Mr. Clemas' wife. They have been married for about seven months but have lived together for five years. They met approximately seven years ago.

**51**  Ms. Clemas testified that prior to the accident she and Mr. Clemas participated in a number of recreational activities together including taking trips, walking on the beach and hiking. She said that Mr. Clemas regularly played golf and tennis and participated in judo three times per week.

**52**  She described his mood and personality prior to the accident as happy, light-hearted and full of energy.

**53**  Since the accident they have not been on any trips together. Financially they cannot afford it and they have to be careful not to engage in activities that cause Mr. Clemas difficulty with his back. Ms. Clemas testified that mood-wise, he is often sad and depressed. She described him as a proud man who does not like to show pain and who feels that he is not adequately providing for his family.

**54**  Ms. Clemas testified that on a typical day, Mr. Clemas will wake up after a difficult sleep and take some Advil for the pain. If it is a work day, he will go to the Home Depot and she will often get texts throughout the day from him saying that he is having a bad back day. When he comes home, he will often position himself on the love seat to alleviate pressure on his back or will play some X-box in the basement.

**Paul Sahota**

**55**  Mr. Sahota is a department supervisor in the plumbing department at the White Rock Home Depot store and is Mr. Clemas' direct supervisor. Mr. Sahota was promoted to that position in April 2013. Previously he was a sales associate in the plumbing department at Home Depot.

**56**  Mr. Sahota testified that a typical sales associate position involves interacting with customers, restocking shelves with product, bringing product down from shelves and some maintenance in the department. Placing and removing product on and off shelves involves climbing ladders and using the "order picker" which is a machine to which an associate is strapped that lifts the associate in the air.

**57**  According to Mr. Sahota, Mr. Clemas is not asked to use the "order picker" or to climb ladders. Mr. Sahota and other sales associates in the plumbing department are aware of Mr. Clemas' back problems and will assist him when lifting is required. Mr. Sahota is supportive of Mr. Clemas' employment at Home Depot and happy to assist him or accommodate his needs. For example, he testified that occasionally he will allow Mr. Clemas to go lie down on a cot in the first aid room or will excuse him early from a shift when his back is hurting.

**58**  Mr. Sahota described Mr. Clemas as being good at customer service. He interacts well with the customers and the fact that he is knowledgeable in the plumbing field is an asset. Mr. Clemas is the only ticketed plumber employed in the plumbing department at the store.

**59**  Mr. Sahota testified that Mr. Clemas is not a full time employee. He is a part time employee who splits his time between the plumbing department and the kitchen and bath department. According to Mr. Sahota, he can provide Mr. Clemas with about 8-12 hours per week in the plumbing department and he gets additional hours in the kitchen and bath department.

**60**  In order for Mr. Clemas to become a full time employee, head office would have to approve more hours for the department. If that occurred, Mr. Clemas and other interested candidates would have to apply and go through an interview process. Mr. Sahota indicated that due to Mr. Clemas' knowledge and experience he has the potential to advance in the company, however his back may be an issue as department supervisors still must undertake the same physical tasks as sales associates.

**The Plaintiff's Expert Evidence**

**Dr. Purtzki**

**61**  Dr. Jacqueline Purtzki is a licensed physician with a specialty in physical medicine and rehabilitation. She examined Mr. Clemas on three occasions at the request of his counsel and she prepared three reports which were entered into evidence.

**62**  Her first report dated July 27, 2012 summarizes her assessment of Mr. Clemas based on an examination that took place on June 28, 2012. Based on that assessment, Dr. Purtzki found Mr. Clemas to be suffering from lower back pain "of mechanical type, compatible with recurrent flare-ups related to activity, likely from facet joint dysfunction." She also noted that:

Mr. Clemas, likely had an increased risk of developing lower back arthritis and degenerative changes over time. He was a high level athlete in an extremely physically demanding sport (judo) before the MVA. His musculoskeletal system likely took a lot of physical strain, and small repetitive injuries that may have taken place despite the apparent absence of significant injury to his spine. This is coupled with the physical demands of being a plumber in a job that generally involves quite a bit of lifting and pulling, pushing, crouching.

...

Prognosis for recovery even with appropriate intervention, I believe, is still guarded. I think it is unlikely that he will be able to return to a physically demanding or moderately demanding labor job.

**63**  Dr. Purtzki's second report is dated August 14, 2012 and is an addendum to her first report following a CT scan of Mr. Clemas' lumbar spine. On reviewing the CT report, Dr. Purtzki noted the presence of "bilateral spondylolysis at L5 with grade 1 anterolithesis of L5 over S1, and then stated:

Mr. Clemas' CT report provides evidence of an anatomical defect in the low back, which corresponds to the clinical location of his pain on examination and by description. His current symptoms are, in my view, compatible with pain generation due to the instability of the spine at the L5/S1 level. Given Mr. Clemas' past history of vigorous physical activity and the possible occurrence of a pars defect related to non-traumatic causes alone, it is likely that the spondylolysis and possibly the spondylolisthesis were present at some time before the MVA. Pars defects occur often during adolescence and are often not recognized.

Given the history of onset of much more severe, disabling low back pain after the MVA, it appears likely that the pars defect became clinically symptomatic related to the MVA...Given the available information, I think that Mr. Clemas incurred an injury to the low back as a result of the MVA, which triggered the current disabling low back pain.

**64**  Dr. Purtzki's most recent report is dated January 28, 2013 and it summarizes her findings following a reassessment of Mr. Clemas on January 14, 2013. In this report, Dr. Purtzki essentially confirms her original opinion, noting as follows under the heading "Prognosis":

Mr. Clemas has significant general degenerative changes at all lumbar spine levels, which are likely a combination of his age, his previous work and his previous recreational activities such as competitive judo. In addition, he has symptomatic grade 1 spondylolisthesis which seems to be mainly limiting him. This debilitating back pain reportedly started after the MVA in question. He continues to be limited and needed to make work and lifestyle changes as a result.

The prognosis for resolution of pain and regarding further back mobility is poor. The prognosis for long-term functional employment is guarded and he likely will have flare ups of back pain, especially if he suffers any additional trauma. He is at higher risk of being laid off or having to take time off work due to back pain.

**65**  In cross-examination, Dr. Purtzki agreed that much of the personal history description set out in her reports is based on what Mr. Clemas told her. For example, she agreed that he told her that he got a job for three months as a foreman and that he later got a job through an acquaintance for a window and siding company and that the company hired an assistant for him to do the heavy carrying and lifting. She also agreed that her description of the accident was based on what Mr. Clemas told her, including her reference to his vehicle being pushed into the intersection.

**66**  Dr. Purtzki did not recall whether Mr. Clemas had told her what he actually did at his then current job, including shovelling rocks, lifting wood, pouring concrete and lifting siding.

**67**  In response to a question from counsel for the defendants, Dr. Purtzki indicated that she did not agree that Mr. Clemas had improved significantly and consistently from the date of the accident through until early 2013. She was then questioned on Dr. Frobb's clinical notes that show a pattern of improvement over time with periodic flare-ups of his back requiring treatment over a number of days. In Dr. Purtzki's view, this pattern, that she described as "remission and relapse", does not suggest overall improvement in Mr. Clemas' condition.

**Dr. Frobb**

**68**  Dr. Mark Frobb is a licensed physician in British Columbia with extensive experience in the treatment and management of chronic back pain and acceleration/deceleration spinal injuries. Dr. Frobb is also accredited to perform neural acupuncture and to practice osteopathic medicine which he described as the non-surgical treatment of spinal problems using manual treatments. Dr. Frobb has been a treating physician of Mr. Clemas since November 2008 when Mr. Clemas was referred to Dr. Frobb by his family doctor.

**69**  Dr. Frobb prepared a report dated June 27, 2012 that was entered into evidence. In his report, Dr. Frobb noted:

Clinical examination reveals evidence of persistent findings of a biomechanical dysfunctional vertebral movement disorder affecting the spinal segmental areas of the lumbar spine associated with an accompanying chronic myofascial pain syndrome in the supporting paravertebral muscles.

These clinical findings are superimposed on underlying chronic degenerative changes of the lumbar spine and sacroiliac joints, a condition that likely predates the motor vehicle accident in question.

...

In my opinion the accident of September 16th , 2008, is a significant causative factor with respect to Mr. Clemas's ongoing chronic pain disorder, physical restrictions and diminished functional capacities as outlined in this report.

**70**  Under the heading "Prognosis" Dr. Frobb states:

It is my clinical opinion that Mr. Clemas's failure to show significant improvement in his chronic pain disorder affecting the lumbar spine following the accident in spite of multiple modalities of therapy places his complete recovery at significant risk.

In my opinion, although there is the possibility that functional capacity will improve over time as it relates to physical workload and consequences of pain associated with this workload, in light of the chronic nature of the complaints this outcome is not certain, indicating that Mr. Clemas's present clinical condition on the balance of probabilities likely represents a status of maximum medical improvement.

**71**  Dr. Frobb confirmed his medical opinion as set out in his initial report in a subsequent report to Mr. Clemas' counsel dated August 2, 2012 which he prepared after reviewing various additional medical records.

**Timothy Winter**

**72**  Mr. Timothy Winter is an occupational therapist employed by Back in Motion Functional Assessments Inc. Mr. Winter conducted a functional capacity evaluation of Mr. Clemas on January 8, 2013 and the results of his evaluation are set out in a report that was entered into evidence.

**73**  The functional capacity evaluation involved subjecting Mr. Clemas to a number of tests intended to measure his ability to perform activities and tasks associated with his occupation as a plumber. The testing also measured Mr. Clemas' effort in performing the various tasks in order to ensure that the results of the tests are an accurate indicator of work capacity. Mr. Winter's findings are summarized at pp. 27-28 of his report as follows:

Evaluation findings indicate that Mr. Clemas is not physically capable of his pre-motor vehicle accident occupation at this time.

Specifically, he presents as limited for the Heavy strength requirements, as well as prolonged exposure periods to non-neutral body postures (i.e. bending, twisting, outer range reaching, crouching, and kneeling). Such non-neutral work demands are further complicated by concurrent exposure to forceful handling and loading functions as are routinely encounter [sic] in this occupation. Consequently, this is a poor occupational choice for Mr. Clemas at this juncture.

With respect to work positions in general, I am of the opinion that Mr. Clemas is capable of full-time employment positions, provided the physical demands of such work are within the guidelines and limitations outlined in this report.

**74**  The limitations identified by Mr. Winter include some capacity for select aspects of medium strength work and full capacity for light strength work. According to Mr. Winter, medium strength work is work in which the employee would be expected to lift up to 25 pounds frequently whereas light strength work would involve occasional lifting of up to 20 pounds and frequent lifting of 10 pounds.

**75**  In his report, Mr. Winter notes, based on his interview with Mr. Clemas, that since leaving R.C. Installations, Mr. Clemas has not returned to plumbing work. He further notes that Mr. Clemas reported working as a foreman on a new townhouse construction project where he periodically engaged in aspects of plumbing work but left the physically arduous work to tradesmen and apprentices. Mr. Winter also records that Mr. Clemas told him that he subsequently moved into installing commercial siding for approximately two years but his tolerance for such work deteriorated over time.

**76**  In cross-examination, Mr. Winter agreed that he was not told by Mr. Clemas about the extent of the physical demands involved in those two jobs, many of which would fall within the classification of heavy strength work.

**Kevin Turnbull**

**77**  Kevin Turnbull is a chartered accountant and economist who prepared two reports that were entered into evidence. The first is dated August 13, 2012 and provides his opinion on the loss of earnings, both past and future, suffered by Mr. Clemas. The second report is dated August 14, 2012 and he sets out a methodology for calculating the cost of future care for Mr. Clemas.

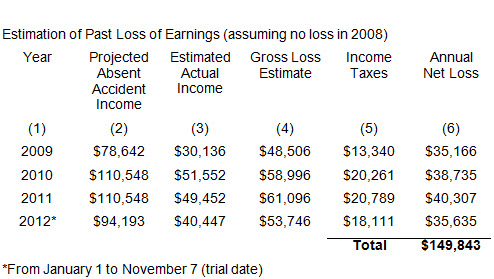
**78**  For the purpose of calculating Mr. Clemas' lost income, Mr. Turnbull assumed that but for the accident, Mr. Clemas would have continued to operate R.C. Installations through until retirement at age 65. Accordingly, Mr. Turnbull's calculation of Mr. Clemas' past income loss to the date of trial is based on the difference between what he estimates Mr. Clemas actually earned from his other employment between the date of the accident and November 7, 2012 (the anticipated trial date as of the date of his report), which employment was principally with PRL.

**79**  Records provided by R.C. Installations revealed that Mr. Clemas continued to be paid through until the end of 2008 thus Mr. Turnbull assumed no income loss for 2008. I would note that this is inconsistent with Mr. Clemas' evidence that once he left R.C. he received four "severance" cheques from his father of $1500.00 each.

**80**  For 2009, Mr. Turnbull calculated Mr. Clemas' actual income based on a T4 slip issued by E & P Construction for the almost three months that he worked there and invoices issued by Mr. Clemas to PRL for the period of June to December 2009. Because Mr. Clemas did not provide Mr. Turnbull with a complete set of invoices covering the entirety of his time at PRL, Mr. Turnbull estimated Mr. Clemas' "actual" income in 2010, 2011 and 2012, up to the time he left PRL in 2012, by reference to average hours worked and amounts billed to PRL as reflected in the invoices Mr. Clemas did provide.

**81**  In order to calculate the income that Mr. Clemas would have otherwise earned from R.C. Installations, Mr. Turnbull used Mr. Clemas' reported income in 2007 and averaged it with his annualized pre-2008 earnings to come up with a figure for 2009. For 2010 and subsequent years, Mr. Turbull assumed that Mr. Clemas' income from R.C. Installations would be $110,548, which is the amount reported on Mr. Clemas' 2007 Income Tax return and which reflects the net income for R.C. Installations for that year as calculated by Mr. Turnbull. The figure is significantly higher than the income reported on any previous return filed by Mr. Clemas.

**82**  Using this methodology, Mr. Turnbull calculated a past loss of income of $149,843 net of tax from the date of the accident to November 7, 2012 as set out in table six in his report:



**83**  He testified that this figure would be slightly higher, by a few thousand dollars, given that the trial in fact commenced on June 17, 2013.

**84**  Mr. Turnbull calculates Mr. Clemas' future income loss based on his estimated loss in 2012, which he calculates to be $63,196 on an annualized basis, extrapolated to age 65. Applying standard discounting factors, Mr. Turnbull estimates Mr. Clemas' future income loss to age 65 as $815,102. Counsel for Mr. Clemas points out that this figure arguably understates Mr. Clemas' loss in that it is based on his earnings at PRL when, in fact, he earns considerably less at Home Depot.

**85**  Mr. Turnbull notes in his report, and agreed on cross-examination, that his calculation does not account for contingencies for unemployment, early retirement or other factors, negative and positive, that might affect Mr. Clemas' future employability and earning capacity. Nor does it account for the possibility of diminished income from the plumbing business due to changes in the economic climate, decreased demand for services, reduced work load etc. Further, implicit in Mr. Turnbull's calculation is the assumption that Mr. Clemas' current earnings at the time of writing the report represent his maximum likely earning potential.

**Derek Nordin**

**86**  Mr. Nordin is a certified vocational evaluator who conducted a vocational assessment of Mr. Clemas on January 24, 2013, the results of which are set out in a report dated February 21, 2013 which was entered into evidence.

**87**  The vocational assessment consists of an interview of the client for 1.5 hours followed by a battery of tests intended to measure the subject's academic achievement, aptitude and vocational interests. In preparing his report, Mr. Nordin also reviewed a number of the medical reports for Mr. Clemas as well as Mr. Winter's functional capacity evaluation report and Mr. Clemas' income tax information for the years 2003-2008.

**88**  As set out in his report, it is Mr. Nordin's opinion that Mr. Clemas "...is not currently employable as a plumber, in either a full or part-time capacity." He further opined that a "best case" scenario for Mr. Clemas is that he will be able to continue with Home Depot for the foreseeable future; but he noted that even if this occurs, Mr. Clemas will stand to earn less in such an occupation than he would have working as a plumber with his father or at another company.

**89**  In cross-examination, Mr. Nordin agreed that in fact the "best case" scenario would be for Mr. Clemas to find work as a plumbing foreman. However, he qualified that answer by noting the limited availability of such positions given Mr. Clemas' minimal experience in a supervisory function and the fact that most companies will only employ one foreman who is typically the owner or a senior employee.

**The Defendants' Evidence**

**90**  The defendant Rose Gabrlik testified about the accident. Ms. Gabrlik has since married and I will refer to her by her married name, Rose Kleinsasser. Ms. Kleinsasser is currently 25 years old and, to use her words, is a stay-at-home wife and mother.

**91**  Ms. Kleinsasser was the driver of the vehicle that struck the rear of Mr. Clemas' vehicle on September 16, 2008. Ms. Kleinsasser testified that at approximately mid-day she was driving her father's Honda Civic north on 176th Street in Surrey in the curb lane. She was coming from White Rock beach and was heading home. In the rear of the vehicle there were two young girls, ages approximately three and five years old, who Ms. Kleinsasser babysat. Ms. Kleinsasser testified that she was stopped at the traffic light at the intersection of 176th Street and 32nd Avenue. The light changed to green for the vehicles to turn left onto 32nd Avenue. The vehicle in front of her started to move as well but then stopped and she ran into the rear of the vehicle.

**92**  Ms. Kleinsasser estimated that she was travelling about five kilometres per hour. She does not recall hearing any screeching of tires and she said that she travelled only a short distance before striking the rear of the vehicle in front of her. She described it as a "quick start and stop."

**93**  Ms. Kleinsasser testified that there was not much of an impact and she does not remember her body moving or striking any part of her car as a result of the collision. She does not recall any significant sound on impact. She was wearing a seatbelt at the time and does not recall it tightening as a result of the impact. Ms. Kleinsasser testified that she does not believe that the vehicle that she struck was pushed forward by the impact.

**94**  According to Ms. Kleinsasser, after the collision, the vehicle in front of her pulled forward through the intersection and parked across the street. The driver (Mr. Clemas) then came back to her vehicle. She indicated that she looked at the bumper of the other vehicle through her windshield before it pulled ahead and from that vantage point did not observe much of anything in terms of damage.

**95**  Ms. Kleinsasser testified that the other driver appeared fine. He did not complain of any pain at that time and she does not believe that he said that he was injured. No police or ambulance was called because the collision, in her view, was so minor that it was unnecessary. Ms. Kleinsasser testified that her father's vehicle sustained about $4,700.00 in damage, principally to the front bumper and the area by the front licence plate. The vehicle was repaired and her parents continue to drive it today. Ms. Kleinsasser identified the photographs in evidence of her father's vehicle.

**96**  In cross-examination, Ms. Kleinsasser said she does not recall if Mr. Clemas first got out of his vehicle after the impact and told her he was pulling forward across the street because he was blocking traffic.

**97**  It was put to Ms. Kleinsasser that there was more damage to her father's vehicle than simply to the bumper and licence plate as she described. Ms. Kleinsasser was shown a copy of the ICBC damage report that indicated that the repairs undertaken on the vehicle were more extensive than she initially suggested.

**98**  It was also put to Ms. Kleinsasser that when she reported the accident to ICBC, she reported experiencing a stiff neck and back. She did not recall, however she agreed that the ICBC accident report reflects those complaints.

**99**  It was also put to Ms. Kleinsasser that her description of a "quick start and stop" was not accurate and that she had "squealed off" when she started to move forward. Ms. Kleinsasser denied this suggestion.

**The Defendants' Lay Witness**

**Peter Glinnum**

**100**  Mr. Glinnum is the President of E & P Construction where Mr. Clemas was employed for approximately three months in January to March 2009. Mr. Glinnum testified that E & P Construction is a plumbing contractor that is engaged in all aspects of the plumbing business including service calls and new construction projects. It generally employs eight to ten people depending on the workload at any given time.

**101**  Mr. Glinnum testified that Michael Clemas responded to an ad that Mr. Glinnum had put in the paper for a journeyman plumber. Mr. Glinnum interviewed Mr. Clemas about his work history, his experience, past injuries, financial issues and any other matters that might interfere with his ability to do the work. No problems were identified and Mr. Glinnum hired Mr. Clemas as a journeyman plumber.

**102**  Mr. Clemas was hired in January 2009. He was hired on a full time basis with the expectation of a 40 hour work week. Mr. Clemas worked full time for E & P Construction until his termination at the end of March 2009.

**103**  Mr. Glinnum testified that he was impressed with Mr. Clemas' qualifications and that he knew what he was talking about when it came to plumbing. Mr. Glinnum also testified that he does not recall Mr. Clemas ever telling him about the accident, any injuries he had, or any pain he suffered, nor did Mr. Clemas ever say that he could not do the plumbing work. Mr. Glinnum testified that had Mr. Clemas raised those issues, he would not have hired him as he needed a full time journeyman plumber.

**104**  For the entire duration of his employment at E & P Construction, Mr. Clemas worked at a new townhouse development called the Azzure. According to Mr. Glinnum, Mr. Clemas' duties at the site included all aspects of plumbing work including cutting wood, drilling holes, digging, carrying pipe and lifting up to about 50 pounds. Mr. Glinnum testified that he would attend the site every day and would observe Mr. Clemas doing physical work such as carrying pipe, drilling holes and installing pipe. In Mr. Glinnum's words, Mr. Clemas did "basically what I expected him to do as a journeyman plumber." In his view, Mr. Clemas fulfilled all of his required duties and was a good employee.

**105**  Mr. Glinnum testified that Mr. Clemas was fired for apparently pushing another employee and threatening to punch him. According to Mr. Glinnum, E & P Construction does not put up with any physical abuse on a work site so they had to let him go. There was no other reason for his termination as his work was good.

**106**  In response to a question from counsel. Mr. Glinnum testified that Mr. Clemas was hired as a journeyman plumber not as a foreman.

**107**  In cross-examination, Mr. Glinnum indicated that in 2009, in addition to the Azzure project, E & P Construction also had a hotel project ongoing in Langley and was finishing a job in White Rock. Mr. Glinnum would move amongst the sites. He would be at the Azzure site every day, usually for an hour but sometimes he would stay longer and sometimes shorter. If he was not there in the morning, Mr. Clemas was responsible for unlocking the lock box, getting out the tools and instructing the apprentices.

**108**  Mr. Glinnum was asked whether, in his absence, the on-site general contractor would speak to Mr. Clemas about issues that arose. Mr. Glinnum said that whenever issues arose, the contractor would call him directly although he agreed that the contractor might also speak to Mr. Clemas because Mr. Clemas was the lead journeyman plumber on site.

**109**  With respect to the incident that led to Mr. Clemas being fired, Mr. Glinnum testified that he had a vague recollection of there being some issue about whether a water test had been completed but he could not recall the specifics. He also testified that there is no formal probation period for new employees.

**The Defendants' Expert Evidence**

**Anthony Upton**

**110**  Mr. Upton is an accountant retained by the defendants to provide opinion evidence concerning the plaintiff's claim for lost earnings and to comment on the plaintiff's expert accounting report prepared by Mr. Turnbull.

**111**  Counsel for Mr. Clemas challenged the admissibility of Mr. Upton's expert report on the grounds that i) it is argument in the guise of opinion, ii) it makes conclusions of fact that are more properly within the realm of the trial judge, and iii) it includes a number of inappropriate comments that go beyond the proper scope of an expert report. While I agree that there are a number of flaws in Mr. Upton's report, I found that taken in its entirety, it did not cross the line from opinion into advocacy and I admitted it into evidence.

**112**  The main thrust of Mr. Upton's report is his assertion that due to the inadequacy of the financial information available to him, he is not able to assess whether any income loss actually occurred in the years following the accident nor is he able to determine potential future income losses. He notes in particular the absence of income tax returns for Mr. Clemas in the years 2009 to 2012 and supporting business and financial records for R.C. Installations.

**113**  Mr. Upton was cross-examined extensively on his report. He was asked why in several instances in his report he departed from the assumptions provided to him in the letter of instruction from the defendants' counsel. For example, despite being told by counsel for the defendants to assume that as of two years prior to the date of the accident Mr. Clemas was running R.C. Installations, Mr. Upton notes at page 5 of his report that the information he has reviewed does "not suggest that Michael Clemas was the owner of RC, in any year."

**114**  Mr. Upton also noted the lack of a complete set of invoices issued by Mr. Clemas to PRL which in his view impeded his ability to assess income loss. Mr. Upton's report is dated March 19, 2013 and was written at a time when the parties did not have complete information about Mr. Clemas' earnings at PRL. Apparently, about one week before the commencement of the trial, a complete set of invoices was received from PRL. As a result, by the time Mr. Upton testified at trial, he had reviewed the invoices and done a calculation of Mr. Clemas' earnings from PRL (and one other company for which Mr. Clemas did some minor work) for the period of June 2009 to July 2012.

**115**  Based on his review of the complete invoices, Mr. Upton calculated Mr. Clemas' gross income for those years as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2009 (June to December) | $26,843 |  |

|  |  |  |
| --- | --- | --- |
| 2010 | $54,670 |  |
| 2011 | $61,900 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2012 (January to July) | $26,776 |  |

**116**  Counsel for Mr. Clemas also submitted a tally of the invoices which showed slightly different figures:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2009 (June to December) | $26,658.21 |  |

|  |  |  |
| --- | --- | --- |
| 2010 | $56,950 |  |
| 2011 | $61,906 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2012 (January to July) | $29,040 |  |

**117**  In his written submission, counsel for Mr. Clemas points out that the above figures do not include other income earned by Mr. Clemas, specifically the amount of $13,896.48 that he earned from E & P Construction in 2009, the $1,300.00 he earned doing some small contract work in 2010 and the $1,736.00 he earned from Home Depot in 2012.

**118**  Another critical opinion expressed by Mr. Upton in his report is that the 2007 reported earnings for R.C. Installations were unusually high when compared to other years, and therefore could not safely be used as the baseline for what Mr. Clemas could or would have earned in future years had he continued to operate R.C. Installations. As noted above, the 2007 figure formed the basis for Mr. Turnbull's opinion about Mr. Clemas' income loss both pre and post-trial.

**Dr. Duncan McPherson**

**119**  Dr. McPherson is an orthopaedic surgeon who examined Mr. Clemas on July 12, 2012 at the request of counsel for the defendants. His finding are set out in a report dated July 23, 2012 that was entered into evidence. Based on his interview and examination of Mr. Clemas and his review of available records, Dr. McPherson notes in his report as follows:

The patient has a continuing localized complaint in his low back, however, retains smooth movement ability. He has a disability in the sense of having arthritic changes in both acromioclavicular joints and he has had a significant injury to his right wrist in the past which limits the range of movement of his right wrist. Power, however, is present in his upper limbs and his hands reflect heavy manual work at this time.

...

The available medical records suggest that the patient had a mild low back strain which steadily improved. He has also had periodic recurrences related to doing heavy work but seems overall to have managed well and to remain physically active. One would not expect any lasting disability as a result of this motor vehicle accident.

**120**  Dr. McPherson provided an addendum to his initial report dated August 13, 2012 where he states:

We know that the patient has a flexible back within the range of what is acceptable or necessary for manual work. The patient apparently was involved full-time in plumbing work up to 2008 and the reason he stopped was because he and his father had some sort of disagreement. It perhaps can be resolved. There seems to be no reason why Mr. Clemas could not return to his plumbing occupation which is a special trade, but he may prefer to carry on in his current occupation, applying siding to homes.

**121**  Dr. McPherson admitted in cross-examination that at the time he wrote both of his reports, he did not have access to either the X-Ray report dated June 13, 2012 or the CT report dated August 3, 2012. With respect to the observation in his second report that there is no reason that Mr. Clemas could not return to his plumbing occupation, Dr. McPherson agreed that pain would be a reason that Mr. Clemas may not be able to work. He suggested that pain was not a "physical" reason and he noted the absence of any restriction in movement on his examination of Mr. Clemas.

**Analysis**

**Findings on the Accident and the Plaintiff's Condition**

**122**  As set out above, Mr. Clemas and Ms. Kleinsasser differ on the magnitude of the impact of the collision and there is no independent evidence to support either version.

**123**  On balance however, given the difference in size of the two vehicles, the fact that both were stopped prior to the impact, and the limited damage to Mr. Clemas' vehicle, I think that the force of the impact can only be described as minimal and that it is unlikely that it was sufficient to project Mr. Clemas' vehicle forward into the intersection to the degree that he testified.

**124**  Nonetheless, there is no doubt that there was some impact and, as set out below under the discussion of causation, I find that the impact was sufficient to trigger Mr. Clemas' back problems.

**125**  In terms of Mr. Clemas' condition, the evidence establishes that since the date of the accident he has suffered from low back pain of varying degrees. As noted by Dr. Purtzki, a CT scan performed in August 2012 revealed "bilateral spondylolysis at L5 with grade 1 anterolithesis of L5 over S1." Spondylolysis refers to a vertebra fracture, which can exist in many people without them being aware of it, whereas spondylolisthesis refers to slippage of one vertebra over the next. The degree of slippage is graded between 1 and 4 with 1 (which is what Mr. Clemas was diagnosed with) being the lowest level.

**126**  Dr. Frobb, in his June 27, 2012 report opines that Mr. Clemas suffers from chronic myofascial pain syndrome and chronic pain disorder.

**127**  Counsel for the defendants invited me to draw an adverse inference from the fact that Mr. Clemas did not call as a witness his family physician, Dr. Cheyne, who treated Mr. Clemas both before and after the accident. However, given the full disclosure of Dr. Cheyne's clinical records and the extensive medical evidence before the Court from Dr. Frobb, who assumed the role of primary treating physician, I am not prepared to draw such an inference. See *Kemle v. McRae,* [*2013 BCSC 935*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0N4-00000-00&context=) at paras. 87 - 89.

**128**  As noted above, Dr. McPherson, the expert called by the defendants has a different view of Mr. Clemas' condition. In his opinion, Mr. Clemas suffered a mild low back strain which has steadily improved.

**129**  I prefer the evidence of Dr. Purtzki and, in particular, Dr. Frobb, who has had a treating physician relationship with Mr. Clemas. Dr. McPherson's opinion is based on a relatively superficial examination of Mr. Clemas and he did not have available to him the X-Ray report dated June 13, 2012 or the CT report dated August 3, 2012 when he authored his report.

**130**  That said, I have difficulty with Dr. Purtzki's assertion that Mr. Clemas has not improved over time. The evidence established that Dr. Frobb has been Mr. Clemas' primary treating physician for his back problems starting in November 2008. Following the initial consult with Dr. Frobb on November 7, 2008, Mr. Clemas underwent an intensive course of treatment involving manual therapy and neural acupuncture that continued through November, December and into early January 2009. Dr. Frobb noted steady improvement through that period.

**131**  Mr. Clemas returned to see Dr. Frobb on July 2, 2009 complaining of paravertebral spasm. He received six treatments over a two week period with Dr. Frobb noting in his records that as of July 17, 2009, Mr. Clemas had returned to his "best level".

**132**  Mr. Clemas next saw Dr. Frobb in October 2009 for four treatments, the final one on October 26, 2009 when Dr. Frobb noted that Mr. Clemas was back to his best level, that no further treatment was required and that he was discharged.

**133**  Mr. Clemas returned to see Dr. Frobb on July 5, 2010 complaining of paravertebral muscle soreness. He was treated five times with Dr. Frobb again noting on July 12, 2010 that Mr. Clemas had returned to his best level.

**134**  Mr. Clemas subsequently sought treatment four times in April 2011, once in August 2011 and five times in June 2012. On June 18, 2012, Dr. Frobb noted that Mr. Clemas showed an excellent response to treatment and had improved to 7-8/9 status, which Dr. Frobb testified reflects Mr. Clemas' subjective assessment of his condition (meaning that Mr. Clemas classified himself as at a level of seven or eight out of nine, with nine representing the optimal level of pain). Thereafter, Mr. Clemas saw Dr. Frobb once in August 2012, once in September 2012 and four times in early April 2013.

**135**  According to Dr. Purtzki, this treatment history does not indicate improvement over time, rather it shows a pattern of remission and relapse. With respect, I disagree. It is apparent that Mr. Clemas required extensive treatment shortly after the accident but that his condition has improved over time to the point where both the frequency and duration of treatment by Dr. Frobb has diminished.

**136**  It should also be noted that during the period of early 2009 to June 2012, Mr. Clemas was employed first by E & P Construction and then by PRL and was able to function in these positions notwithstanding the fact that both involved a relatively significant amount of physical work, albeit with periodic flare-ups that required treatment.

**137**  In summary, I find that Mr. Clemas suffered a low back injury that caused him considerable pain and discomfort early on. I find that his injury has improved over time but that going forward he is likely to continue to experience some ongoing back pain as well as occasional flare-ups of greater severity.

**Causation**

**138**  The principles governing the causation analysis are well established. A helpful summary of those principles was provided by Madam Justice Martinson in *Barnes v. Richardson,* [*2008 BCSC 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MY-00000-00&context=) at paras. 17 - 23:

[17] Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: ***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=), [*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=) at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***: ***Hosak v. Hirst***, [*2003 BCCA 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=), [*9 B.C.L.R. (4th) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=) at para. 10.

[18] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: ***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. 13, [*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=).

[19] The Supreme Court of Canada considered the principles that apply to causation in ***Resurfice Corp. v. Hanke***, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). The "but for" test applies, except in very limited circumstances. Mr. Barnes bears the burden of showing that, but for the negligent act of the driver, the injuries of which he complains would not have occurred. In special circumstances, the law has recognized exceptions to the basic "but for" test and applied a "material contribution" test: see ***Resurfice*** at paras. 24-25 [and ***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]. Those circumstances do not apply in this case. See also ***Bohun v. Sennewald***, [*2008 BCCA 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208M-00000-00&context=), [*77 B.C.L.R. (4th) 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208M-00000-00&context=), a medical malpractice case.

[20] However, neither test requires that the plaintiff establish that the defendant's ***negligence*** was the sole cause of the injury. A defendant is liable as long as he or she is part of the cause of an injury, even though his or her act alone was not enough to create the injury: ***Athey*** at para. 17.

[21] There is no reduction of liability because of the existence of other preconditions. The defendants remain liable for all injuries caused or contributed to by their ***negligence***: ***Athey*** at para. 17. A non-tortious cause that precedes the accident but contributes to the injury, a precondition, is not relevant to causation unless symptomatic at the time of the accident: ***Larwill v. Lanham***, [*2003 BCCA 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=), [*190 B.C.A.C. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=) at para. 22. Even if a minor impact causes the plaintiff's symptoms, it is no answer for the defendant to say that the plaintiff was peculiarly vulnerable to injury because of a pre-existing susceptibility: ***Rai v. Wilson*** [*(1999), 120 B.C.A.C. 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2259-00000-00&context=) at para. 6, 196 W.A.C. 122.

[22] The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient that the defendant's ***negligence*** was a cause of the harm: ***Athey*** at para. 19.

[23] The finding of a contribution outside of the *de minimis* range is a material contribution and sufficient to render the defendant fully liable for the damages: ***Athey*** at para. 44. The British Columbia Court of Appeal clarifies in ***Sam v. Wilson***, [*2007 BCCA 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=), [*78 B.C.L.R. (4th) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=) at para. 109 that "material contribution", as used in ***Athey***, is synonymous with "substantial connection", as used in ***Resurfice***, and should not be confused with the "material contribution test".

**139**  Applying these principles in the context of this case, I find that while Mr. Clemas likely had a pre-existing back condition, that condition was asymptomatic at the time of the accident. I find as well that Mr. Clemas' low back pain was triggered by the accident and that accordingly the defendants are liable for the damages suffered.

**Non-Pecuniary Damages**

**140**  The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases including by the Court of Appeal in *Stapley v. Hejslet,* [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) as follows (at para. 46):

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
10. the plaintiff's stoicism (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=)).

**141**  In this case, Mr. Clemas relies on a number of authorities to support a claim for non-pecuniary damages in the range of $85,000-$125,000. Specifically, Mr. Clemas cites the following cases:

1. *Barnes v. Richardson et. al*, [*2008 BCSC 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MY-00000-00&context=)
2. *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=)
3. *McKenzie v. Sidhu*, [*2013 BCSC 925*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0MH-00000-00&context=)
4. *Slocombe v. Wowchuk*, [*2009 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0H8-00000-00&context=).

**142**  In response, the defendants rely on the following cases as supporting an award in the $40,000-65,000 range:

1. *Kailey v. Dhaliwal,* [*2007 BCSC 759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21DC-00000-00&context=)
2. *Lowen v. Kovacevic,* [*2005 BCSC 1520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2DG-00000-00&context=)
3. *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=)
4. *Noon v. Lawlor,* [*2012 BCSC 545*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3BP-00000-00&context=)
5. *Solowoniuk v. Morash,* [*2000 BCSC 1840*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2R3-00000-00&context=)
6. *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=).

**143**  Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate that individual for the pain and suffering experienced by that person (*Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at para. 189). Moreover, the compensation award must be fair and reasonable to both parties (*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=) at para. 109 citing *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=)).

**144**  In this case, I accept that the pain associated with Mr. Clemas' lower back condition has caused a diminishment in his enjoyment of life, including his participation in various recreational pursuits. However, I do not accept that the interference is as extensive as Mr. Clemas claims so as to warrant an award of damages in the $100,000 range.

**145**  In this regard, I found Mr. Clemas' evidence of his pre and post-accident activities somewhat vague and lacking in detail. Further, the claim that he has been unable to engage in any meaningful way in virtually any recreational pursuits, or activities of any kind, is inconsistent with the fact that he was able to function in a relatively physical job for almost four years after the accident.

**146**  That said, the nature of Mr. Clemas' condition and its associated pain supports an award greater than the $50,000 proposed by the defendants.

**147**  Taking all of the circumstances into account and bearing in mind the factors identified by the Court of Appeal in *Stapley*, *supra*, I find that a reasonable award of non-pecuniary damages in this case is $75,000.

**148**  The defendants submit that the award for non-pecuniary damages should be reduced on account of the significant risk that, given Mr. Clemas' pre-existing condition, he would have become symptomatic regardless of the accident. On this point, it is useful to recall the evidence of Mr. Clemas' own medical experts. For example, Dr. Purtzki noted in her report dated August 14, 2012 that the spondylolysis and possibly the spondylolisthesis were likely present at some time before the accident. Similarly, Dr. Frobb stated in his report dated June 27, 2013 that Mr. Clemas' current condition was "superimposed on underlying chronic degenerative changes of the lumbar spine and sacroiliac joints, a condition that likely predates the motor vehicle accident in question."

**149**  In *Barnes v. Richardson, supra*, Madam Justice Martinson applied a 15% reduction to the plaintiff's damages to take account of the likelihood that an unrelated event might have triggered his condition, in accordance with the "crumbling skull" principle.

**150**  In my view a similar approach is warranted here given my finding that Mr. Clemas would likely have experienced similar symptoms in the future without the accident. I would accordingly reduce Mr. Clemas' damages by 15%, leaving a net award of $63,750.00.

**Past Income Loss and Loss of Future Earning Capacity**

**151**  I will deal with Mr. Clemas' claims for past income loss and loss of future earning capacity together because both involve assumptions about what he would have earned had he not been injured in the accident.

**152**  The central thrust of Mr. Clemas' claim is that he can no longer work in his chosen profession as a plumber. In support of this claim, he relies on the evidence of Drs. Frobb and Purtzki, the functional capacity evaluation of Mr. Winter and the vocational assessment of Mr. Nordin, all of which support the notion that Mr. Clemas needs to switch careers.

**153**  The difficulty is that it is apparent from the evidence that Mr. Clemas was able to function as a lead journeyman plumber while at E & P Construction in 2009, albeit the position lasted only three months. Similarly, he was able to function for approximately three years at PRL, with some intermittent flare-ups with his back that required treatment from Dr. Frobb. Further, it appears that none of the experts relied on by Mr. Clemas were aware of the extent of the physical requirements of either of the E & P or PRL positions.

**154**  Further, what was not adequately explained in the evidence is why Mr. Clemas could not assume a similar lead journeyman plumber role within the existing R.C. Installations business. Both Mr. Clemas and his father Richard were adamant that they would never hire a plumber from outside the family to work in the business because they could not trust the work product. As a result, Mr. Clemas is prepared to give up on the plumbing business entirely rather than adjust his expectations in a way that might enable him to continue in the business in a supervisory capacity and take advantage both of his skills and experience and the good will of an existing business.

**155**  In light of these factors, I do not accept that Mr. Clemas' current employment at Home Depot represents Mr. Clemas' maximum or optimal earning potential.

**156**  Mr. Turnbull in his report assumes that beginning in 2010, Mr. Clemas would have earned $110,548 annually had he continued to operate R.C. Installations. That figure reflects the estimated net income for R.C. Installations in 2007 which is the highest net income figure by a significant margin for the years 2005-2010 as calculated by Mr. Turnbull. He then uses that figure to calculate both Mr. Clemas' past and future income loss.

**157**  In my view, it is not reasonable to use the 2007 earnings as the benchmark by which to assess Mr. Clemas' potential annual income that he would have earned from R.C. Installations. Mr. Clemas' explanation for the 2007 result was that this was the first year in which he operated the business by himself and he worked extra hard to develop the business. No evidence was adduced to establish that a similar level of productivity would continue into the future.

**158**  I think a better approach, keeping in mind again that the assessment of damages is not intended to be a mathematical calculation, is to average the net income for R.C. Installations over the period 2005-2008. I would note that there is some uncertainty about the accuracy of the figures used in Mr. Turnbull's report given that, as noted by Mr. Upton, Mr. Turnbull was not provided with income tax returns or other financial information for R.C. Installations. Nonetheless, Mr. Turnbull had access to the ledgers for R.C. Installations and I am satisfied that I can rely on his figures for the purposes of this assessment.

**159**  Mr. Upton took issue with the attribution of R.C. Installations' net income to Mr. Clemas for the purpose of assessing Mr. Clemas' income. As Mr. Upton noted, there is no clear indication that Mr. Clemas was ever the "owner" of R.C. Installations. However, I agree with counsel for Mr. Clemas that legal ownership is largely irrelevant here where R.C. Installations was run as an unincorporated family business and where the income would flow directly to the person operating the business.

**160**  Mr. Turnbull estimates the net income for R.C. Installations as follows:

|  |  |  |
| --- | --- | --- |
| 2005 | $84,063 |  |
| 2006 | $73,179 |  |

|  |  |  |
| --- | --- | --- |
| 2007 | $110,548 |  |

|  |  |  |
| --- | --- | --- |
| 2008 | $46,736 |  |

**161**  The 2008 figure is an annualized figure based on the income received in the pre-accident period. The average annual net income for R.C. Installations based on the above figures for the period of 2005-2008 is $78,631.50.

**162**  Taking all of the above into account, I think it is reasonable to assume that Mr. Clemas would have earned on average $80,000 annually as a plumber, either self-employed at R.C. Installations or in a similar capacity had the accident not occurred. I would note that this figure is similar to the $78,642 that Mr. Turnbull estimated that Mr. Clemas would have earned in 2009 absent the accident and the $81,988 that Mr. Turnbull projected as the net income of R.C. Installations in 2010.

**163**  Turning then to Mr. Clemas' claim for past income loss, the correct approach is to compare what Mr. Clemas did earn in the period leading up to the trial, to what he would have earned as a plumber, which I have found to be $80,000 per year.

**164**  Using the figures provided by Mr. Clemas' counsel, I calculate Mr. Clemas loss as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Year | Total Earned | Difference (Loss) |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2009 | $40,551.69 | $39,445.31 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2010 | $58,250 | $21,750.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2011 | $61,906.00 | $18,904.00 |  |

**165**  Mr. Clemas' claim for past income loss continues through 2012 and up until the trial date of June 17, 2013. The difficulty is that Mr. Clemas quit his employment with PRL in July 2012 and, in my view, he has been under-employed ever since. Thus, it is not reasonable to use his earnings for a partial year in 2012 or his earnings from Home Depot in 2013 to calculate his loss.

**166**  During the years 2010 and 2011, when he worked full time at PRL, he earned on average about $60,000, which includes some minor independent contract work. In my view, this reasonably reflects what Mr. Clemas can be expected to earn from alternate employment or in plumbing-related employment, for example in a supervisory capacity.

**167**  Accordingly, I would assess Mr. Clemas' income loss for 2012 as $20,000 plus an additional $10,000 for the approximately one-half of 2013 up to the date of trial. Adding these amounts to the figures for 2009-2011, Mr. Clemas' past income loss totals $110,099.31. Adjusted for income tax, using the rate of 33.7% supplied by counsel, the result is a net award of $72,995.

**168**  Turning to the claim for loss of future earning capacity, the principles governing an assessment of such a claim are well described by Mr. Justice Voith in *Brewster v. Li*, [*2013 BCSC 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CN-00000-00&context=) at para 142:

[142] The legal framework for the assessment of the plaintiff's future wage loss claim has been described numerous times. The decision of *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=), [*10 B.C.L.R. (4th) 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) contains a useful summary of some of the principles and approaches that are to be used when assessing future earning capacity:

[100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in ***Andrews v. Grand & Toy Alberta Ltd****.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: ***The Queen v. Jennings***, [*[1965] O.J. No. 982*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SG31-JF75-M2R4-00000-00&context=), *supra*. A capital asset has been lost: what was its value?

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

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

**169**  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=), the Court of Appeal, citing its earlier decision 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=), described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

...in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach...or the capital asset approach[.]

**170**  The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what the likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, 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. While there is a more mathematical component to this approach, the assessment of damages is a matter of judgment not mere calculation.

**171**  The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff: 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 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=).

**172**  In this case, given that Mr. Clemas has an established earnings record both pre and post-accident, I am satisfied that the earnings method is appropriate for assessing his claim. As noted, Mr. Turnbull estimated Mr. Clemas' loss under this head by comparing what Mr. Clemas earned at PRL in 2012 to what he could have earned at R.C. Installations, again using the figure of $110,548. He calculated an annual loss of $63,196 which he extrapolated until Mr. Clemas reached age 65 which resulted in a present value of Mr. Clemas' alleged loss of $815,000.

**173**  I have found, however, that it is not reasonable to use the figure of $110,548 as the benchmark for assessing Mr. Clemas' loss. Rather, I have found $80,000 to be a more accurate figure of what Mr. Clemas would have earned. Further, given Mr. Clemas' pre-existing condition and the likelihood that it would have been triggered even without the accident, I think it doubtful that Mr. Clemas would have continued as a plumber until age 65. I think it more likely that he would have had to change occupations by age 60.

**174**  I therefore find that Mr. Clemas will suffer an income loss annually of approximately $20,000 until age 60. Using the multiplier provided by Mr. Turnbull, which was not challenged by the defendants, I estimate his future income loss to be $204,400, rounded to $205,000.

**175**  I would note that had I employed the capital asset approach to assessing Mr. Clemas' loss, I would have arrived at a similar figure. Taking account of the factors identified by the Court in *Brown v. Golaiy, supra*, I think that approximately $200,000 would be a reasonable amount to compensate Mr. Clemas for his diminished earning capacity.

**Cost of Future Care**

**176**  Mr. Clemas' claim under this head of damages includes the cost of two types of treatment identified by Dr. Frobb as being of possible benefit to Mr. Clemas. The first is prolotherapy which involves a series of injections intended to strengthen the connective tissues of the back. Dr. Frobb's evidence was that a course of six treatments would cost $1,500 and that this treatment is not covered under the public medical services plan. The second possible course of treatment is a facet rhizotomy, which involves using an electric current to deaden the nerves in the affected area so as to reduce pain. According to Dr. Frobb, this treatment costs between $5,000-10,000 every 6 to 18 months. The cost of this treatment is covered by the medical services plan, however there is a one to two year wait time for the treatment.

**177**  In my view, the cost of these treatments is not recoverable from the defendants. Neither treatment has been recommended by a treating physician. Rather, Dr. Frobb simply identifies the treatments as a possible course of action, and with respect to the facet rhizotomy, he notes that Mr. Clemas would have to be assessed by a spinal pain interventionalist to determine if he is a suitable candidate for the procedure. There is no evidence that Mr. Clemas has done anything to investigate the possibility of pursuing either or both of the treatments or that he has been assessed for suitability. Further, the facet rhizotomy is available in the public health system. While this would not necessarily disqualify someone from claiming the cost of the procedure if done privately, there would have to be evidence supporting the need for the procedure to be done quickly. No such evidence exists in this case.

**178**  I do accept that Mr. Clemas will continue to require some treatment going forward including periodic manual therapy from Dr. Frobb or a chiropractor, acupuncture and pain medication. I think Mr. Clemas' estimate of $540 on average every 12 months is reasonable. Using the multiplier set out in Mr. Turnbull's second report, which was not challenged by the defendants, results in a future care cost to age 60, by my calculation, of $5,500.00. I have limited Mr. Clemas' recovery to age 60 given my finding that he would have experienced similar symptoms in the future without the accident.

**Special Damages**

**179**  Mr. Clemas claims damages in the amount of $2,903.19. Some of this amount is supported by invoices with the balance based on Mr. Clemas' estimates of what he spends on pain medication. He submits that his estimates are conservative. In the circumstances, I think that a reasonable amount under this head is $2,500.00.

**Loss of Housekeeping Capacity**

**180**  Mr. Clemas submits that as a result of the injury to his lower back, and the corresponding physical limitations, he has had to cut back on housekeeping and yard maintenance work. He says that his father does much of the yard work and that his wife does virtually all of the housework. Mr. Clemas seeks an award of $20,000 under this head.

**181**  In his evidence, Richard Clemas testified that Michael was never required to do much in the way of house maintenance on the house that he rents from Richard. Michael Clemas himself testified that he would cut the grass at the house and that he is now to the point that he cuts the grass about 60% of the time and that his stepson does it the rest of the time. With respect to housework, Julie Clemas testified that prior to the accident, she did most of the housework and that she continues to do so after the accident.

**182**  In *Jones v. Davenport,* [*2008 BCSC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20F6-00000-00&context=), Mr. Justice Halfyard stated, at para. 92, that the plaintiff must:

...establish a real and substantial possibility that she will continue in the future to be unable to perform all of her usual and necessary household work. It would also need to be shown that the work that she will not be able to do, will require her to pay someone else to do, or will require others to do it for her gratuitously.

**183**  Based on the evidence, I am not convinced that there has been a significant impact on Mr. Clemas' involvement in house or yard maintenance and I decline to award damages under this head.

**SUMMARY**

**184**  In summary, Mr. Clemas is awarded the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $63,750.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Income Loss | 72,995.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future Earning Capacity | 205,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care | 5,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 2,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Diminished Housekeeping Capacity | 0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $349,745.00 |  |

**185**  If the parties are unable to agree on costs, they may speak to the issue.

R.A. SKOLROOD J.

**End of Document**

[***Gosal v. Singh, [2009] B.C.J. No. 2131***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B267-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.A. Loo J.

Heard: June 22-26, 29 and 30, 2009.

Judgment: October 29, 2009.

Dockets: M054654, M041670

Registry: Vancouver

**[2009] B.C.J. No. 2131** | 2009 BCSC 1471 | 2009 CarswellBC 2881 | 182 A.C.W.S. (3d) 356

Between Sukhwinder Kaur Gosal, Plaintiff, and Amardeep Singh and Mopinder Kaur, Defendants And between Sukhwinder Kaur Gosal, Plaintiff, and Mirko Lucchesi and La Dolce Vita Bakery & Cafe Inc., Defendants

(117 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injures — Back and spine — Neck — Head injuries — Headaches — Psychological injuries — Emotional and mental distress — Depression — Action by the plaintiff for damages sustained in two motor vehicle accidents, allowed — Defendants were liable for the accidents — Plaintiff suffered mild to moderate soft tissue injuries to her neck, upper back, shoulders and mild and lower back pain, which caused severe headaches — She was recovering when the second accident exacerbated her injuries, including her depression and anxiety — Plaintiff was awarded damages of $227,046, which included non-pecuniary damages of $95,000, past income loss of $121,625 and $3,678 for future care costs.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Considerations — Aggravation of pre-existing injuries — Duration of loss — Employment status — Extent of incapacity — Cost of future care — Loss of earning capacity — Non-pecuniary loss — Action by the plaintiff for damages sustained in two motor vehicle accidents, allowed — Defendants were liable for the accidents — Plaintiff suffered mild to moderate soft tissue injuries to her neck, upper back, shoulders and mild and lower back pain, which caused severe headaches — She was recovering when the second accident exacerbated her injuries, including her depression and anxiety — Plaintiff was awarded damages of $227,046, which included non-pecuniary damages of $95,000, past income loss of $121,625 and $3,678 for future care costs.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Parking — Rules of the road — Action for damages for personal injuries allowed — Plaintiff was injured in two motor vehicle accidents — Liability was admitted for the first — In the second, plaintiff was driving slowly intending to turn into school parking lot — Defendant's parked vehicle suddenly pulled in front of her — Plaintiff swerved but could not avoid collision — Defendant was negligent in moving his vehicle from a parked position without ensuring he could do so safely.**

|  |
| --- |
| Action by Gosal for damages sustained in two motor vehicle accidents. On January 28, 2003 Gosal was injured when her car was rear-ended by a delivery van driven by the defendant Lucchesi. Liability was admitted. Gosal was recovering from her injuries when she was involved in a second accident. On June 28, 2005 she was driving and collided with a minivan that had been parked and that pulled out in front of her. The minivan was driven by the defendant Singh. Liability for this accident was denied. Gosal was 45 years old. She was married and was the mother of four children. She worked in her husband's business, cared for her household and attended school. Gosal currently had full-time employment as a counsellor. She still had neck, shoulder and back pain and tingling sensations in both hands and arms. If she was in pain she became depressed. Her injuries prevented her from being the homemaker and mother that she used to be.  HELD: Action allowed.  Gosal was awarded damages of $227,046. Singh was liable for the second accident as his ***negligence*** was the sole cause of the accident. He moved his vehicle from a parked position without first determining it was safe to do so. Gosal had no opportunity to avoid the collision. In the first accident Gosal suffered mild to moderate soft tissue injuries to her neck, upper back, shoulders and mild and lower back pain, which caused severe headaches. She was treated with physiotherapy, massage and chiropractic treatments but her recovery took longer because of her depression and anxiety. She was recovering when the second accident exacerbated her injuries, including her depression and anxiety. Gosal was not malingering. She continued to improve but the process was slow. Over the next few years, with a regular daily exercise program, her physical pain and depression would continue to improve but it might not resolve completely. The award included non-pecuniary damages of $95,000, past income loss of $121,625 and $3,678 for future care costs. No award was made for loss of earning capacity. There was not a real possibility that she would become a psychologist but for the accidents. None of the medical evidence indicated that she was precluded from pursuing this goal if she chose to do so. No award was made for loss of housekeeping capacity. She was able to complete most of her household chores, despite the back pain she suffered from time to time. Although the two actions were tried together the parties did not address the apportionment of damages. If it could not be agreed upon submissions would have to be made. |

**Counsel**

Counsel for Plaintiff: D.W. Grunder.

Counsel for Defendants: I. Lee.

**Reasons for Judgment**

|  |
| --- |
| **L.A. LOO J.** |

**1**   Sukhwinder Kaur Gosal was involved in two motor vehicle accidents. She commenced two separate actions that were tried at the same time.

**2**  On January 28, 2003 Ms. Gosal was injured when her Toyota Corolla was rear-ended by a delivery van driven by the defendant Mirko Lucchesi. Liability for the accident is admitted.

**3**  Ms. Gosal was recovering from her injuries when she was involved in a second accident. On June 28, 2005 she was driving and collided with a minivan that had been parked and then pulled out in front of her. The minivan was driven by the defendant Amardeep Singh. Liability for the second accident is denied.

**The Background**

**4**  Ms. Gosal is 45 years old. She was born in India and came to Canada when she was 12 years old. After living in Canada for four years, she returned to India for boarding school where she completed grade 12. She returned to Canada when she was 19 years old. In 1987 she married Jasbir Cheema and the couple lived in or around Mississauga, Ontario. The first of their four children was born in 1988. Ms. Gosal worked as a driving instructor for Mr. Cheema's driving school in Mississauga. In 1995 Mr. Cheema closed the driving school and the couple moved to Vancouver.

**5**  In 1996 Ms. Gosal obtained her travel and tourism diploma and started working as a reservation representative. Mr. Cheema attended Vancouver Film School and in 1998 started working for North Shore Driving School. In 2000 he started his own business Good Training Driving School, a sole proprietorship.

**6**  In June 2002 Ms. Gosal left her job with Air Transat Holiday and in July 2002 began working for her husband. She was paid $1,500 a month. She did most of the administrative or "paperwork", and occasionally gave driving lessons. Her hours were flexible so that she could attend to their children's needs and her own needs.

**7**  In January 2003 the couple's four children ranged in age from four to 14 years old.

**8**  On September 27, 2002 Ms. Gosal began the first of seven courses she needed to complete the Vancouver Community College ("VCC") Counselling Skills Certificate Program. She completed the course on December 6, 2002. On January 14, 2003 she enrolled in the second course that was scheduled to complete on February 4, 2003. The courses generally took place one or two mornings per week.

**9**  Ms. Gosal had a busy life. She did all of the housework and cooking with no or little help from her husband, children, or anyone else. On a typical day, she would drop the two younger children off at preschool, attend her class at VCC, pick the children up from preschool, make their lunch, pick the two older children up from school in the afternoon, drive the children to their extracurricular activities, and help them with their homework. She worked for her husband. She went to the temple regularly, and took the children to the park or to the movies. She socialized with her friends, and she helped her parents (who lived nearby).

**The First Accident: January 23, 2003**

**10**  On Tuesday January 23, 2003 at about 2:45 in the afternoon, Ms. Gosal was driving her two younger children and a five-year-old niece to their swimming lessons when she was stopped on East 49th Avenue waiting to turn left to proceed north on Killarney Street. Suddenly, Ms. Gosal heard a loud bang as Mr. Lucchesi's delivery van slammed into the rear of her vehicle. Her head whipped back and forth and her youngest child began screaming. Fearing that her daughter had been injured, Ms. Gosal paid no attention to her own needs, even though she was trembling and her heart was pounding.

**11**  After paramedics attended at the scene of the accident and determined that her daughter was not hurt, Ms. Gosal managed to drive home.

**12**  The next morning Ms. Gosal realized she had been injured. She had pain through the right side of her neck and shoulder extending down her right arm and into her hand. She had tingling sensations in her right arm and her right hand would tingle and go numb. She had back pain, especially her mid and lower back. She had a headache.

**13**  On January 30 she saw her general practitioner, Dr. Sevena Khunkhun, who diagnosed her with soft tissue injuries. By February 3 the pain in her neck, shoulder, and back had increased, and she was anxious about driving. Dr. Khunkhun referred her to physiotherapy. By February 12, the pain had again worsened, and by the end of February Ms. Gosal reported to Dr. Khunkhun that she could not concentrate or sleep. She was tired and could not continue with her classes at VCC.

**14**  Ms. Gosal received 50 physiotherapy treatments from Susan Mao, a registered physiotherapist, from February 11, 2003 to April 21, 2004. According to Ms. Mao's written opinion, the initial sessions were used to decrease pain and inflammation and exercises were prescribed to increase range of motion and strength. Ms. Gosal was later involved in an extensive work conditioning program and initially discharged from physiotherapy on June 6, 2003. She continued with her exercise program at the community centre gym.

**15**  Ms. Mao considered Ms. Gosal physically ready for a gradual return to work. However, Ms. Gosal reported to her that she was not emotionally ready to return to work.

**16**  In May 2003 Dr. Khunkhun referred her to Dr. Cameron Vickram, a psychotherapist who uses cognitive behaviour therapy and Indo-cultural therapy. By then, Ms. Gosal was quite depressed and her Effexor dosage had been increased. With Dr. Vickram's help she started to improve, albeit slowly.

**17**  Ms. Gosal reported to Dr. Khunkhun that she wanted to register for a course at VCC in September 2003, but that she was too depressed and anxious.

**18**  She returned to physiotherapy with Ms. Mao on September 18, 2003 due to tingling in her right hand. In her report dated November 27, 2008 Ms. Mao writes:

Ms. Gosal returned for physiotherapy treatments on September 18, 2003 due to right hand paresthesia. Ms. Gosal explained that she discontinued exercises at Killarney Community Centre because her gym pass expired and also because she could not find time to go for exercises. She reported that she started to have pain in the right side of the neck and back and numbness in the right fourth and fifth digits after discontinuing the exercises. Her general practitioner advised her to resume physiotherapy and to continue with her exercises at Killarney.

**19**  In November 2003 the family moved from Vancouver to Delta, but because of her neck and low back pain Ms. Gosal was unable to pack or unpack any of the moving boxes. All she could do was direct her mother on what to put where.

**20**  Ms. Gosal, who prided herself on keeping a clean and tidy house, had difficulty with housework. She could not vacuum or do the laundry because of low back pain. She found it hard to cook. She is right-handed and because of the tingling and numbness, it hurt to cut vegetables or wash dishes. She did the work in small increments, taking breaks to sit down and massage her hand.

**21**  By the end of 2003, her Effexor dosage was again increased because of her depressive symptoms: headaches, inability to concentrate, poor memory, and poor sleep.

**22**  On April 21, 2004 Ms. Gosal was discharged from physiotherapy. During the discharge assessment her cervical and lumbar active range of motion was normal for all movements. According to Ms. Mao's report, Ms. Gosal had resumed her exercise program between September 2003 and April 2004.

**23**  Ms. Gosal still complains of pain in the right side of her neck and back, as well as pain and numbness in her right arm, although the severity and frequency of the pain has decreased over time. Only the defendants' expert, Dr. Davis, suggests that Ms. Gosal is malingering or exaggerating her complaints.

**24**  Balbir Gosal is Ms. Gosal's mother. She testified that for the first year after the accident she had to help her daughter with her housework, including cooking, washing the dishes, and laundry. When the family moved from Vancouver to Delta, Mrs. Gosal testified that, with the exception of very light-weight things, her daughter could not lift anything.

**25**  Even Ms. Gosal's children and husband had to help with housework, which was unusual for the family.

**26**  Ms. Gosal's physical symptoms gradually improved by August 2004 but she had not returned to work. She was still depressed and suffering from what had become chronic pain.

**27**  In September 2004 Ms. Gosal enrolled in another course at VCC. The ten three-hour classes took place on Tuesday nights from September 21 until December 7, 2004. Ms. Gosal found the course reading and projects difficult because of her headaches and inability to concentrate. Long periods of sitting exacerbated her low back pain.

**28**  In January 2005 Ms. Gosal enrolled in another course and completed it at the end of March 2005. She found the course difficult because of her headaches and inability to concentrate.

**29**  In May 2005 Ms. Gosal was referred to Dr. Raman Manchanda for her chronic pain.

**30**  By June 2005 Ms. Gosal still required counselling for her depression. She still had pain on the right side of her neck and shoulder, and numbness down her right arm into her fingers, but the frequency was decreasing. With Dr. Vickram's encouragement, she was able to do more at home, socially, and in the community. She sat and drove for longer periods of time. However, she was still unable to lift heavy objects or clean her house because of low back pain. She continued to be anxious about driving and only drove when it was necessary. She avoided traffic whenever she could and drove down the side streets.

**The Second Accident: June 28, 2005**

**31**  On June 28, 2005 at or about 7:45 in the morning, Ms. Gosal was driving her three younger children to the Khalsa school on 124th Street near 69A Avenue in Surrey when she was involved in the second accident. She was driving slowly in the single lane of traffic as she approached the school, intending to make a right turn into the school's parking lot. A minivan was parked on the right-hand side of 124th Street just before the parking lot. Ms. Gosal said that she was about half a car-length away from the parked minivan, when it suddenly pulled out in front of her as if the driver was making a U-turn. Ms. Gosal swerved but her Toyota collided with the minivan. The driver's side of Ms. Gosal's vehicle ended up in the oncoming lane and the minivan struck the front passenger side of her vehicle.

**32**  Ms. Gosal testified that Mr. Singh did not have his driver's licence with him and wanted to settle the damage claim under the table. He told her that he would speak to her husband and get her car fixed and that they could then get on with their daily lives. He was in a hurry and mentioned that he was late for a truckers' rally.

**33**  Mr. Singh is a self-employed truck driver. He testified that he parked the minivan, dropped his daughter off at the school, waited a few seconds to watch her leave, looked in his mirrors, looked over his shoulders, signalled, looked again, pulled his minivan into the lane, "and right on the moment [the] accident happened".

**34**  He denies telling Ms. Gosal he wanted to settle with her husband rather than going through ICBC. He denies that he was trying to make a U-turn. He denies being on his way to a truckers' rally, although he admits that there was an independent truckers' strike in progress in the Lower Mainland at the time.

**35**  On cross-examination he again explained that the accident and the moment when he pulled his minivan away happened "at the same moment".

**36**  Ms. Gosal testified as follows during her examination for discovery which was read during her cross-examination:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you don't recall? Okay. Do you recall approximately how fast you were travelling when you first saw him? |  |
|  | A |  | Well, I was slowing down because it's a 30 zone, kilometre zone. I was slowing down, because the parking lot to Khalsa School was approaching, and that's when I was about to pass the vehicle. All of a sudden he pulled out. I would probably say about 20, I guess. [Emphasis added.] |  |

**37**  Ms. Gosal and Mr. Singh agree that the accident occurred either at the same time or immediately after he pulled out.

**38**  I conclude that Mr. Singh moved his vehicle from a parked position without first determining that he could do so safely, and that Ms. Gosal had no opportunity to avoid the collision. I find that Mr. Singh's ***negligence*** was the sole cause of the accident.

**39**  The second accident aggravated Ms. Gosal's injuries and, in her words, she went "back to square one". Her neck, shoulder, right arm, and finger pain flared up, her headaches became worse, and she became more distressed and depressed. She now complained of numbness in her left shoulder, arm, and hand. She also reported to Dr. Manchanda that she had pain in her left foot.

**40**  Ms. Gosal was referred to a psychiatrist, Dr. Jatinder Sandhu, who began treating her on March 27, 2006. Dr. Sandhu diagnosed Ms. Gosal as suffering from recurrent major depressive disorder. He saw Ms. Gosal a total of 21 times between March 2006 and September 2008.

**41**  On Dr. Khunkhun's advice Ms. Gosal did not enrol in another counselling course until April 2006. She successfully completed that course at the end of June 2006. Between February and March 2007, and April and June 2007, Ms. Gosal completed two additional courses. From April to June 2008 she completed the practicum component of the program and obtained her Counselling Skills Certificate in July 2008.

**42**  While attending the courses, she complained to her treating physicians of neck and back pain, memory problems, inability to concentrate, headaches, and other symptoms caused by the accidents. She took increasing larger dosages of Cipralex. She struggled, but managed to deal with her depression and anxiety.

**Ms. Gosal's Present Circumstances**

**43**  On October 6, 2008 Ms. Gosal secured full-time employment as a settlement counsellor with Progressive Intercultural Community Services. She works 35 hours a week. In January 2009 her wages were increased from $19 to $20 an hour. Her work generally involves listening to clients, helping them find resources in the community, and working on the computer. She enjoys the work, is learning as much as she can, and currently has no plans to change jobs.

**44**  However, Ms. Gosal still has neck, shoulder, and back pain, and tingling sensations in both hands and arms. Some days it is her left arm, other days her right arm. The pain comes and goes. Some days are better than others. There are days when she is not in pain. If she is in pain, she gets depressed. If she is depressed, her pain gets worse. She continues to take medication for depression, and has regular chiropractic treatments which give her relief for a few weeks at a time.

**45**  Ms. Gosal is obviously distraught that she is not the homemaker or mother she wants to be. She says that she is no longer "there" for her children. She used to be there to answer all of the many questions that children have. Now she brushes off their questions because she needs time to be alone. She no longer watches television with her children. She used to love reading, but now, because of her inability to concentrate, she finds herself reading the same words over and over again. She no longer reads for pleasure. She no longer finds joy in talking to her mother, her friends, or even her husband. She is tired all of the time.

**46**  Gurjeet Hothi has been Ms. Gosal's good friend for some 26 years. Before the first accident they saw each other every other week and socialized both inside and outside their homes. Ms. Hothi noticed a change in Ms. Gosal after the first accident. She was depressed and complaining about neck pain and headaches which she never did before. She spent most of her time at home and was no longer very sociable. After the second accident Ms. Hothi observed Ms. Gosal to be more depressed, and worried about the future because the pain had forced her to stop her studies. Ms. Gosal did not want to do anything outside of the house. When Ms. Hothi was over at Ms. Gosal's house, she saw that Ms. Gosal had difficulty cooking and cutting vegetables. The house was not as clean or organized as it used to be. Ms. Hothi says that Ms. Gosal is "much better now", but that she is still not the person she once was.

**47**  Mr. Cheema's evidence is similar to that of Ms. Hothi. Before the first accident, Ms. Gosal was very active, talkative, and "jolly". After the first accident she became quiet, depressed, and complained about pain. She could no longer do the things she used to do and her mother had to help with most of the cooking and cleaning. Since the accident, Mr. Cheema has had to help with the cooking, which is not something he did before the first accident. His wife has improved, but she is still not the same person as she was before the accident.

**48**  Ms. Gosal admits that her physical and emotional conditions have improved and continue to improve day by day. She attributes the improvement to completing her counselling certificate, obtaining employment, and keeping herself busy. She exercises by going to the gym and walking as much as she can.

**The Medical Evidence**

**49**  Ms. Gosal suffered mild to moderate soft tissue injuries to her neck, upper back, shoulders, and mid and lower back, which caused severe headaches. She was treated with physiotherapy, massage, and chiropractic treatments, but her recovery took longer because of her depression and anxiety. She was recovering when the second accident exacerbated her injuries, including her depression and anxiety.

**50**  Dr. Khunkhun states that Ms. Gosal's long-term prognosis is guarded because her symptoms have not resolved after such a long period of time since the accidents. She does not consider Ms. Gosal to be at an increased risk of any long-term sequelae such as osteoarthritis. She believes Ms. Gosal would continue to benefit from body conditioning and strengthening exercises. She observed that in the past Ms. Gosal benefitted from regular exercise and when she stops exercising regularly, her mood deteriorates and her pain increases.

**51**  Dr. Manchanda last saw Ms. Gosal on September 24, 2008. She told him that she had pain on about four or five days a week, and no pain on about two days a week. She was still looking for employment in counselling. At that time, Dr. Manchanda felt that Ms. Gosal could work in a job that was sedentary or involved light physical duties. He also felt that Ms. Gosal could complete the majority of her household chores, but that she might require a break or assistance with the heavier chores, such as vacuuming or carrying heavy laundry.

**52**  Dr. Manchanda's prognosis has thus far proved to be accurate. Ms. Gosal has worked full-time since October 6, 2008 in a job that is fairly sedentary and involves only light physical duties. There is no evidence that she has taken time off work because of symptoms arising from the accidents.

**53**  Like Dr. Khunkhun, Dr. Manchanda recommends that Ms. Gosal participate in aerobic exercise for 30-60 minutes a day.

**54**  The benefit of regular exercise for pain and depression is echoed by Dr. Andrew Hepburn, the defendants' expert, who examined Ms. Gosal once on May 4, 2004, before her second accident.

**55**  Ms. Gosal had an "emotional relapse" after the second accident, but Dr. Vickram found her genuinely motivated to improve both physically and emotionally, to improve her educational qualifications, and to return to work. By mutual agreement Dr. Vickram terminated his therapeutic involvement with Ms. Gosal in October 2005. The termination process had started a few months earlier. By October 2005 Dr. Vickram found that Ms. Gosal was self-sufficient. While she was worried about her career at that time, she was equipped with skills to deal with her anxiety and mood difficulties.

**56**  Dr. Vickram, jointly with Dr. David Wong, interviewed and assessed Ms. Gosal on four occasions in April 2009. Dr. Wong administered various psychological symptom assessment questionnaires and concluded that Ms. Gosal suffers from a major depressive disorder or adjustment disorder as a result of the accidents, and that she may require long-term psychotherapeutic treatment, including Indo-cultural therapy.

**57**  Dr. Sandu saw Ms. Gosal 21 times between March 2006 and September 2008. He is of the opinion that she developed a major depressive disorder caused by the stress of the pain resulting from the first accident. The second accident triggered a relapse of the major depressive disorder. Ms. Gosal suffers from chronic pain but not a chronic pain disorder. Dr. Sandu stopped treating Ms. Gosal on September 23, 2008. He felt that her depression and pain had improved such that she no longer needed to be under his care, and that her condition and medication could be monitored by her family physician.

**58**  The defendants rely on the reports of Dr. Andrew Hepburn and Dr. Hymie Davis. Dr. Hepburn is an orthopaedic surgeon who examined Ms. Gosal on May 4, 2004. Dr. Davis is a psychiatrist who saw Ms. Gosal on August 17, 2007. Both Dr. Hepburn and Dr. Davis testified at trial.

**59**  Dr. Hepburn examined Ms. Gosal 15 months after the first accident and before the second accident. When he examined her in May 2004, she told him that she had improved significantly since the accident. He agreed that she suffered soft tissue injuries from the first accident, and that some individuals take longer than others to heal.

**60**  Dr. Davis opined that clinically, Ms. Gosal described symptoms of a major depressive disorder and chronic pain. However, he contended that she was not depressed because "she smiled appropriately". He claimed that because Ms. Gosal's injuries ought to have resolved within a few months, he questions why her pain symptoms have continued.

**61**  On the basis of Ms. Gosal's answers to several hundred questions from the Minnesota Multiphasic Personality Inventory (MMPI-2) and "using the Graham interpretation" of results, Dr. Davis concludes that consciously or unconsciously, Ms. Gosal's complaints of pain are for secondary gains, such as sympathy.

**62**  In his publication on MMPI-2 results (from which Dr. Davis quoted extensively), Mr. Graham cautions that culture, race, and ethnicity are important in interpreting tests results. However, Dr. Davis disagrees that Ms. Gosal's cultural background was important in interpreting her MMPI-2 results. He argues that because she has been in Canada for 20 years, can read and speak English, and can follow instructions and write exams, for all intents and purposes she is "western".

**63**  I was left with the impression that Dr. Davis was presenting a case for the defence rather than providing an impartial expert opinion.

**64**  Dr. Davis' argument that Ms. Gosal's injuries should have healed and that she is seeking secondary gains or malingering, is at odds with his article, "The Whiplash Injury" (July 1998), *The Advocate* 545. He wrote at 565, 566, and 568:

The so-called 'Whiplash injury' is the result of a forced hyperextension-flexion action of the cervical spine as the result usually of a rear ender accident of whatever causation. The neck is thus forced back and then immediately forward followed by a host of physical and emotional symptoms which are consistent in their nature, frequently prolonged in their duration and often with a response resistant to all forms of therapy.

...

Such symptoms may, to the casual observer, appear disproportionately intense relative to the severity of the accident with damage to the affected vehicle appearing minor and with physical signs slight or absent. Special investigations eg: radiographs, may be negative yet the patient is in constant pain over the neck and surrounding areas and a host emotional reactions occur which appear disproportionate to the force of impact. The symptom complex of physical pain and psychiatric symptoms are so consistent however that there is little doubt that such a Syndrome exists.

...

Malingering is always to be considered in ongoing symptomatology especially when litigation and court proceedings are determined. The diagnosis of malingering indicates that the victim or patient is attempting to deceive for the purpose of gaining financial benefit or some other desired goal and there is little doubt that greed or the desire for things personally beneficial is an essential component. A high index of suspicion should be aroused if such persons have a past history of malingering or there is a marked discrepancy between the person's claimed distress or disability and the objective findings. Lack of cooperation with the diagnostic evaluation and a history of previous, similar accidents in the past, especially where compensation is involved, should alert the medical and legal attendants. Consequently, a full personality profile is essential in eliminating the wheat from the chaff and collateral information from old records or from persons well acquainted with the victim are all helpful in coming to a more definitive formulation. In my experience however and this is confirmed by Keiser in his well known book, the amount of malingering in this Syndrome is uncommon and such people are easily eliminated on careful investigation.

**65**  In her dealings with her family and her treating physicians, Ms. Gosal speaks Punjabi.

**66**  I accept Dr. Sandhu's testimony that although he has lived in Canada for 21 years he is still not westernized, and that if he took the MMPI-2 test, his answers would produce invalid results. He said that Ms. Gosal might be westernized in appearance, but in her heart and her mind, she is East Indian. She was born and raised in her early years in India. She has been shaped in large part by Indian culture.

**67**  I prefer Dr. Sandhu's opinion that Ms. Gosal is not seeking secondary gains. She was looking after the household and her children's needs as best she could, and doing her best to continue with her studies. Having observed Ms. Gosal, and on all the evidence, I conclude that she is not malingering and that her complaints of pain and depression are genuine.

**68**  She continues to improve, albeit slowly. I find that there are two to three days a week when she is not in pain. Full-time employment has assisted her both physically and emotionally. Though it is now more than six years since the first accident, and more than four years since the second accident, she still suffers from depression and pain. I anticipate that over the next few years, with a regular daily exercise program, her physical pain and depression will continue to improve but may not resolve completely.

**Non-pecuniary or General Damages**

**69**  Ms. Gosal seeks an award of $100,000 for non-pecuniary damages. The defendants contend that an award between $30,000 and $35,000 is appropriate.

**70**  Non-pecuniary or general damages are awarded to compensate for the pain, suffering, disability, and loss of enjoyment of life Ms. Gosal has suffered and will continue to suffer as a result of the accidents. It is a sum of money that is intended to restore her to the position she would have been in had the accidents not occurred.

**71**  I find that circumstances of Ms. Gosal's injuries are similar to those in *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=), [*149 A.C.W.S. (3d) 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=), where the award for non-pecuniary damages was $90,000, and *Jackson v. Lai*, [*2007 BCSC 1023*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3K8-00000-00&context=), [*160 A.C.W.S. (3d) 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3K8-00000-00&context=), where the award was $100,000.

**72**  I consider an award of $95,000 for non-pecuniary damages to be appropriate.

**Past Income Loss**

**73**  Ms. Gosal contends that but for the accidents she would have continued working as a driving instructor, obtained her Counselling Skills Certificate earlier than July 2008, and started working as a counsellor earlier than October 2008. Ms. Gosal testified that she expected to complete the certificate program in 12 months, by September 2003.

**74**  In closing argument Ms. Gosal claims that she could have obtained her certificate in 24 months, by September 2004, and then obtained employment shortly thereafter. She claims that but for the accidents she would have earned $181,843 as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| 2003 |  | $16,500 (11 months x $1,500 per month as a driving instructor) |  |
| 2004 |  | $18,000 (12 months x $1,500 per month as a driving instructor) |  |
| 2005 |  | $35,945 ([13 weeks x $19.00 per hour x 35 hours per week = $8,645] + [39 weeks x $20.00 per hour x 35 hours per week = $27,300]) |  |
| 2006 |  | $36,400 (52 weeks x $20.00 per hour x 35 hours per week) |  |
| 2007 |  | $37,128 ($36,400 x 1.02 to project a 2% pay increase over the previous year) |  |
| 2008 |  | $37,870 (previous years' earnings with a 2% pay increase) |  |

$181,843 (total)

**75**  The defence emphasizes that Ms. Gosal only registered for one course before the first accident, and argued that she would not have completed the program as quickly as she claims. She failed to mitigate her loss by not returning to work when "she was physically cleared to return to work by May 2003", and that, in any event, she was either too busy with the children or would have helped her husband with his political campaign and not worked. The defence argues that at most, Ms. Gosal is entitled to damages of $5,000 for past wage loss.

**76**  VCC's detailed information relating to the Counselling Skills Certificate Program states that the part-time program "can be completed in 15 months to three years" depending on each student's time constraints.

**77**  Ms. Gosal was enrolled in her second course, which ran from January 14, 2003 to February 4, 2003 when the second accident occurred. Had the accidents not occurred, Ms. Gosal would have had to complete seven more courses between February and September 2003 in order to complete the program within a year. That would have been an impossible feat. Had she planned to complete the program within one year, she would have enrolled in more than one course at a time before the first accident.

**78**  Based on Ms. Gosal's past history, I conclude that she planned to take one course at a time to complete the Counselling Skills Certificate Program. I conclude that because of the accidents, her completion of the program was delayed by 18 months; she could have completed the program by the end of December 2007.

**79**  There is no evidence that her present position with Progressive Intercultural Community Services was available to her at that time, and I am left to speculate what work she would have obtained after December 2007. It is reasonable to assume she would have taken a couple of months, as she did, to find suitable employment.

**80**  I do not accept that Ms. Gosal would have worked for all of 2003 and 2004 at her husband's driving school.

**81**  Ms. Gosal testified that she worked approximately 30 to 35 hours per week at Good Training Driving School and was paid $1,500 per month. She looked after all of the "paperwork", and from "time to time" gave driving lessons. She scheduled her work around her children's needs, housework, and her classes.

**82**  Mr. Cheema testified that after the first accident, he worked alone but found it "overwhelming" and could not carry on. There is no evidence he looked for someone to assist him with the "paperwork". In early April 2003, or just over two months after the accident, he began looking for another full-time job. From May 2003 to January 2004 he worked full-time as the Channel 11 news anchor, and before starting work at 1:00 p.m., "here and there in the morning" he gave a driving lesson. From 2005 to 2007 the driving school was inactive. Its books and records were "trashed" as early as November 2003, when the family moved from Vancouver to Delta.

**83**  From January 2004 to June 2004 Mr. Cheema took a leave of absence from his news anchor position and began campaigning in the federal election. Ms. Gosal was not feeling well enough to help him with his campaign. Mr. Cheema was defeated in the federal election. In July 2004 he registered in a real estate course and since January 2005 he has worked full-time as a realtor.

**84**  On Ms. Gosal's 2002 income tax return, she noted that Mr. Cheema was self-employed in 2002 and earned a net income of only $8,639.06. On her 2003 income tax return she noted his net income had increased to $22,062.74. For eight months during 2003 he worked as a news anchor.

**85**  While it was not argued, I think it is fair to conclude on the evidence that Mr. Cheema started looking for another full-time job in early April 2003 because his driving school business was not profitable. I am unable to find that but for the accident, Ms. Gosal would have continued to work in her husband's driving school for the remainder of 2003 and all of 2004.

**86**  On the other hand, prior to the accident, Ms. Gosal always worked. In 2003 when she was already the mother of four young children, she earned $18,003 as a travel agent, and in 2001 she earned $16,921. In 2002 she earned $10,603 as a travel agent, and $9,000 from working for her husband.

**87**  I have no doubt that but for the accident, Ms. Gosal would have worked, though not at her husband's driving school or her current job, or for the entire year once her husband decided to work as a news anchor. It is also reasonable to assume that she would have taken time off to help her husband during his political campaign.

**88**  I do not accept the defendants' argument that Ms. Gosal failed to mitigate her loss by returning to work when "she was physically cleared to return to work by May 2003". Ms. Gosal suffered more than just physical injuries. She clearly had emotional injuries that prevented her from working.

**89**  Doing the best I can, I assess Ms. Gosal's past income loss up to the date of trial as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2003 (11 months) | $13,500 |  |

|  |  |  |
| --- | --- | --- |
| 2004 | $12,000 |  |
| 2005 | $16,500 |  |
| 2006 | $16,500 |  |
| 2007 | $16,500 |  |
| 2008 | $30,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2009 (6 months) | $16,625 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total** | **$121,625** |  |

**Loss of Earning Capacity**

**90**  Ms. Gosal seeks $150,000 for loss of earning capacity and future income loss on the basis that but for the accident, after obtaining her counselling certificate, she would have earned a Masters of Social Work degree and then obtained a degree that would enable her to work as a psychologist. She relies on a document published by BC Futures showing that full-time psychologists earn an average of $62,100 annually, and full-time social workers earn an average of $44,900 annually.

**91**  Ms. Gosal claims that her long-term goal was to become a psychologist. She testified that given her inability to concentrate and memory loss, she does not know if she can further her studies to become a psychologist.

**92**  However, prior to the accidents, Ms. Gosal had no firm plan other than to obtain her Counselling Skills Certificate, gain some experience, and then choose her next steps. She suggested that in order to become a psychologist, she first needed to become a social worker by obtaining a Masters of Social Work degree, and from there she would have become a psychologist.

**93**  Ms. Gosal may have been influenced by Dr. Vickram who is both a registered social worker and registered psychotherapist. She admitted on cross-examination that she had not explored what she needed to do in order to become a psychologist, and only says she would have done whatever she needed to do to become a psychologist. Even in written closing argument on behalf of Ms. Gosal, her general plan to become a psychologist was described as "admittedly vague".

**94**  Ms. Gosal relies on Dr. Manchanda's September 24, 2008 report to say that she will be likely unable to tolerate employment involving moderate to heavy physical duties, such as heavy lifting, frequent lifting, frequent bending or twisting, or prolonged sitting for greater than one hour. She relies on *Andres v. Leslie*, [*2005 BCSC 1096*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B149-00000-00&context=), [*141 A.C.W.S. (3d) 961*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B149-00000-00&context=) at paras. 38-40, which cites *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=), [*24 A.C.W.S. (3d) 959*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.).

**95**  The defendants argue that Ms. Gosal is not entitled to anything for loss of earning capacity because her plan to become a psychologist lacks an air of reality. Additionally, Dr. Manchanda's opinion that Ms. Gosal is able to work in a sedentary job, or a job involving light physical duties is consistent with the kind of work Ms. Gosal has always done. She has no plans to work in an area that involves moderate to heavy physical duties. The defendants rely on *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), [*64 B.C.L.R. (4th) 152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at paras. 15-18:

[15] The judge said in her reasons, at paragraph 45, "It is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life." The defendants submit that this is the wrong test and it led the judge to arrive at an erroneous award. I agree with that submission.

[16] The judge appears to have lifted the phraseology "it is impossible to say ..." from the judgment of Southin J.A. in *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) at 59, quoted in *Parypa v. Wickware*, [*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=), [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=):

[63] This passage makes clear the principle that it is not the lost earnings themselves that must be compensated, but loss of earning capacity as a capital asset that requires compensation. There are several cases in this court which confirm that the capital asset approach is correct: *Earnshaw v. Despins* [*(1990), 45 B.C.L.R. (2d) 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4DT-00000-00&context=); *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=); and *Kwei v. Boisclair* [*(1991), 60 B.C.L.R. (2d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=). The significance of compensating earning capacity as a capital asset as opposed to projected future earnings is seen in the following passage from *Palmer*, supra, at 59:

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

[17] But the language in question there was used in the context of appellate review and, with respect, it cannot be transposed to an original analysis at the trial level. The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: *Parypa* para. 65.

[18] When the record is examined according to that approach, I cannot see the basis for a substantial possibility giving rise to compensation for diminished earning capacity. There being no other realistic alternative occupation that would be impaired by the plaintiff's accident injuries, the claim for future loss must fail.

[Emphasis in original.]

**96**  I am unable to conclude that there is a real possibility that Ms. Gosal would have become a psychologist but for the accidents. She may still be suffering from depression, but none of the medical evidence convinces me that she is precluded from pursuing further education in the future or becoming a psychologist if that is indeed what she chooses to do.

**97**  Her claim under this head of damages fails.

**Special Damages**

**98**  Ms. Gosal seeks $6,743.42 in special damages. This amount represents prescriptions, mileage to her various treating physicians or physiotherapist, and gym memberships.

**99**  The defendants argue that Ms. Gosal failed to mitigate her loss by failing to follow the advice of her doctors. In January 5, 2005 Dr. Khunkhun recommended that Ms. Gosal see a psychiatrist. Dr. Khunkhun testified that Ms. Gosal never refused to see a psychiatrist, but that they decided to try a different anti-depressant medication and the only reason for the referral to a psychiatrist was for an opinion on which anti-depressant medications to try.

**100**  Next, the defendants suggest that Ms. Gosal failed to mitigate her damages by failing to take the cortisone injections offered by Dr. Manchanda. Ms. Gosal has a phobia of needles. Dr. Manchanda testified that some, but not all patients, benefit from cortisone injections.

**101**  Lastly, there was one mention in a clinical record that Ms. Gosal had been too busy to renew her gym membership and attend the gym. However, there was no evidence to show how long she stopped attending the gym.

**102**  In *Foran*, Madam Justice Sinclair Prowse dealt with the duty to mitigate at paras. 105-110:

[105] In this case, the Defendants contend that the Plaintiff breached her duty to mitigate her damages by failing to seek treatment between August 26, 2003, through to December 27, 2004, and in particular, by failing to return to see Dr. Bozek, or to fill the prescription that he gave her for medication for her migraine headaches.

[106] As a consequence of these failures, the Defendants submit that the awards made to the Plaintiff should be reduced by 50%.

[107] The Defendants have the burden of proving that the Plaintiff failed to fulfil her duty to mitigate, 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=), [*16 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

[108] In particular, the Defendants must establish that the Plaintiff failed to undertake a recommended treatment, or failed to obtain advice that she ought to have obtained. The Defendants must also show that by following the recommended treatment or by obtaining the advice the Plaintiff could have overcome (or could in the future overcome), the problem and that the refusal to take the treatment or to obtain the advice was unreasonable: *Janiak*, *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=), [*[1994] 1 W.W.R. 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (B.C.C.A.).

[109] The Defendants have not proven these elements.

[110] At the most, the only recommendation that she failed to follow was to return to Dr. Bozek when her headaches kept reoccurring. However, even if this does constitute a failure to undertake a recommended treatment for purposes of this application, (and I am not satisfied that it does), the evidence falls short of proving that had the Plaintiff returned to Dr. Bozek's office she could or would have in the future overcome the problem.

**103**  In the case at bar the defendants have not established that Ms. Gosal has failed to mitigate her damages. The defendants claim that Ms. Gosal is not entitled to claim mileage for seeing Dr. Khunkhun on matters unrelated to the accident. However, Ms. Gosal was never cross-examined on her list of special damages and the only evidence I have is her list totalling $6,743.42 which sets out her special damages (or out-of-pocket expenses) as a result of the accidents. I therefore find her claim for special damages reasonable and award her the sum of $6,743.42.

**Cost of Future Care**

**104**  Ms. Gosal advances a claim of $3,678 for cost of future care:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 1. |  | kinesiology/physiotherapy sessions | $580 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | 12 sessions of cognitive behavioural | $1,800 |  |
|  |  | therapy |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | mileage to counselling | $130 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4. |  | mileage to physiotherapy | $136 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 5. |  | mileage to chiropractor | $352 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 6. |  | fitness membership passes | $680 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total** | **$3,678** |  |

**105**  This claim is based on Drs. Vickram and Wong's opinion that Ms. Gosal needs long-term psychotherapeutic treatment; Dr. Manchanda's opinion that she should participate in daily aerobic exercises and an active rehabilitation program for strengthening her upper back; and Dr. Saran's opinion that she should continue with her chiropractic treatments, self-directed exercise regime, and weekly yoga classes.

**106**  The defendants concede that all the treatments were recommended by Ms. Gosal's doctors, but again claim that had she followed her doctors' advice her injuries would have resolved by now, and she would not require future treatment.

**107**  The defendants have not established that Ms. Gosal failed to follow any recommended treatment and that if she had followed such recommendations, her injuries would have resolved.

**108**  I therefore award Ms. Gosal $3,678 for cost of future care.

**Loss of Housekeeping Capacity**

**109**  Ms. Gosal seeks $5,000 for loss of future housekeeping capacity. In February 2009 Ms. Gosal hired a woman to come into her home for three or four hours once per week to do the vacuuming, clean the washrooms, and sometimes help cut vegetables. Ms. Gosal pays her $15 per hour.

**110**  In *Foran*, Madam Justice Sinclair Prowse wrote at para. 115:

[115] An award for loss of housekeeping capacity is designed to compensate a plaintiff for his/her loss of ability, or diminished capacity, to do regular housekeeping tasks. Depending on the circumstances, loss of housekeeping capacity may fall under any of five heads of damages (non-pecuniary damages, special damages, past loss of income, cost of future care or loss of future earning capacity) - or it may constitute its own separate head of damages: *McTavish v. MacGillivray*, [*74 B.C.L.R. (3d) 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=), [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=); *Kroeker v. Jansen* [*(1995), 4 B.C.L.R. (3d) 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=), [*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=) (C.A.).

**111**  According to Dr. Manchanda, "Ms. Gosal should be able to complete the majority of her household chores. She may require a break or some assistance with heavier chores such as vacuuming a large room or carrying heavy laundry" (emphasis added).

**112**  On cross-examination Dr. Manchanda expressed surprise that Ms. Gosal had hired a "housekeeper".

**113**  Ms. Gosal testified that after the first accident she could not vacuum because it was heavy work and caused back pain. She never resumed vacuuming before the second accident or after the second accident.

**114**  Ms. Gosal was not asked any further questions on the topic of housekeeping capacity either on direct or on cross-examination.

**115**  While I recognize that Ms. Gosal suffers back pain from time to time, I am not satisfied that she continues to be unable to vacuum or complete most of her household chores, and do not allow anything under this head of damage.

**Summary of Damage Award**

**116**  In conclusion, Ms. Gosal is entitled to the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $95,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past income loss | $121,625.00 |  |
|  | Special damages | $6,743.42 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care | $3,678.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total:** | **$227,046.42** |  |

**117**  Although the two actions were tried together, the parties did not address the apportionment of damages. If they cannot agree, they may make submissions on the issue.

L.A. LOO J.

**End of Document**

[***Mathroo v. Edge-Partington, [2015] B.C.J. No. 139***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4KW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.A. Schultes J.

Heard: October 1-3, and 21, 2014.

Judgment: January 28, 2015.

Docket: M150946

Registry: New Westminster

**[2015] B.C.J. No. 139** | 2015 BCSC 122

Between Gurcharan Mathroo, Plaintiff, and David Ian Edge-Partington, Defendant

(106 paras.)

**Case Summary**

**Damages — Physical or psychological injuries — Physical injuries — Arm injuries — Elbow — Fractures — Action for damages for injuries sustained by pedestrian struck by vehicle allowed in part — 83-year-old plaintiff sustained fracture to right elbow that required surgery to insert plate — Plate prominent and plaintiff's evidence it caused pain, loss of strength and disrupted life accepted, as was his anxiety about walking — Plaintiff awarded $60,000 non-pecuniary loss — No award for housekeeping or in-trust award, as no reliable evidence on how much additional care family had to provide or value of services — No evidence on costs of recommended gentle exercise program or ibuprofen — Plaintiff awarded $275 special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Extent of incapacity — Cost of future care — Loss of housekeeping ability — Special damages — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting mobility — Action for damages for injuries sustained by pedestrian struck by vehicle allowed in part — 83-year-old plaintiff sustained fracture to right elbow that required surgery to insert plate — Plate prominent and plaintiff's evidence it caused pain, loss of strength and disrupted life accepted, as was his anxiety about walking — Plaintiff awarded $60,000 non-pecuniary loss — No award for housekeeping or in-trust award, as no reliable evidence on how much additional care family had to provide or value of services — No evidence on costs of recommended gentle exercise program or ibuprofen — Plaintiff awarded $275 special damages.**

**Tort law — *Negligence* — Contributory *negligence* — Duty of care — Motor vehicles — Pedestrians — Motor vehicles — Pedestrians — Rules of the road — Action for damages for personal injuries sustained in motor vehicle accident allowed in part — Plaintiff began crossing at intersection when cars had stopped and pedestrian signal was on — Defendant was waiting to turn right on red light — Defendant looked right and did not see plaintiff, then looked left and began to roll forward, striking plaintiff, who was two to three feet into intersection — Nothing indicated plaintiff would not be given right of way — Plaintiff not negligent in crossing without first making eye contact with driver waiting at red light — Defendant 100 per cent liable.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Crossing road — Pedestrians — Turns — Right turn at intersection — Yielding — Right of way — Liability — Civil actions — *Negligence* — Contributory *negligence* — Action for damages for personal injuries sustained in motor vehicle accident allowed in part — Plaintiff began crossing at intersection when cars had stopped and pedestrian signal was on — Defendant was waiting to turn right on red light — Defendant looked right and did not see plaintiff, then looked left and began to roll forward, striking plaintiff, who was two to three feet into intersection — Nothing indicated plaintiff would not be given right of way — Plaintiff not negligent in crossing without first making eye contact with driver waiting at red light — Defendant 100 per cent liable.**

|  |
| --- |
| Action for damages for personal injuries sustained by the plaintiff pedestrian when he was struck by the defendant's vehicle. The roads were dry and clear on the day in question. The plaintiff was walking with a friend, and they approached an intersection to cross at the crosswalk. The plaintiff pushed the button and then they proceeded into the intersection when the light was green, pedestrian signal was on and cars had stopped. About two to three feet in, the plaintiff was struck by the defendant's vehicle. The defendant was waiting to turn right on a red light. He testified he looked right and did not see any pedestrians, so looked left for about 10 seconds and then began moving forward. The defendant had not yet stepped on the gas when the plaintiff appeared in front of his vehicle and the defendant struck him. The defendant did not deny liability, but argued the plaintiff also failed to take reasonable care before crossing. The 83-year-old plaintiff had some post-accident soreness to his hips and back, but his most serious injury was an open fracture to his right elbow, which required surgery and having a plate inserted. The plaintiff testified the plate remained prominent and caused discomfort when he put his elbow down, as well as decreased utility and pain. The plaintiff sought $50,000 to $110,000 non-pecuniary loss, as well as additional awards for loss of housekeeping ability and in-trust award for his family who had to care for him, cost of future care and special damages.  HELD: Action allowed in part.  There was no evidence of any actions of the defendant that should have indicated to the plaintiff that the defendant was not going to give him the right of way. The defendant was in a stationary vehicle stopped at a red light when the plaintiff entered the intersection. While making eye contact with the defendant before entering the intersection may have been safer, the plaintiff was not unreasonable in not doing so. The defendant was 100 per cent liable. The plaintiff was a credible and reliable witness and his evidence of his symptoms was accepted even though it went beyond those objectively observed by doctors. The plate appeared very prominent and it was accepted that it caused pain, reduced strength and disrupted the plaintiff's life. The plaintiff was retired, but his evidence that he now had anxiety and discomfort while walking and this disrupted his social life and gardening was accepted. The evidence of the plaintiff's family member that he required hours of care from family now was not accepted, however, as the plaintiff was not an invalid. The plaintiff was awarded $60,000 non-pecuniary loss. Given the lack of reliable evidence on how much more the plaintiff's family had to do for him because of his injuries, and the value of these services, no additional award was made for loss of housekeeping capacity or in-trust. The cost of the recommended gentle exercise plan and occasional ibuprofen was unknown, so no cost of future care award was made. The plaintiff was awarded $275 special damages for physiotherapy and the ambulance. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 180*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0HH-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: R. Sidhu, A.S. Dhaliwal.

Counsel for the Defendant: D. Fiorvento, K.S. Johal.

**Reasons for Judgment**

I. INTRODUCTION

II. LIABILITY

1. Evidence (b) Discussion
2. DAMAGES
3. Evidence
4. Treatment ii. Continuing Effects iii. Ajaib Lottay - Son-in-law iv. Dr. Zarkadas - Orthopedic Surgeon v. Dr. Gandhi - Family Physician
5. Discussion
6. Credibility and findings of fact ii. Non-pecuniary damages
7. Submissions (d) Principles (e) Conclusion
8. In trust claim ii. Future care costs iii. Special damages
9. COSTS

|  |
| --- |
| **T.A. SCHULTES J.** |

**I. INTRODUCTION**

**1**  On the morning of April 13, 2012, Gurcharan Mathroo was hit by a truck driven by David Edge-Partington as he and a friend were attempting to cross 84th Avenue at 132nd Street in Surrey on foot. Mr. Mathroo's most serious injury was a fracture to his right elbow, which required surgery to insert a plate and screws into his arm.

**2**  The trial dealt with each party's degree of liability for the accident and the extent of the damages that Mr. Mathroo should receive in relation to his injuries.

**3**  Mr. Mathroo was 83 years old at the time of trial. He was born in India and lived there until 1990, when he and his wife immigrated to Canada to live with their daughter, who sponsored them. Once in Canada he worked as a carpenter until his retirement in 2001. For the last 10 years he lived mainly with his son and daughter-in-law on 132nd Street. About two weeks before the trial began he moved in with his daughter and her husband in a different area of Surrey.

**4**  He does not speak English, and instead testified with the assistance of an interpreter.

**II. LIABILITY**

1. **Evidence**

**5**  It is common ground that the accident occurred on a clear, dry morning and that the weather and road conditions played no part in it.

**6**  Mr. Mathroo and a friend, who was also an elderly man, were intending to walk to the Dasmesh Darbar Sikh temple. This was something he did two or three times per week. He had a group of friends with whom he enjoyed socializing at the temple and he also performed some volunteer work there. The walk usually took him about half an hour.

**7**  He and his friend were walking northbound on the west side of 132nd Street. There is a marked crosswalk at 84th Avenue, with a button on a light standard that activates a pedestrian crossing signal when the light is green for traffic on 132nd. This was Mr. Mathroo's usual route to the temple and he was very familiar with it.

**8**  When they reached that intersection, Mr. Mathroo pushed the button and waited for the pedestrian signal. When it appeared, he felt it was safe to cross and started walking. His friend was to his right. He said that the traffic was flowing (I infer on 132nd) but that the cars were stopped at the crosswalk that they wished to cross.

**9**  He agreed with the suggestion on cross-examination that he had not made eye contact with any of the drivers of the stopped cars, to make sure that they had seen him and that it was safe to cross. However, that is a practice that he had begun to follow since this accident.

**10**  After he stepped into the intersection and proceeded two or three feet, he was hit by a vehicle, causing him to fall over on to his right side. He did not see this vehicle before it struck him and did not have time to take evasive action in relation to it. He also had no idea of the force of the impact, or whether he was thrown any distance by it.

**11**  His right arm was hurting badly and he noticed blood in his elbow area. He was worried that he would be run over by other vehicles while lying on the road. Someone assisted him to sit down on the side of the road. An ambulance arrived and he was taken to hospital for treatment.

**12**  Mr. Mathroo's friend was not called as a witness or referred to by name in the evidence.

**13**  Mr. Edge-Partington testified that he was driving his truck east on 84th before the accident. He was intending to turn right and go south on 132nd, to return to the location of his business. There are two lanes eastbound on 84th in that area -- a left turn lane and a through lane. He was in the through lane.

**14**  When he reached the intersection with 132nd, the light in his direction was red so he came to a stop. There were one or two cars in the left turn lane. His truck was stopped pointing slightly to the right. His right turn signal was on. He looked to his right and saw a lamppost and a sidewalk, but no people.

**15**  Mr. Edge-Partington was referred to the photographs in evidence, which show bushes along a fence beside the sidewalk. In cross-examination he elaborated that the effect of these bushes was that from his position at the stop line he could see only the lamppost and the corner of the sidewalk. This is the direction from which Mr. Mathroo and his friend came.

**16**  He then looked to his left. There was a line of three cars going south on 132nd, followed by a semi-truck. He intended to turn right after the cars but before the semi. He was looking left for 8 - 10 seconds and then began to move forward. He did not look right again before he began to move.

**17**  His movement forward consisted only of taking his foot off the brake, which resulted in a speed of less than one kilometre per hour. He had not yet applied the gas. The truck moved about two feet forward. He then realized that two pedestrians were right in front of his truck. He was not able to say whether or not they were in the crosswalk. They were hit by the middle of his front bumper before he had time to avoid the collision.

**18**  He immediately got out, helped them up and guided them over to the sidewalk. The driver of the semi pulled over and spoke to the pedestrians, who did not speak English. The driver also phoned for emergency services, and the police, fire department and an ambulance all attended.

**19**  One of the pedestrians had a bleeding elbow and the other had a scrape.

**20**  The police officer who attended issued Mr. Edge-Partington with a traffic violation ticket for failing to yield to a pedestrian. He said that he did not dispute it because his business is very time-consuming and he did not want to lose any more time dealing with this incident. I infer that he gave this explanation because he does not necessarily concede his responsibility for the ticket on the merits.

1. **Discussion**

**21**  Wisely, Mr. Edge-Partington's counsel did not contend that there should be no liability at all on his part. It seems clear that he committed one of the classic lapses of care in the operation of a vehicle -- allowing it to move in one direction while looking in a different one. Instead, his counsel argues that Mr. Mathroo failed to take reasonable care for his own safety in the manner that he entered the road, and that liability should be apportioned partly to him as a result.

**22**  To the extent that his liability is based on the premise that Mr. Mathroo was unaware of the crosswalk or that he may have left the sidewalk outside of it, that premise is not supported by his evidence.

**23**  Mr. Mathroo described the "designated area" where he was to cross in his direct evidence and he did not accept the suggestion in cross-examination that he was not paying attention to whether there was a painted crosswalk there. In response to the suggestion that it is possible he was outside the crosswalk he said that he had taken the route that "he normally took". The suggestion that he would have stepped off the curb at the left side of the sidewalk (which according to the photos was outside the crosswalk boundary) was interrupted by an objection by Mr. Mathroo's counsel and was not asked in that form again.

**24**  Mr. Edge-Partington is unable to assist on this point, other than to maintain that his truck was not yet within the crosswalk when it came to its initial stop before moving forward again. Consequently I think the possibility that Mr. Mathroo was outside the crosswalk remains entirely speculative, and so s. 180 of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318*, which requires a pedestrian who crosses a highway outside of a crosswalk to yield the right-of-way to a vehicle, is not applicable to the analysis of liability.

**25**  The potentially stronger argument in favour of attributing some degree of contributory ***negligence*** is that Mr. Mathroo focussed entirely on the appearance of the walk signal in deciding to enter the intersection, instead of considering the presence and movement of vehicles that might pose a risk to him, as a reasonably careful pedestrian should have done. Mr. Edge-Partington's counsel emphasizes that having the right to proceed under the legislation does not absolve a pedestrian of the requirement to take care for his own safety. The classic reference for that principle is *British Columbia Electric Railway Co. v. Farrer*, [*[1955] S.C.R. 757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YN-00000-00&context=).

**26**  However, it does not follow that a pedestrian will inevitably be contributorily negligent for failing to watch out for dangerous actions of approaching drivers. As was explained 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.) at p. 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: see *Mercer v. Mercer*, [*[1949] 2 W.W.R. 294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2CC-00000-00&context=) at 296, [*[1949] 3 D.L.R. 826*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2CC-00000-00&context=) (Man. C.A.). [Emphasis added.]

**27**  A helpful application of these principles is found in *Olesik v. Mackin*, 1987 CarswellBC 1066, [*[1987] B.C.J. No. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X1HX-00000-00&context=) (S.C.):

6 The defendants contend that Mr. Olesik had his head down as he was crossing the road, that he failed for this reason to see their vehicle, and that he should accordingly be held at least partly to blame for the accident.

7 It was a dark, rainy January evening and the evidence suggests that Mr. Olesik was probably looking down, protecting himself from the elements. But I find no adequate basis in the evidence for the contention that his failure continually to watch approaching vehicles caused or contributed to his injuries.

8 To meet the onus which rests on the defendants to prove such an allegation of contributory ***negligence***, they must, in my view, establish much more than inadequate attention on Mr. Olesik's part. They must also establish: (i) at what distance a person in Mr. Olesik's position should have realized, from the speed of the approaching headlights, that the defendants' car was not going to yield him the right of way; (ii) that it would then have been possible for such a pedestrian, by stopping, going back or rushing forward, to avoid their car; and (iii) that a reasonable person in Mr. Olesik's circumstances -- a senior citizen pushing a cart -- would have taken and succeeded in such evasive action.

9 The evidence being quite inadequate to establish such a case, I find the defendants alone responsible for his injuries.

[Emphasis added.]

**28**  In this case it has certainly not been established that there were any actions by Mr. Edge-Partington in the operation of his truck from which Mr. Mathroo should have concluded that he was not going to be granted the right-of-way. On Mr. Edge-Partington's own evidence, he would have been stationary looking north in the direction of the southbound traffic on 132nd at the point that Mr. Mathroo and his friend entered the crosswalk. There was nothing in those circumstances to suggest to a reasonable pedestrian that Mr. Edge-Partington would then move forward without looking in their direction. The fact that it may be the very safest course for pedestrians to interact defensively with all drivers who are waiting to turn right on a red light, by making eye contact before entering the intersection, does not mean that they fail to act reasonably to preserve their own safety by proceeding without such contact.

**29**  Accordingly I will not be imposing any liability on Mr. Mathroo for the accident, and find Mr. Edge-Partington 100% liable for it.

**III. DAMAGES**

1. **Evidence**

***i. Treatment***

**30**  Mr. Mathroo was taken to Surrey Memorial Hospital after the accident. He had an abrasion on his right knee, but his most serious injury was an open fracture to his right elbow, which means that the bone was exposed to the outside as result of a wound in that area. The fracture was to the olecranon -- the bony point of the elbow.

**31**  Dr. Jackson, an orthopedic surgeon, operated on him that evening. In essence, the surgery consisted of reducing the fracture (restoring it to its correct alignment) and fixing it in place with the plate and screws. The fracture was comminuted, meaning the bone was in several pieces, but nevertheless Dr. Jackson felt that he was able to reduce it quite well.

**32**  Mr. Mathroo was kept in hospital until April 16, 2012. According to Dr. Jackson this was mainly to ensure that the antibiotics he was given had addressed the risk of infection from his open wound. He was released with a cast on the injured area and a sling for the arm.

**33**  He testified that afterwards he experienced headaches, as well as soreness in both hips and his back. He agreed that during his examination for discovery he described suffering bruising only to his knee, but that is not necessarily inconsistent with post-accident soreness in other areas of his body. He said that he had some difficulty sleeping because of the pain as well. These effects of the accident appear to have lasted for only a short period.

**34**  When Dr. Jackson saw Mr. Mathroo for a follow-up on May 7, he observed that the plate below the skin was quite prominent. Mr. Mathroo described suffering some "bother" from the plate when he put the arm down, put any pressure on the plate, or banged it against anything. Dr. Jackson's impression was that this situation was a "minor bother" to Mr. Mathroo.

**35**  Mr. Mathroo's counsel objected to the admission of notes and a medical letter by Dr. Jackson that described this conversation with Mr. Mathroo, on the basis that it was properly characterized as an expert medical opinion that had not been adduced in a proper form. In fact it became clear during his evidence that by writing "minor bother", Dr. Jackson was trying to convey a sense of the severity of the problem as Mr. Mathroo was describing it to him, not purporting to offer an opinion about its severity. However, the possible inconsistency between his description of the severity of his symptoms to Dr. Jackson and his evidence at trial was not put to Mr. Mathroo in cross-examination, so it is difficult to give much weight to this material in assessing his credibility.

**36**  Dr. Jackson and Mr. Mathroo discussed the option of having the plate surgically removed. It appears from his answers in cross-examination that Mr. Mathroo misunderstood the advice from Dr. Jackson on this point. He testified that he was told that he could not have it removed because the wound would not heal well. It could only be removed if he injured his elbow again. In fact, as documented by Dr. Jackson, Mr. Mathroo was given a choice, but elected not to have it removed at that point.

**37**  Following the recommendation of his family doctor, he attended 13 physiotherapy sessions for his arm, in October and November of 2012. He stopped because of a trip to India that November. He did not receive any physiotherapy while in India or resume it on his return.

***ii. Continuing effects***

**38**  By the time of trial, this problem with his right arm was the only continuing physical effect of the accident on Mr. Mathroo. In general he described the arm as "not functioning" and said that it is "quite a hardship" for him. He has difficulty putting weight on it. He is right handed, and so when he attempts to use his right arm to do the tasks that he used to do with it before the accident, it causes him pain, which requires him to take medication. He is also generally in pain at night.

**39**  He tries to avoid taking pain medication unless he really needs it because it has the side effect of causing constipation.

**40**  Having to rely mainly on his left arm makes it difficult for him to bathe and dress himself, and especially to put on his turban properly. He has taken to tying it only once a month, and in the interim just removing it from and placing it back on his head while it is still tied.

**41**  This problem with his right arm prevented him from keeping up with a vegetable garden that he used to maintain at his son's house when he was living there.

**42**  He also walks less frequently than he did before the accident. He explained that this was because he is in pain and because he cannot let his arm "dangle on the side", by which I infer he meant hang by his side as he walks. In addition, he is scared of vehicles when he crosses a road. He did not mention any anxiety about walking to his family doctor until recently. He explained that this was because his doctor had never asked him about it. Overall, he testified that he does not "feel like" walking.

**43**  Mr. Mathroo said that because of his inability to walk as much as before the accident he now has to go to the Singh Sabah temple instead of Dasmesh Darbar. He relies on a family member to drive him there. He did however acknowledge in cross-examination that he has walked to Singh Sabah on occasion and that this requires crossing one or possibly two intersections.

**44**  The loss of the social interaction with friends at his former temple has affected him negatively.

**45**  Mr. Mathroo agreed with the suggestion on cross-examination that he and his family follow the values of traditional Sikh culture, which includes different generations of the family living together in the same home. That is the basis on which he and his wife lived with his son and daughter-in-law and, in the weeks just before the trial, they have begun to live with his daughter and son-in-law. At his son's home, he and his wife would look after their grandchildren when they were needed. In general, his children have looked after them since they have been in Canada. This is the expectation in his culture.

**46**  He also agreed that in this traditional type of household the women do the cooking and cleaning. Since his wife has been ill his daughter-in-law and now his daughter have taken over her housework responsibilities. He himself did not do work around the house other than gardening. His main pastimes before the accident were going to the temple and spending time with his family.

***iii. Ajaib Lottay - Son-in-law***

**47**  He is married to Mr. Mathroo's daughter. Mr. Mathroo and his wife lived with them immediately after their arrival in Canada. From time to time after that Mr. Mathroo would stay with them for brief periods when he wanted to spend time with his daughter. He also lived with them from May to August 2012, while he was recovering from the accident and after his return from India in March 2013 (following a brief stay with his son). Mr. Mathroo would then go "back and forth" between the two homes.

**48**  At the time that Mr. Lottay testified, Mr. Mathroo had been back living with him and his wife for two-and-a-half weeks. He explained that Mr. Mathroo does not get along with his son's wife.

**49**  After the accident, he visited Mr. Mathroo in hospital every day. In addition to the elbow and knee injuries, Mr. Lottay also saw bruising on Mr. Mathroo's left side.

**50**  He confirmed Mr. Mathroo's change to a different temple since the accident and his reduced attendance at the new one. He elaborated that Mr. Mathroo is unable to perform volunteer service at the temple because he would have to use his right hand in order to provide the offering that visitors receive from the volunteers.

**51**  In general Mr. Lottay has noted that Mr. Mathroo "does not want to go out" because he is worried that he will get involved in another accident.

**52**  The main focus of Mr. Lottay's evidence was to describe the assistance that family members have had to provide with Mr. Mathroo's care. He said that during the initial two weeks after the accident when Mr. Mathroo was staying at his son's house, his daughter would go there and spend five or six hours a day caring for him. Once Mr. Mathroo moved to their house in May, she spent three to four hours a day on those tasks. After his return from India she has spent three to four a day assisting him.

**53**  "These days", which I take to mean since Mr. Mathroo has returned to live with them, she spends four to five hours a day on that task. Her assistance is with tasks like eating his food, washing his hair, tying his turban, grooming his beard, dressing and putting his shoes and socks on. He was independent in carrying out these tasks before the accident. He can do these things himself, but his arms become tired and he needs to take a painkiller.

**54**  Her assistance is on top of her own household duties. She is a full-time homemaker.

**55**  Mr. Lottay, his wife and their adult daughter have also been required to drive Mr. Mathroo to the medical and physiotherapy appointments that have been required by his injuries. Taking him to see Dr. Gandhi is a two- or three-hour endeavour, because Dr. Gandhi is very busy and there is a lot of time spent waiting.

**56**  Mr. Lottay provided some of the results of Internet searches that he has conducted to find Punjabi-speaking care aides to assist Mr. Mathroo. The cost of hiring such an aide is beyond his family's means, he said.

***iv. Dr. Zarkadas - Orthopedic Surgeon***

**57**  He practices at Lions Gate Hospital. His sub-specialities include injuries to the elbow, which currently make up 30% of his practice. In general a large component of his current practice involves the management of orthopedic trauma.

**58**  He noted Mr. Mathroo's complaints of discomfort from the plate in his arm, of having to avoid using his right upper arm because of elbow discomfort, and of weakness in his right hand, in particular his inability to make a fist.

**59**  During his examination, which took place in May of 2014, Dr. Zarkadas observed that the plate in Mr. Mathroo's arm was very prominent and tender to the touch. He found a slight restriction in the range of motion in Mr. Mathroo's right elbow. The ability to straighten and bend it were each reduced by five degrees compared to his left elbow.

**60**  He agreed with the suggestion in cross-examination that this was a "very functional range of motion".

**61**  Mr. Mathroo's grip strength in his right hand was also slightly less than on the left. This latter difficulty could have been caused by some atrophying of muscle as a result of the trauma, which the physiotherapy that he had received had been unable to remedy.

**62**  In his examination of an x-ray that was taken of Mr. Mathroo's arm in February of 2014, Dr. Zarkadas observed some indications of early arthritis to the outside of the elbow. These degenerative changes were likely the result of the accident, he thought.

**63**  Dr. Zarkadas gave a favourable prognosis and noted that Mr. Mathroo's surgical result has been "very satisfactory" to date. Overall, Mr. Mathroo had "mild residual pain and a degree of stiffness", with the stiffness likely to be permanent.

**64**  He agreed with the suggestion on cross-examination that there has been an "excellent recovery." Although he had used the term "considerable disability" in the factual assumptions portion of his report, he also agreed that such a term did not describe Mr. Mathroo's situation.

**65**  He expected that Mr. Mathroo would continue to have difficulty tying up his turban. He conceded however that the limited mobility of Mr. Mathroo's cervical spine that he noted in his examination would limit the tilting of his neck, which could also increase the difficulty of putting the turban on.

**66**  Dr. Zarkadas saw no reason why Mr. Mathroo would have difficulty walking short distances to his temple and did not expect that "dangling" of his right arm would cause him any difficulties in that regard.

**67**  He saw no benefit to any further physiotherapy. He also did not think it was likely that going to physiotherapy before October of 2012 would have increased Mr. Mathroo's range of motion.

**68**  He suggested that Mr. Mathroo should do as much with his right arm as he could tolerate and strengthen it with a gentle resistance program. Nevertheless, Mr. Mathroo has reached maximal medical recovery and further improvements are likely to be very small.

**69**  He did not recommend Mr. Mathroo having a further operation to have the plate removed, given his age and the risks associated with undergoing the necessary anesthetic.

***v. Dr. Gandhi - Family Physician***

**70**  He has been a doctor for more than forty years and has practised in Canada since 1990. He holds a specialty in family medicine. He has been treating Mr. Mathroo since 1999. He speaks Punjabi in addition to English and so is able to communicate directly with Mr. Mathroo, who is usually accompanied by a family member during his visits.

**71**  His report, which was written in March of 2014, described visits by Mr. Mathroo in relation to his injuries from the accident between June 19, 2012 and July 2, 2013.

**72**  He describes complaints by Mr. Mathroo of difficulty in making a fist with the right hand, and of pain in the right wrist, forearm and elbow. He resisted the suggestion in cross-examination that his observations were entirely subjective -- he measured Mr. Mathroo's grip strength and made objective findings of tenderness over the plate.

**73**  He agreed that during the visits covered by the report, Mr. Mathroo did not raise any concerns about anxiety in dealing with motor vehicles while walking, or that the accident had restricted his ability to engage in gardening. In a more recent visit, in September of 2014, Mr. Mathroo told him that he is nervous when he goes for a walk and that the accident has affected his gardening.

**74**  He also agreed that in addition to the accident injury, Mr. Mathroo was being treated for a variety of other health complaints, such as hypertension, eczema and prostate enlargement, all of which could adversely affect the quality of his life.

**75**  In addition, he conceded that Mr. Mathroo had indications of degenerative disc disease, which he explained is wear and tear on the joints with age. The majority of his patients of Mr. Mathroo's age have such changes. Unlike Dr. Zarkadas, he did not think that a decrease in neck mobility from disc degeneration would adversely affect Mr. Mathroo's ability to tie his turban. To his knowledge, the neck is held steady during that process and it is more the hand movements that are important to tie the turban.

**76**  He referred Mr. Mathroo for physiotherapy on the first post-accident visit in June 2012 and again in October of 2012. As I have described previously, it was following this second referral that Mr. Mathroo actually attended. In response to the suggestion that in general injuries resolve the sooner a person attends physiotherapy he said, "It helps." In re-examination he clarified his opinion to state that earlier attendance at physiotherapy would not have made a difference "with the complaints [that Mr. Mathroo is] having."

1. **Discussion**

***i. Credibility and findings of fact***

**77**  I found Mr. Mathroo to be a credible and reliable witness. For his age he seems mentally sharp and there were only a few times when he needed assistance to grasp the point of a question. Despite the barrier imposed by the use of an interpreter, his evidence still came across as a blunt, direct and mainly coherent recounting of actual experiences, without any indications of exaggeration or bids for sympathy. He conceded points that were not supportive of his claim without evasion or defensiveness, and he appeared genuinely taken back at any suggestion that he might not be telling the truth. His approach to the task of giving evidence seemed to be completely without guile.

**78**  I appreciate the caution that must be applied when assessing those of Mr. Mathroo's symptoms that go beyond what Dr. Gandhi or Dr. Zarkadas can confirm objectively. But this does not strike me as a case in which additional effects of an accident are being made up by him. My overall impression is rather that the mechanical details of his injury that are revealed by medical examination do not fully capture the day-to-day effects of this injury as he experiences them. In particular, it is clear that he experiences the presence of the plate in his arm as very troubling. When he showed it to me during his evidence he seemed genuinely disturbed. That is consistent with the observations of both orthopedic surgeons. To the objective observer, it appears very prominent on his somewhat emaciated arm.

**79**  It is common ground that resting on the plate or bumping it would be uncomfortable, given the lack of soft tissue protecting it, and it has not been suggested that using the arm in a manner that avoids provoking such discomfort would not cause him fatigue. I find it persuasive in this regard that he does not claim that he cannot use the arm at all to do his former tasks, which would be out of line with the medical evidence, but only that it tires him and causes him pain to use, which seems realistic to me. The same is true for his ability to make a fist -- there is some measurable decrease in the grip strength in his right hand and I do not consider it unrealistic that he would experience this loss of strength in the way he has described.

**80**  I also think it is necessary to take into account, as a matter of common sense and ordinary human experience, that a person of his age will be less resilient in bouncing back from, and more focused on a relatively intrusive injury like this. I think this increased focus accounts for symptoms like his descriptions of the "dangling" of his arm while walking. The absence of a medical basis to stop walking does not exclude a genuine hesitancy to continue based on his own perceptions of his injury. I see this as an example of a defendant taking his plaintiff as he finds him -- an elderly man, frailer and more apt to see an injury as life-changing in several different ways -- rather than as excessive or unreasonable sensitivity on Mr. Mathroo's part. This is a case in which the need for solace to address the disruption of the plaintiff's life does not track the physical severity of his injuries precisely.

**81**  As to his fear of cars while walking, I do not view the absence until very recently of any complaints about anxiety to Dr. Gandhi as contradicting his evidence on this point. He described it as an emotional reaction to the accident. He did not attempt to elevate it to a psychological condition and I would not have expected him necessarily to have complained to or sought assistance from a physician to deal with it. Mr. Lottay also observed this fear in action. I accept his evidence that he suffers from this fear and that it is part of the reason that he no longer "feels like" walking.

**82**  The loss of access to his friends at the Sikh temple would only have endured for as long as he lived within walking distance of Dasmesh Darbar, no longer felt comfortable walking there and could not access a family member to drive him. That opportunity is now foreclosed to him, regardless of the accident, by his move to his daughter's house, which the evidence indicates, is 10 - 15 kilometres away from where his son lives. However to the extent that it took an emotional toll on him while it was in effect, this lack of access to his original temple was a legitimate consequence of his injuries.

**83**  However, I am unable to accept Mr. Lottay's evidence about the degree of care that Mr. Mathroo has required from his daughter and other family members. Except perhaps for the acute phase immediately following his release from hospital, I cannot imagine how the number of hours that Mr. Lottay describes could possibly have been devoted to Mr. Mathroo's care. Those are the kinds of hours one would expect to be devoted to the care of a total invalid, not a person in Mr. Mathroo's situation, even after taking fully into account the impact of the injuries on him and the tasks that Mr. Lottay described.

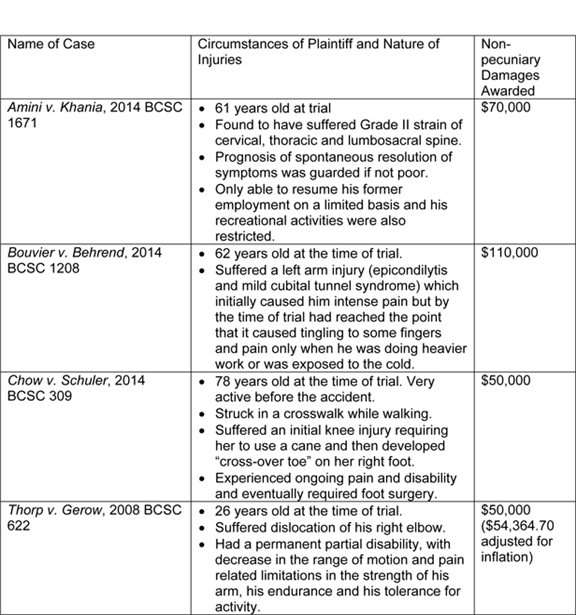
***ii. Non-pecuniary damages***

1. **Submissions**

**84**  Mr. Mathroo's counsel submits that the range of non-pecuniary damages that should be considered in this case is from $50,000 - $110,000.

**85**  The most helpful case in arriving at an appropriate award, she argues, is *Wong v. South Coast British Columbia Transportation Authority*, [*2013 BCSC 1118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M11S-00000-00&context=). In that case the plaintiff, an 84-year-old woman had fallen and broken her hip when the bus she was riding in began moving abruptly before she could take her seat. She had been very active before the accident and now required more assistance with her mobility and basic activities of daily living. Her son testified that she needed "ten times" more help than before. The award of non-pecuniary damages was $90,000, although the plaintiff was also found to be 25% contributorily negligent.

**86**  In addition, Mr. Mathroo's counsel provided the following decisions:

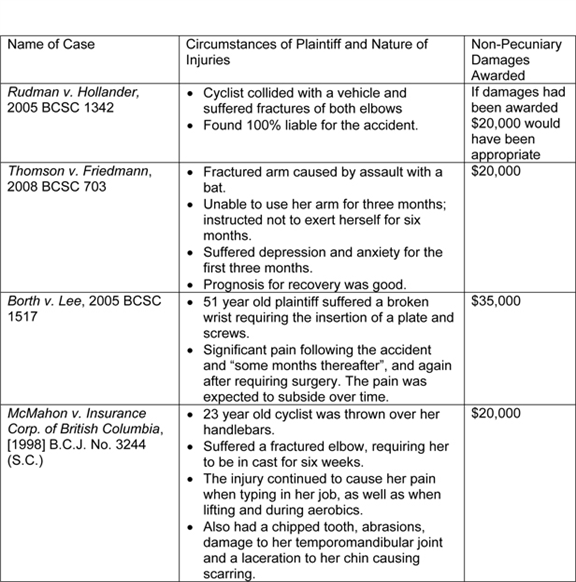


**87**  Mr. Mathroo's counsel also referred to what has been described as the "golden years doctrine", as illustrated in decisions such as *Fata v. Heinonen*, [*2010 BCSC 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62J8-00000-00&context=):

[88] The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in *Giles v. Canada (Attorney General)*, [*[1994] B.C.J. No. 3212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1SM-00000-00&context=) (S.C.), rev'd on other grounds [*(1996), 21 B.C.L.R. (3d) 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G29P-00000-00&context=) (C.A.).

**88**  Finally under this head of damages, Mr. Mathroo's counsel submits that it is open to me, where the evidence of loss of future housekeeping capacity is not specifically quantified, to make a general award as part of non-pecuniary damages (see for example *Eaton v. Regan*, [*2005 BCSC 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S16W-00000-00&context=)). She suggests that $2,500 should be added to the award on this basis

**89**  Mr. Edge-Partington's counsel argues that a much lower range of damages should be considered, along the lines of $20,000 - $30,000. He relies on the following decisions:



**90**  Mr. Edge-Partington's counsel rejects the application of the golden years doctrine here. He points out that it does not automatically apply to all elderly plaintiffs. In this case, Mr. Mathroo has maintained a sufficient range of motion in his elbow to carry out the activities of daily living, he did not engage in a wide range of activities before the accident, and can be expected to suffer a decline in the quality of his life because of other chronic ailments in any event. Instead, counsel relies on the decision in *Olesik*, which I referred to in the liability section on the duties of a pedestrian, to support the argument that the limited remaining life expectancy of a person in Mr. Mathroo's situation justifies a lower award than would otherwise result.

**91**  Counsel also argues that this is a case in which Mr. Mathroo's damages should be reduced because of his failure to mitigate his injuries, by pursuing the recommended physiotherapy in a more timely way. He relies on *Taylor v. Grundholm*, [*2010 BCSC 860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-228K-00000-00&context=) and *Taggart v. Yuan* (11 January 2008), Vancouver M062358 (B.C.S.C.).

1. **Principles**

**92**  The basic principles underlying an award on non-pecuniary damages are not in issue. I will simply repeat my summary of them in *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=):

[62] The purpose of non-pecuniary damages is to compensate a plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai,* [*2007 BCSC 1023*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3K8-00000-00&context=) at para.134.

[63] A helpful list of factors to consider in assessing the amount of such an award was set out by Kirkpatrick J.A. 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=) at para. 46:

1. 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:
2. age of the plaintiff;
3. nature of the injury;
4. severity and duration of pain;
5. disability;
6. emotional suffering; and
7. 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=)).

[64] In the Stapley decision at para. 45, Kirkpatrick J.A. also included the following helpful passage from *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=), [*129 D.L.R. (3d) 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 267:

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"...

[65] That said, other cases will assist the court by serving as a guide in arriving at an award that is just and fair to both parties: *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=).

1. **Conclusion**

**93**  To the extent that other decisions can serve as a guide to ensure fairness to the parties, I would say that the injuries in *Wong* and *Bouvier* can be characterized as more serious, or at least more intrusive, than what Mr. Mathroo suffered. The injuries in *Amini* were chronic and interfered quite substantially with the plaintiff's work and recreational activities, which has not occurred here. *Chow* is comparable on the plaintiff's personal circumstances, but Mr. Mathroo's initial injury and presence of the hardware is arguably more serious. The injury in *Thorp* is quite similar, minus the insertion of hardware, but the impact on Mr. Mathroo's self-confidence and sense of well-being seems to have been greater.

**94**  As to the authorities provided on behalf of Mr. Edge-Partington, the single-line reference to damages in *Rudman*, which was provided only in the event that the liability decision, which consumed the rest of the judgement, was found to be in error, cannot be treated as a considered decision on quantum. *Thomson* lacks the surgical treatment with intrusion of hardware or the inhibition to the same degree of the plaintiff's previous pleasurable activities, although the injury itself is comparably serious. The injury and the eventual surgical treatment in *Borth* are roughly comparable, but I would say that the injury has had a greater impact on Mr. Mathroo. I frankly do not know what to make of the award in *McMahon*, except to say that it seems inordinately low to me and likely has been superseded by a higher range in the 17 years since it was given. I also note that the authorities cited to the judge by the plaintiff herself were only in the $12,000 - $15,000 range, which may account for the result.

**95**  The golden years doctrine has some limited applicability here, in that Mr. Mathroo has experienced a decrease in his willingness to walk because of the effect of his injuries on his perceptions of his physical condition and his feelings of safety when walking, but I take the point made by Mr. Edge-Partington's counsel that he was not involved in that many activities beforehand, other than going to the temple and gardening, so the curtailment of them has been more limited than in other cases cited on his behalf.

**96**  I do not feel comfortable relying on *Olesik* to reduce the non-pecuniary damages on the basis of Mr. Mathroo's limited remaining life expectancy, as urged by Mr. Edge-Partington's counsel. Its applicability on that issue has been questioned by other decisions of this Court. In *Giles v. Attorney General of Canada*, [*[1994] B.C.J. No. 3212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1SM-00000-00&context=) (S.C.) varied on other grounds [*(1996) 71 B.C.A.C. 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G29P-00000-00&context=), Mr. Justice Fraser held that the principle described in *Olesik* and the golden years doctrine essentially balanced each other out, so that advanced age should not be a factor either way in arriving at an appropriate award. This view was adopted more recently in *Duifhuis v. Bloom*, [*2013 BCSC 1180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M14M-00000-00&context=).

**97**  Similarly, I do not see how an argument about failure to mitigate can survive the evidence of Dr. Gandhi and Dr. Zarkadas that Mr. Mathroo's current condition would not be any better if he had begun physiotherapy earlier and so I cannot give effect to it.

**98**  In all the circumstances, before dealing with whether an amount should be added to reflect a loss of Mr. Mathroo's housekeeping capacity, I would make an award of non-pecuniary damages of $60,000.

**99**  As to loss of future housekeeping capacity, I accept that Mr. Mathroo will need some assistance in the future with things that he can now do only with discomfort when using his right hand, and that such assistance will likely come from his daughter. There may also be some driving provided by family members in situations where he might previously have walked -- perhaps to the new temple.

**100**  The first problem with the evidence is the lack of evidence on which to base a valuation of those services -- the results of the Internet inquiries engaged in by Mr. Lottay on the cost of a Punjabi-speaking care aide are hearsay, and not subject to any exception that would make them admissible. The more fundamental problem is the absence of evidence of the actual extent and frequency of the services, and how much they overlap with care that will be provided to him in any case as a result of the general family arrangements and his advancing age. His daughter's services to him certainly have value regardless of whether she is employed outside of the home, but I have no reliable baseline of the care that she already provides and will continue to provide against which his increased needs due to the accident can be assessed. There is only Mr. Lottay's recitation of a list of tasks, with no evidence of what each one specifically required his wife to do. There is a difference between a definite claim that cannot be precisely quantified and speculatively making an award when the actual loss may be minimal or non-existent. Accordingly I am unable to make an additional award under this heading.

***i. In trust claim***

**101**  It is common ground that the principles to be applied in assessing an in-trust claim are set out in *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=):

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

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 (here, the normal care of an uninjured child);
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. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
6. the family members providing the services need not forego other income and there need not be payment for the services rendered.

**102**  As I have said, I find Mr. Lottay's estimates of his wife's time caring for Mr. Mathroo to be unrealistic. While I could probably arrive at a lower and more reasonable number of hours by drawing inferences from the descriptions of the tasks that Mr. Mathroo says he has problems with, and applying some assumptions about the amount of time it would take his daughter to assist him with them, I would still know nothing about the "quality and nature" of those services for the purposes of valuing them, because Mr. Mathroo was not forthcoming about what exactly he needs done for himself and Mr. Lottay's own involvement is largely with driving. As a result, I am not able to make any award under this heading.

**103**  I should make it clear that my dismissal of the claim under this heading, and under loss of future housekeeping capacity, are based on the shortcomings in the evidence that has been provided. I would not have acceded to the argument made on behalf of Mr. Edge-Partington that any additional care provided to Mr. Mathroo would have been subsumed within the concept of "filial piety" as it was expressed in decisions such as *I.C.B.C. v. Chan*, [*2007 BCSC 1431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1G3-00000-00&context=) and *Haczewski v. British Columbia*, [*2012 BCSC 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BB-00000-00&context=). The evidence in this case has certainly not established that the adult children in a traditional Sikh family will invariably take on all of a parent's accident-related care needs as a matter of course.

***ii. Future care costs***

**104**  Evidence of the costs of Dr. Zakaras's recommended gentle exercise program and of the Ibuprofen that Mr. Mathroo takes occasionally has not been provided and such costs are not well-known enough to be arrived at by judicial notice. It is not sufficient to propose a "nominal amount" without such evidence, on the theory that the true amount is likely to be greater. I am unable to make an award under this heading.

***iii. Special damages***

**105**  The special damages of $195 for physiotherapy user fees and $80 for ambulance costs are certainly reasonable and he will receive them. The total award under this heading is $275.

**III. COSTS**

**106**  My preliminary view is that Mr. Mathroo has achieved success on the only really important issue in this case, and should therefore receive his costs. However, counsel are free to make submissions concerning costs, orally or in writing as they prefer, provided that they advise Supreme Court Scheduling within 30 days of the judgment of their intention to do so.

T.A. SCHULTES J.

**End of Document**

[***Schafer v. Whiteley, [2013] B.C.J. No. 249***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3CX-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

D.A. Halfyard J.

Heard: January 21-25, 2013.

Judgment: February 15, 2013.

Docket: M65396

Registry: Nanaimo

**[2013] B.C.J. No. 249** | 2013 BCSC 225

Between Natalie Krystle Schafer, Plaintiff, and Kaitlyn Whiteley and Karen Whitely, Defendants

(236 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Tongue — Leg injuries — Knee — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff injured back, neck, tongue and knee — Defendant failed to establish plaintiff contributorily negligent — Plaintiff awarded $2,000 for past income loss — Potential future loss of income earning capacity awarded at $30,000 — Special damages were $1,382 — Cost of future care for exercise program of $6,000 awarded — No evidence plaintiff failed to mitigate damages by not following medical advice — Plaintiff awarded $70,000 in non-pecuniary damages for pain and suffering and impact on recreational activities and social relationships — Motor Vehicle Act, s. 174.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Considerations — Extent of incapacity — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Affecting recreational activities — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff injured back, neck, tongue and knee — Defendant failed to establish plaintiff contributorily negligent — Plaintiff awarded $2,000 for past income loss — Potential future loss of income earning capacity awarded at $30,000 — Special damages were $1,382 — Cost of future care for exercise program of $6,000 awarded — No evidence plaintiff failed to mitigate damages by not following medical advice — Plaintiff awarded $70,000 in non-pecuniary damages for pain and suffering and impact on recreational activities and social relationships — Motor Vehicle Act, s. 174.**

**Tort Law — *Negligence* — Contributory *negligence* — Duty of care — Motor vehicles — Motor vehicles — Rules of the road — Signals and warnings — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff injured back, neck, tongue and knee — Defendant failed to establish plaintiff contributorily negligent — Plaintiff awarded $2,000 for past income loss — Potential future loss of income earning capacity awarded at $30,000 — Special damages were $1,382 — Cost of future care for exercise program of $6,000 awarded — No evidence plaintiff failed to mitigate damages by not following medical advice — Plaintiff awarded $70,000 in non-pecuniary damages for pain and suffering and impact on recreational activities and social relationships — Motor Vehicle Act, s. 174.**

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| Action by the plaintiff for damages from a motor vehicle accident. The plaintiff injured her back, neck, tongue and knee. The plaintiff's vehicle was struck by a vehicle driven by the defendant in an intersection. The plaintiff was travelling through the intersection and the defendant was making a left turn. The defendant admitted liability, but argued that the plaintiff was contributorily negligent because her turn signal was on when she entered the intersection and she could have avoided the accident if she noticed the defendant's vehicle. The defendant also contested the extent of the plaintiff's damages.  HELD: Action allowed in part.  The defendant failed to provet the plaintiff was contributorily negligent. The evidence failed to establish whether the plaintiff's turn signal was on or that she could have avoided the accident if she noticed the defendant's car. Accordingly, the defendant failed to discharge her onus to establish these facts on a balance of probabilities. The plaintiff was a physically active person who wished to pursue full-time employment as a physical education teacher. The accident caused pain and suffering and the back injury impaired her ability to perform physical activities and impacted the plaintiff's sexual relationship with her boyfriend. She was awarded $70,000 in non-pecuniary damages. The parties agreed that $2,000 was an appropriate award for past loss of income. The plaintiff was awarded $30,000 for potential future loss of income earning capacity. The back injury created the possibility she would be unable to work full-time without the need to take time off. Special damages of $1,382 were awarded. A cost of future care award for an exercise program was made in the amount of $6,000. There was no evidence the plaintiff failed to mitigate her damages by failing to follow medical advice. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 174*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0H8-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: T.J. Huntsman.

Counsel for the Defendants: J.G.A. Hutchinson.

**Reasons for Judgment**

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| --- |
| **D.A. HALFYARD J.** |

**The Action**

**1**  In this trial, the plaintiff Natalie Krystle Schafer claims damages for personal injuries which she sustained as the result of a motor vehicle accident which occurred on May 5, 2010, in Nanaimo. The plaintiff alleges that the accident was caused solely by the negligent driving of the defendant Kaitlyn Whiteley. The claim against the defendant Karen Whiteley alleges vicarious liability on the ground that she was the registered owner of the vehicle being driven by Kaitlyn Whiteley. Both liability and damages are in issue.

**The Issue of Liability**

**The Accident**

**2**  I will summarize the facts relating to the accident which are either admitted or not in dispute.

**3**  At shortly before 11:00 a.m. on Wednesday, May 5, 2010, the plaintiff was driving her 2008 Mazda sedan in a northerly direction on Uplands Drive. She was approaching the intersection with Hammond Bay Road, which runs in an east-west direction at that location. The plaintiff was travelling at about 50 kilometres per hour (kph), which was the posted speed limit. The intersection was controlled by traffic signal lights. The traffic light was green for vehicles travelling north on Uplands. The plaintiff did not have to slow down or stop at the intersection, and she intended to drive through the intersection and continue going north on Uplands Drive.

**4**  As the plaintiff neared the intersection, Uplands Drive widened from one lane to three lanes for north bound traffic:

1. A lane for vehicles intending to turn left, so as to travel west on Hammond Bay Road;
2. A lane adjacent (to the right of) that left-turn lane, for vehicles intending to drive through the intersection and continue north on Uplands Drive; and
3. An outside or curb lane for vehicles intending to either travel through the intersection to continue north on Uplands Drive, or to turn right onto Hammond Bay Road so as to travel east.

**5**  The plaintiff was driving in the curb lane. For at least 70 metres before reaching the intersection of Hammond Bay Road, the plaintiff was driving on a slight uphill grade.

**6**  The defendant Kaitlyn Whiteley was driving her mother's 2003 Ford Focus, travelling south on Uplands Drive, approaching the intersection of Hammond Bay Road. There were three traffic lanes at that point, for vehicles travelling south on Uplands Drive, which were similar to the three lanes for northbound vehicles on Uplands Drive, approaching the intersection. There was an uphill grade for southbound vehicles on Uplands Drive that were approaching the intersection, which was somewhat steeper than the uphill grade for northbound vehicles on Uplands Drive that were approaching the Hammond Bay Road intersection.

**7**  Ms. Whiteley was travelling south in the left-hand turn lane. The traffic light was also green for southbound traffic on Uplands Drive. Ms. Whiteley was intending to make a left-hand turn so as to travel east on Hammond Bay Road. It was not necessary for her to stop for the traffic light and she proceeded into the intersection at a speed of about 30 kph. Without stopping, she commenced making a left-hand turn.

**8**  Part way through the left-hand turn, the defendants' vehicle collided with the plaintiff's vehicle, which was proceeding through the intersection in the same lane that it had been travelling as it neared the intersection. The front ends of the two vehicles came into collision. The driver's side front of the plaintiff's vehicle sustained heavier damage than its right front. The passenger side front of the defendants' vehicle sustained heavier damage than the driver's side front. Both vehicles were heavily damaged and were deemed not repairable.

**9**  Firefighters, ambulance attendants and a police officer attended very soon after the accident occurred. The plaintiff required assistance to enable her to get out of her car (her seat belt was jammed). She was obviously injured. She was put on a stretcher, placed in the ambulance and taken to hospital. It appears that Ms. Whiteley was able to get out of her car after the collision. She was upset and was physically shaken up. She was taken to the hospital but as it turned out she was not physically injured as a result of the accident.

**10**  Weather conditions and road surface conditions were apparently good, and had no bearing on the accident. The two drivers would have had an unobstructed view of each other for some time and distance before the collision occurred, but that time and that distance is unknown. No driving offence was charged against either driver.

**11**  Ms. Whiteley saw the plaintiff's vehicle approaching the intersection from the south, before she commenced her left-hand turn. The plaintiff did not see the defendants' vehicle, at any time before the two vehicles collided.

**The Position of the Plaintiff**

**12**  The plaintiff alleges that the defendant Kaitlyn Whiteley was 100% at fault for the accident. It is submitted that the defendant failed to comply with her statutory obligation imposed by s. 174 of the *Motor Vehicle Act*, in that she failed to yield the right-of-way to the plaintiff's vehicle, when the plaintiff's car was either in the intersection or so close to the intersection as to constitute an immediate hazard. The plaintiff says that the defendant's breach of her statutory obligation was a negligent act and that it was the sole cause of the collision.

**The Position of the Defendants**

**13**  The defence concedes that Ms. Whiteley was partly at fault for the accident, although counsel did not specifically identify the negligent act that was being admitted. But from the tenor of the defence argument, I infer that it is admitted that Ms. Whiteley commenced turning left when the plaintiff's vehicle was either in the intersection or so close to the intersection as to constitute an immediate hazard.

**14**  But it is contended on behalf of the defendants that there was ***negligence*** on the part of the plaintiff which was also a cause of the collision. Firstly, it is alleged that the plaintiff's right-turn signal was activated and flashing as she approached the intersection of Hammond Bay Road, and that this induced Ms. Whiteley to believe that the plaintiff was going to turn right onto Hammond Bay Road, rather than drive through the intersection. The defence contends that Ms. Whiteley would never have proceeded to turn left, if the plaintiff had not been signalling her intention to turn right onto Hammond Bay Road.

**15**  Secondly, the defence alleges that the plaintiff's failure to see Ms. Whiteley's vehicle when it was there to be seen, was a negligent omission which was also a cause of the collision. It is implicit in this submission that, if the plaintiff had seen Ms. Whiteley's vehicle in the process of making a left-hand turn, she could have taken steps to avoid the collision.

**16**  The defence submits that fault for the accident should be apportioned 75% to the plaintiff and 25% to the defendant Kaitlyn Whiteley.

**Reply Position of the Plaintiff**

**17**  The plaintiff flatly denies that her right turn signal was activated as she approached the intersection with Hammond Bay Road. With respect to her admitted failure to see the defendants' vehicle before the collision, the plaintiff argues that, even if she had seen the defendants' vehicle and realized it was making a left turn, she could not have avoided the collision. It is argued that, in the circumstances that existed, there was insufficient time and distance to enable her to take steps to avoid a collision with the defendants' vehicle.

**18**  The plaintiff thus denies that her driving conduct caused or contributed to the accident.

**Issues**

**19**  The defence having admitted that the negligent driving of the defendant Kaitlyn Whiteley was a cause of the accident, the issue is whether the plaintiff drove in a negligent manner, and if so, whether her ***negligence*** was also a cause of the collision. The defence bears the burden of proving the defence of contributory ***negligence***. The defendants allege two facts in support of the defence of contributory ***negligence***, as follows:

1. The right-turn signal on the front of the plaintiff's car was activated and was flashing, as she approached the intersection.
2. If the plaintiff had seen the defendants' vehicle when she ought to have seen it, she could have taken steps to avoid the collision.

**Was the right-turn signal on the plaintiff's vehicle activated as she approached the intersection?**

**20**  The only evidence that the plaintiff's right-turn signal was activated, comes from the defendant Kaitlyn Whiteley. The only evidence that the plaintiff's right-turn signal was not activated comes from the plaintiff. I cannot decide the issue of whether or not the plaintiff's right-turn signal was activated without assessing the credibility of the evidence given by these two witnesses on this issue.

**The credibility of the defendant Kaitlyn Whiteley**

**21**  Kaitlyn Whiteley is now 21 years of age. At the time of the accident, her age was 18 years and 10 months. She said that she had been driving a motor vehicle since she was about 16 years old. She testified to the effect that she saw the right-turn signal of the plaintiff's car flashing as it approached the other side of the intersection, that this caused her to believe that the plaintiff was going to make a right-hand turn onto Hammond Bay Road and that because of this, she proceeded with her intention to make a left-hand turn; but the plaintiff did not turn right and the collision occurred. She testified to the effect that, at the accident scene she told the investigating police officer that she saw the plaintiff's right turn signal flashing, before she herself turned left.

**22**  Ms. Whiteley further testified in direct examination that the plaintiff's boyfriend (who was Nigel Ward) approached her when she was sitting in the emergency room at the hospital, shortly after the accident. She said that she was upset, she had seen the plaintiff being carried away on a stretcher and thought she had received a serious injury, and so she "apologized." She did not elaborate on what her apology consisted of, but it was implicit in her testimony that she was apologizing for having caused the accident.

**23**  In cross-examination, Ms. Whiteley said that she obtained her learners drivers licence when she was a few months past the age of 16, and that a little more than a year later she obtained her "N" drivers licence. She said she had the "N" licence for two years, meaning that she still had only an "N" drivers licence at the time of the accident. She said she later took the driver's test, to obtain a full and unrestricted driver's licence.

**24**  Ms. Whiteley admitted that she had received one speeding ticket and one ticket for not having her headlights on, while she was driving with an "N" driving licence. She said these infractions did not cause any delay in her taking the test for a full driver's licence.

**25**  On being questioned extensively about her conduct following the accident, Ms. Whiteley said that her mother handled all of the dealings with ICBC and said she could not recall speaking to any person who represented ICBC. She eventually admitted that she spoke to a person on the phone after her mother spoke to that person; and she conceded that this person may have been with ICBC, and that the conversation probably related to the accident in some way. But she said she could not recall any of the conversation.

**26**  Ms. Whiteley denied the suggestion that she had lied on her examination for discovery, on the point of whether she had "seen" anyone from ICBC about the accident.

**27**  On being questioned about the accident, Ms. Whiteley gave many answers which amounted to "I don't know." The subject - matters of those questions included the speed of her own vehicle, the speed of the plaintiff's vehicle, whether the plaintiff's vehicle had slowed down, the distance between her vehicle and the plaintiff's vehicle when she saw the right-hand signal flashing, the distance she travelled while turning left up to the point of impact and the location in the intersection where the collision occurred.

**28**  Ms. Whiteley denied counsel's suggestion that she was mistaken about whether the plaintiff's right-turn signal was on.

**29**  Counsel for the plaintiff submitted that Ms. Whiteley had failed to report the accident promptly to ICBC, and argued that she was evasive in answering questions about whether she had talked to ICBC. Plaintiff's counsel pointed out that Ms. Whiteley could remember almost nothing else about the accident, except her assertion that she saw the plaintiff's right-turn signal flashing. Counsel further stated that her conduct in apologizing to Nigel Ward at the hospital without stating that she saw the plaintiff's right-turn signal flashing, diminishes the reliability of her trial testimony on this point. It was further stated that Constable Clayton Wurzinger's finding the turn-signal lever in the plaintiff's car in a neutral position after the collision, supported the plaintiff's version.

**30**  In essence, counsel for the plaintiff submitted that, for these reasons, Ms. Whiteley's evidence was unreliable, was not confirmed by any other evidence and should not be accepted by the court.

**The credibility of the plaintiff**

**31**  The plaintiff testified that she is now 30 years of age. At the time of the accident, she was on her way to work in Lantzville. She said that she left her residence on Butternut Drive, drove to Uplands Drive and made a right turn and then travelled continuously on Uplands Drive to the place where the accident occurred. She said that she would have signaled a right turn onto Butternut Drive but that the signal light would automatically go off once she straightened out the steering wheel after making the turn. She said that she did not activate her right-hand turn signal at any time thereafter, and she was adamant that the right signal light was not flashing as she neared the place where the collision occurred.

**32**  The plaintiff stated that she had driven through this intersection many times, and that it was her regular route to drive to work in Lantzville. She intended to drive through the intersection and across Hammond Bay Road and to continue north on Uplands Drive. She said she had no intention of making a right-hand turn. She said that the light was green and that there was no need for her to slow down before entering the intersection and that she did not slow down. She said she was travelling at about 50 kph.

**33**  The plaintiff further testified in direct that, if she had activated her right-turn signal somewhere along Uplands Drive after making her right-hand turn off Butternut Drive (to change lanes in an area where there were two lanes for northbound traffic), and if the right-turn signal accidentally remained activated after she moved to the right, she would have heard the signal clicking and she would have seen the arrow flashing in her dashboard and would have turned the signal off. The plaintiff stated that she would have had to slow down considerably, in order to make a 90 degree right-hand turn onto Hammond Bay Road but said she did not slow down. She admitted that she did not see Ms. Whiteley's car, at any time before the collision.

**34**  In cross-examination, the plaintiff confirmed that she had not seen the defendants' vehicle before the collision. She said that she was paying attention to the road ahead, but seemed to concede that she was focusing her attention on the possibility that a vehicle travelling west on Hammond Bay Road might make a right-hand turn onto Uplands Drive in front of her.

**35**  In attempting to explain why she did not see the defendants' vehicle before the collision, the plaintiff suggested that it might have been obscured by the hill that sloped down from the intersection to the north. But the photographs introduced on behalf of the plaintiff, which showed what a driver would see as he or she drove north on Uplands Drive toward the intersection of Hammond Bay Road, and Nigel Ward's evidence in estimating approximate distances from the intersection reflected in the photographs, were inconsistent with that explanation of the plaintiff. The evidence establishes that a driver in the plaintiff's circumstances could see any vehicle nearing the stop line of the left turn lane on the north side of the intersection from a distance of at least 40 metres before reaching the southern edge of the intersection.

**36**  Counsel questioned the plaintiff about her professed absolute certainty that her right-turn signal was not on. When he suggested to the plaintiff that it was possible that the right-turn signal was activated, the plaintiff said that it was not possible. Counsel suggested that the series of questions and answers from 189 to 194 of the plaintiff's examination for discovery show that the plaintiff previously gave inconsistent evidence on this point in that she allowed it was possible that she had left the right-turn signal on accidentally; and in that the plaintiff had also admitted that, if the radio was on (and it might have been), she might not hear the clicking of the turn signal. At no time did the plaintiff admit the possibility that she would not have seen the signal light flashing on her control panel if it had been left on accidently.

**37**  The plaintiff testified that she had not heard of the defendant's allegation that her right signal light had been activated, until the ICBC adjuster told her, a few days after the accident. She said that was the first time that she started thinking about that issue.

**38**  It was demonstrated in cross-examination that the ability of the plaintiff to estimate distances was exceedingly poor.

**39**  At the end of her cross-examination, the plaintiff repeated that she was absolutely 100% sure that she did not have her right-turn signal on, at the relevant time.

**40**  I agree with defence counsel that Constable Wurzinger's finding the turn signal lever of the plaintiff's car in a neutral position after the collision, does not confirm the plaintiff's evidence. There are simply too many ways in which the lever could have been moved into the neutral position, if it had been in the activated position at the time of the collision. I also agree with counsel for the plaintiff that Gary Booth's evidence (that he did not notice whether the plaintiff's right-turn signal was on or not) does not confirm the evidence of Ms. Whiteley. I find that Mr. Booth's evidence to the effect that if the plaintiff's right-turn signal was on at the time, that could possibly explain why the defendant might have made the left-hand turn, is not relevant and is not capable of confirming the defendant's evidence.

**41**  Counsel for the defendants submitted that the plaintiff's failure to see the defendants' vehicle supported the conclusion that she was not keeping a proper lookout and not paying proper attention to her driving. From this foundation, counsel argued that the plaintiff's right-turn signal could have been accidently left on, and she was not paying sufficient attention to notice that it was still activated. It was further contended that it was improbable that Ms. Whiteley would have turned left in the circumstances that existed, unless she had some reason to believe that the plaintiff was going to make a right-hand turn.

**Conclusions on first issue**

**42**  There are some weaknesses in the credibility of both parties. As to Ms. Whiteley, it is true that she told Constable Wurzinger, at the accident scene, that the plaintiff's right-turn signal was on. That prior consistent statement cannot be evidence of the truth of its contents, nor can it bolster the strength of the defendant's trial testimony on the same subject. But in my view, that prompt complaint neutralizes the submission by counsel for the plaintiff that Ms. Whiteley was not being honest when she testified that the plaintiff's right signal light was on. I am not satisfied that she was dishonest.

**43**  As to the plaintiff, I find that she honestly believed in the truth of her testimony. Notwithstanding her reluctance to admit the possibility that she was mistaken, that possibility does exist. But I am not persuaded that the plaintiff was mistaken, and so I am not prepared to reject her testimony on this point.

**44**  The burden of proof rests on the defence. Even if Ms. Whiteley believed that the plaintiff's right turn signal was on, I am not satisfied that she was not mistaken. In that respect, I find that the defence has failed to meet the burden of proof. I am not persuaded that it is more probable than not that the plaintiff's right signal light was on at the time of the accident. There is a possibility that the signal light was activated, but that falls far short of the standard of proof required. I find that the defence has failed to prove the first allegation on which the defence of contributory ***negligence*** is based.

**If the plaintiff had seen the defendant's vehicle before the collision, could she have avoided the collision?**

**45**  A person's failure to keep a proper lookout when driving a motor vehicle with the result that that the driver fails to see another vehicle which constitutes an immediate hazard, is conduct which falls below the standard of care that a reasonable driver would exercise. If that conduct in breach of the standard of care is shown to have caused or contributed to an accident, then ***negligence*** (in this case contributory ***negligence***) will be made out.

**46**  Again, the defendant bears the burden of proving that Ms. Schafer's failure to see Ms. Whiteley's car before the collision, was a cause of the collision. In order to do this, the defence must establish that, after the point in time when Ms. Schafer ought to have seen Ms. Whiteley's car in the process of turning left across her path of travel, Ms. Schafer had an opportunity to avoid the collision; and that a reasonable driver in her position would have avoided the collision. See *Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.) at para. 18; *Nerval v. Khehra* [*2012 BCCA 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2JD-00000-00&context=) at paras 35 - 37.

**47**  Ms. Whiteley saw the plaintiff's vehicle approaching from the south. But she was unable to give any estimate of the distance between her vehicle and the plaintiff's vehicle at the time she commenced her left turn. Nor was Ms. Whiteley able to estimate the speed of the plaintiff's vehicle. She was only able to say that she was "about halfway through" her left turn, when the collision occurred.

**48**  The plaintiff did not see Ms. Whiteley's vehicle at any time before the collision. As a consequence, she cannot give any evidence on this issue, beyond her testimony that she was travelling north at about 50 kph and was intending to drive straight through the intersection, across Hammond Bay Road. She also said that she did not slow down as she neared the intersection, and Ms. Whiteley agreed that the plaintiff's vehicle did not slow down.

**49**  Gary Booth was the only other witness to the accident. He was an independent witness. His credibility was not challenged, and I accept his evidence. Shortly before the accident occurred, he had been driving west on Hammond Bay Road. He encountered a red traffic light at the intersection of Uplands Drive, and was stopped at the east side of the intersection in the middle lane, when he saw the accident occur. His car was the first in the line of stopped traffic, and he had an unobstructed view of the intersection.

**50**  Mr. Booth estimated that the plaintiff's vehicle was travelling at about 50 kph, travelling north on Uplands Drive. Mr. Booth testified that, as the plaintiff's vehicle neared the intersection, it appeared to be going too fast to make a right-hand turn onto Hammond Bay Road and he saw nothing to indicate that the driver of that vehicle intended to make a right-hand turn.

**51**  Mr. Booth testified that the defendant's vehicle was travelling south on Uplands Drive, in the left-turn lane, and entered the intersection travelling at about 30 kph. He said that the plaintiff's vehicle continued to travel through the intersection, and the defendant's vehicle (which did not stop) proceeded to turn left and the two vehicles collided. His description of the location of the point of impact was understandably somewhat vague. The two vehicles moved after the collision, before coming to rest. He thought that it all happened too fast, for the driver of the Mazda (the plaintiff) to avoid a collision with the left-turning Ford Focus. In cross-examination, Mr. Booth agreed with counsel's suggestion that the arc of the left turn being made by the Ford Focus would line up with the fast lane for east-bound traffic on Hammond Bay Road. Mr. Booth did not notice whether or not the right-turn signal of the Mazda car was on, just before the collision. He did not know, one way or the other.

**52**  The admission by the defence that Ms. Whiteley must accept some fault for the collision necessarily includes the concession that she should have yielded the right of way to the plaintiff's vehicle. That implies the further admission that the plaintiff's car was so close that it constituted an immediate hazard when Ms. Whiteley began to turn left.

**53**  There was no evidence from which the location of the point of impact between the two vehicles could be identified. No measurements were taken of the approximate distance that Ms. Whiteley's vehicle travelled, from the stop line of the left-turn lane to the point of impact. There was no measurement of the approximate distance that the plaintiff's vehicle travelled from the stop line at the south side of the intersection to the point of impact. There is no expert evidence to reconstruct this accident. If the location of the point of impact had been identified, the said measurements could have been made and the speeds of 30 kph and 50 kph would permit the calculation of the time it took each of the two vehicles to travel from the two opposite edges of the intersection, to the point of impact.

**54**  One of the common sense inferences that may be drawn is that the plaintiff's vehicle (travelling at 50 kph) would cover a greater distance in a shorter time than the defendant's vehicle would travel (moving at 30 kph). Having regard to the aerial photograph of the intersection (Exhibit 7, Tab 2), it seems to be a reasonable inference that the defendants' vehicle travelled a greater distance from the stop line at the north edge of the intersection, than the distance travelled by the plaintiff's vehicle from the stop line at the south edge of the intersection, to the point of impact. But as I have said, no measurements were taken of the intersection at all. Ms. Whiteley testified that she was intending to turn left into the lane for eastbound traffic on Hammond Bay Road that was closest to the centre line. The evidence establishes that the plaintiff was travelling through the intersection, in the curb lane. If some measurements had been taken, it would have been possible to estimate the approximate location of the point of impact.

**55**  The admission of fault was made by defence counsel on the footing that the plaintiff's right-turn signal light was activated. This amounts to the concession that, even if the plaintiff's right turn signal was flashing, Ms. Whiteley should not have turned left, unless the plaintiff's car slowed down or made some movement to indicate that the plaintiff was going to turn right onto Hammond Bay Road. Ms. Whiteley admitted that she did not see the plaintiff's car slow down or give any indication that it was going to turn right (other than her assertion that the right-turn signal was flashing).

**56**  It is common knowledge that, when a driver is confronted with an immediate hazard, it takes a short time for the driver to react, before he or she can begin to take steps to try to avoid the hazard. In many cases, there has been evidence given that this reaction time for a reasonable driver is one second or one and one-half seconds. There is no such evidence in this case, but nevertheless, it must be acknowledged that the plaintiff would have required a short interval of time to react to the hazard created by Ms. Whiteley's vehicle, if she had seen it begin to turn left, before the collision. Then, in order to avoid a collision, she would have had to try to take some evasive action (such as changing direction, slowing down or speeding up).

**57**  Mr. Booth testified that the collision happened very fast. He thought the driver of the Mazda (the plaintiff) had no chance to avoid a collision with the left-turning vehicle. That opinion of course, is not conclusive, and it may not even be admissible. But in my opinion, Mr. Booth's evidence does establish that there was an extremely short period of time within which the plaintiff might have been able to take evasive action.

**58**  It is a simple mathematical calculation to determine how many metres per second each of the two vehicles was travelling just before the collision. If a moving object is travelling at a speed of one kilometre per hour, that means that it would travel 1,000 metres in 3,600 seconds (i.e., one hour). If that moving object travels 1,000 metres in 3,600 seconds, then in one second (at a speed of one kph), the object would travel 1,000 / 3,600 = 0.278 metre.

**59**  The plaintiff's vehicle was travelling at 50 kph, so that in one second at that speed she would have travelled 0.278 x 50 = 13.9 metres. The defendant was travelling at 30 kph so that, in one second her vehicle would have travelled 0.278 x 30 = 8.34 metres. If it is assumed that it takes a reasonable driver approximately one second to react to a sudden hazard, then the plaintiff's vehicle would travel 13.9 metres in that "reaction" time interval. No measurements of the intersection were taken, and on the evidence presented, I am unable to find that, at the point in time when the plaintiff ought to have known that the defendant was making a left turn ahead of her, the plaintiff's vehicle was further away from the point of impact than 13.9 metres. She might not have had sufficient time to even react to the hazard presented by Ms. Whiteley's left-turning vehicle, even if she had seen it.

**60**  It should also be kept in mind that the front end of the defendant's vehicle collided with the front end of the plaintiff's vehicle. This allows for the possibility that, even if the plaintiff had seen the defendant's vehicle before impact, and speeded up or swerved to her right in an attempt to avoid a collision, the defendants' vehicle might still have struck the plaintiff's vehicle at some point along the driver's side. There is the further possibility that, if the plaintiff had hit the brakes after seeing Ms. Whiteley's turning vehicle, she might not have had time to slow down enough to avoid crashing into that vehicle as it crossed her path.

**Conclusions on second issue**

**61**  The burden of proof is on the defence. In my opinion, the defence has failed to establish that, after she ought to have seen Ms. Whiteley's vehicle turning left, the plaintiff had sufficient time and distance within which to avoid the collision, and that a reasonable driver in Ms. Schafer's position would have avoided the collision.

**62**  For the reasons I have outlined, I conclude that the defendants have failed to prove that the ***negligence*** of the plaintiff (i.e., her failure to see the defendants' vehicle) was a cause of the accident. The defence of contributory ***negligence*** fails. The defendants are 100% liable for the damages that are to be awarded for the plaintiff's injuries.

**Damages**

**The claims**

**63**  The plaintiff alleges that she sustained soft-tissue injuries to her neck, lower back, left knee and face as a result of the collision. She claims damages under the categories of non-pecuniary loss, past loss of earnings, loss of future earning capacity, special damages and the cost of future care.

**The position of the defence**

**64**  The defence admits that the plaintiff is entitled to awards for non-pecuniary loss, past loss of earnings, special damages and the cost of future care. The parties are agreed as to the awards that should be made for past loss of earnings and special damages. The amounts of the damages that should be awarded for non-pecuniary loss and the cost of future care are in dispute.

**65**  The defence denies that the plaintiff is entitled to any award of damages for loss of future earning capacity.

**Overview of the evidence on damages**

**66**  The plaintiff testified and gave evidence relevant to all categories of damages being claimed. The other witnesses who gave evidence relevant to the issue of damages were Nigel Ward (Ms. Schafer's fiancé), Karli Van Vliet (a friend of Ms. Schafer and a high school physical education teacher), Gregory Jackson (functional capacity evaluator) and Dr. Mark D. Adrian (specialist in physical medicine and rehabilitation).

**67**  The expert report of Gregory Jackson was filed as an exhibit and he was cross-examined in court by counsel for the defendants. Dr. Adrian's evidence was given by way of expert reports and he was not cross-examined. Ms. Van Vliet's evidence was given by way of an agreed statement of her evidence (Exhibit 8).

**68**  The defendants introduced the expert report of Dr. Rajiv Reebye, a specialist in physical medicine and rehabilitation. Counsel for the plaintiff cross-examined Dr. Reebye at trial. He was unable to travel to Nanaimo due to weather conditions, and so he testified by way of video conferencing.

**69**  I will review the evidence of the witnesses just mentioned, by outlining what I consider to be the important parts of their evidence, in a summary way.

**The Evidence of the plaintiff, Natalie Schafer**

**70**  I will first summarize the testimony given by the plaintiff in direct examination.

**71**  The plaintiff was 28 years of age at the time of the accident on May 5, 2010. She grew up in Port Alberni and graduated from high school there, in 2000. She moved to Nanaimo in 2002, where she commenced studies at the Vancouver Island University (VIU) in September 2002. Her marks were not very good in her earlier years of study, and it took her until May or June 2010 to obtain her Bachelor of Arts degree (with a major in physical education, with distinction).

**72**  The plaintiff applied to VIU for admission to the program leading to a Bachelor of Education degree. She was notified that her application was accepted, in early May, 2010. The plaintiff attended VIU from September 2010 to December 2011, and obtained her Bachelor of Education degree. She said that her goal was to be a high school physical education teacher.

**73**  The plaintiff had been active in sports while in high school, including gymnastics, soccer, volleyball, softball, dancing, skiing and snowboarding. After high school, she continued to play soccer, softball and volleyball, and to engage in winter sports.

**74**  Over the years since graduating from high school, the plaintiff has done a considerable amount of volunteer work working with children. At the time of the accident, she was employed by the Boy's and Girl's Club, at Lantzville.

**75**  The plaintiff testified that after the collision, she was experiencing a lot of pain in her neck and lower back. She said she hit her left knee on the dashboard which resulted in bruises and soreness. She said that, when the airbag deployed, it scraped the left side of her face and also caused her to bite her tongue, which was bleeding. In describing her condition after the accident, the plaintiff stated "I was in pretty rough shape."

**76**  The plaintiff was released from hospital that same day, after having been x-rayed and given anti-inflammatory medication. She said the pain in her neck and lower back were the worst.

**77**  The day after the motor vehicle accident, the plaintiff went to see her family physician, Dr. Meyer. Her pain continued.

**78**  The plaintiff was unable to work for about a month after the accident. When she returned to work, she was unable to continue with her work at the Boy's and Girl's Club, and changed to work involving special needs children. She was still unable to resume any of the recreational and athletic activities that she had been engaged in, before the accident. Her work with the special needs children started on June 16, 2010, and she continued working there until starting courses at VIU in September 2010, in the Bachelor of Education degree program.

**79**  The plaintiff resumed her job working with special needs children in the summer of 2011, and worked until August 31, 2011. She then returned to VIU, and completed her Bachelor of Education degree program by the end of December 2011. In January 2012, she was hired as a teacher on call (TOC) by School District 70 in Port Alberni. The plaintiff stated that she has worked 70% to 75% of full-time, since then as a substitute teacher.

**80**  The plaintiff experienced some headaches after the accident. The injuries to her knee and face had healed and the pain had subsided within a few weeks after the accident. Her headaches had dissipated within a few months. The neck and back pain continued, with the lower back injury causing the more serious pain.

**81**  The plaintiff undertook a program of physiotherapy treatment on the advice of her doctor. The physiotherapy commenced a few weeks after the accident. At several points in her treatment program, ICBC refused to pay for further physiotherapy treatments, and the plaintiff ended up paying for some of these treatments herself. She has done daily exercises at home, as recommended by the physiotherapist, and has used cold and hot packs on her low back and neck to relieve the pain.

**82**  In January 2011, after Dr. Meyer moved away from Nanaimo, the medical clinic assigned a new doctor to the plaintiff, Dr. Bodenstab. He prescribed more physiotherapy for the plaintiff.

**83**  The plaintiff had visited Dr. Meyer a number of times for treatment and advice relating to her injuries, and she continued to see Dr. Bodenstab as required. She did not feel comfortable with having Dr. Bodenstab as her doctor.

**84**  The plaintiff says that she has not been able to return to most of the activities that she had previously been engaged in, since the accident. She has returned to playing softball, but says she cannot slide into the bases and is not nearly as competitive now as she used to be. She has not engaged in basketball, snowboarding or skiing or track and field activities since the accident and has played soccer only occasionally. She says these activities require vigorous movements which she cannot do or is afraid to do. She says she used to run half-marathons, but now can run only a distance of two to three kilometres, and her running must be "low impact" (which I took to mean, jogging).

**85**  The plaintiff has been engaged for quite some time in exercise programs offered by an organization called "Over the Hurdles." In that program, she engages in frequent and fairly rigorous exercises (often in groups) which she has found helpful.

**86**  In July 2012, the plaintiff began an exercise program supervised by a personal trainer who was a kinesiologist.

**87**  The plaintiff says that her neck and low back pain have improved since the accident.

**88**  The plaintiff's work as a substitute teacher in Port Alberni requires her to drive from Nanaimo to Port Alberni and return on each day that she works. She says that this requires about one hour of driving each way and that this prolonged sitting aggravates her symptoms of low back pain.

**89**  The plaintiff was examined by Dr. Adrian on August 8, 2012, by Greg Jackson (functional capacity evaluator) on October 17 and 18, 2012, and by Dr. Reebye on November 14, 2012. Since her examination by Dr. Reebye, the plaintiff has done some pool exercising, on his recommendation. She says that she has found her exercising with a personal trainer and group fitness classes, to be more beneficial to her than the pool exercises.

**90**  The plaintiff said that she had never experienced pain in her neck or lower back, before the accident.

**91**  The plaintiff states that she experiences pain in her lower back every day. She says that she feels all right when she gets up in the morning, but that her lower back gets sore by the time she drives to Port Alberni to begin work. She feels much better on weekends and other days off work. But she says she still cannot do the activities she used to do.

**92**  The plaintiff says that she lives with Nigel Ward and that they are engaged to be married. He has a steady job working for the City of Nanaimo. She has looked for work as a teacher in Nanaimo, but says that it is unlikely she will be able to obtain work as a teacher in the Nanaimo School District because of the fierce competition. She says that her best chance of obtaining a full-time teaching job is in Port Alberni. But she says that she fears she will never be able to do the physical work required of a high school physical education teacher.

**93**  The plaintiff says that she gets flare ups of her pain, worse in the lower back, if she does any heavy lifting or other vigorous activity, or sits or stands for any prolonged period. She says that her symptoms are much reduced or minimal on weekends or on days when she does not work.

**94**  The plaintiff says that her intimate relationship with Nigel Ward has been negatively affected by her injuries.

**95**  The plaintiff said that her pain symptoms have improved over time, but said that there has been no improvement in the past few months before trial. She says that her neck pain is not as often or as bad as her low back pain. The plaintiff testified that she turned down work as a TOC at Port Alberni "a few times", because her back was too sore. She said she did this, by not answering her telephone when she knew that School District 70 was calling to offer her work.

**96**  The plaintiff says that she can do regular housework chores, but cannot do work in the garden.

**97**  The plaintiff expressed doubt that she could work full-time as an ordinary classroom teacher in Port Alberni, if she was offered a full-time position by School District 70. She said that she is currently working about 70% of the time, and believes that she would have to stick to that amount of work, even if her job did not require her to teach any physical education classes.

**98**  The plaintiff testified, with the aid of documentary evidence, that if she was currently working as a full-time teacher, she would be earning about $51,000 per year.

**99**  The plaintiff seemed to concede that it was unlikely she would be able to obtain work as a high school physical education teacher in the near future. But she said that, even if she received such a job offer, she would have to turn it down because she could not do the work required of such a teacher. She said that she still holds out hope for further improvement.

**Cross-Examination of the Plaintiff**

**100**  Counsel for the defendants first suggested to the plaintiff that she had made a statement to Dr. Meyer on June 10, 2010 that was inconsistent with her trial testimony. It was conceded on behalf of the plaintiff that Dr. Meyer had written a note on June 10, 2010 to the effect that the plaintiff had told him that she was back to work and was without pain in her neck or back. The plaintiff denied making any such statement to Dr. Meyer.

**101**  Defence counsel elicited testimony from the plaintiff to the effect that her neck and back symptoms at the time she saw Dr. Reebye on November 14, 2012 were similar to the symptoms she had when she saw Dr. Adrian on August 8, 2012. Defence counsel then established that the plaintiff had testified on examination for discovery on October 10, 2012, as follows: (Q 344-346)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 344 Q |  | And so you have had some further improvement in, say, the last six months? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | 345 Q | Even the last few months? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 346 Q |  | So you are continuing to improve with the low back. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Improving, but still pain. |  |

**102**  When confronted with her discovery evidence, the plaintiff seemed to concede that her neck and back pain symptoms had improved in the two months between her examination by Dr. Adrian and her examination for discovery. But she testified that there had been no improvement in her symptoms, between the discovery on October 10, 2012 and the trial (which started on January 21, 2013).

**103**  The plaintiff had testified to the effect that she would not be capable of working full-time as an ordinary classroom teacher, in Port Alberni. Defence counsel confronted the plaintiff with the evidence given by Greg Jackson, which was to the effect that the plaintiff should be able to work full-time as a normal classroom teacher, without difficulty. The plaintiff said that she disagreed with that opinion of Mr. Jackson, and said that she could not work more than 70% of full-time as an ordinary class-room teacher. Her main reason for saying this was the adverse effect of driving back and forth from Nanaimo to Port Alberni, on her low back symptoms.

**104**  Counsel for the defendants suggested to the plaintiff that her prior conduct indicates that she had pursued training to qualify her to work with special needs children, just as much or more than she had pursued training in physical education. The plaintiff denied this suggestion and repeated that her goal was to teach physical education in high school and that she had not switched her focus to special needs education. She did acknowledge an interest in that field of work.

**105**  The plaintiff had testified in direct examination that she had turned down work as a teacher "a few times", and it was implicit in her testimony that she did this because her back was too sore. As mentioned, the plaintiff testified that the way she did this was to not answer the telephone when she knew she was being called to go to work in Port Alberni. Defence counsel then established that the plaintiff had given the following testimony on discovery:

|  |  |  |  |
| --- | --- | --- | --- |
|  | 441 Q | Alright. You haven't turned down any |  |
|  |  | opportunities because of your back? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Not since the accident, no. |  |

**106**  In an attempt to explain this apparent inconsistency, the plaintiff seemed to suggest that there was a significant difference between expressly "turning down" an offer of work, and refraining from answering the telephone when her employer was calling. But she acknowledged that the consequences would be the same, in each case, that is, that she would miss work.

**107**  The plaintiff had testified to the effect that she worked about 70% of full-time as a teacher, between January 2012 and June 2012. She also said that she did not feel capable of working more than 70% of the time. Defence counsel then established that the plaintiff had given the following evidence on her examination for discovery:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 452 Q |  | Okay, so in January to June 2012 how many day jobs did you get with the school board? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was called pretty much every day. I think I counted five days that I didn't get called in from when I got hired on until May. And then May I got a contract job for the last two months of school. |  |

. . .

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 458 |  | Q |  | So even though you are teacher on call, you've essentially had full-time work from January to June, 2012. |  |

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

**108**  The plaintiff acknowledged giving that evidence on discovery, but said that she had since looked at the employment records of the school district, and discovered that she had been mistaken about the number of days that she had worked from January through June 2012. She said that she only worked every day in May and June, and that in February, March and April she worked about 75% of full-time. Finally, the plaintiff said that, when all of her work days were added up for the six month period, she worked on average from 70% to 75% of the time.

**109**  Defence counsel suggested to the plaintiff that she should consider moving to Port Alberni or staying overnight a few times a week at her parent's place in Port Alberni, so as to avoid the low back pain caused by driving back and forth from Nanaimo to Port Alberni on a daily basis. The plaintiff agreed that doing those things would significantly reduce her episodes of low back pain, but took the position that it was unreasonable to expect her to do either of those things. She said her partner and now fiancé Nigel Ward has steady employment with the City of Nanaimo. The plaintiff stated that they were making their home in Nanaimo. She acknowledged that the chances were remote for her to obtain employment as a teacher in Nanaimo due to the fierce competition.

**110**  The plaintiff conceded that her best chance of obtaining full-time employment as a teacher was with School District 70 in Port Alberni. She also agreed that she had a far better chance of obtaining full-time employment as an ordinary classroom teacher, than as a high school physical education teacher (because there are far more classroom teachers than physical education teachers).

**111**  The plaintiff had acknowledged in cross-examination that she had never had to stop work while she was working in a classroom, due to back pain.

**112**  The plaintiff testified to the effect that her episodes of low back pain are ongoing, that her neck pain is "basically . . . resolved" and that her headaches had disappeared long ago.

**Re-Examination**

**113**  In re-examination, the plaintiff stated that if she received a job offer to work as a full-time ordinary classroom teacher in Port Alberni, she would refuse that offer. She said that the reason she would refuse is because she would have to drive back and forth from Nanaimo to Port Alberni every day, which involved two hours of driving, which caused pain in her lower back. She again stated her reasons for not wanting to move to Port Alberni.

**Nigel Ward**

**114**  Nigel Ward testified that he and the plaintiff started dating in 2008, that they were now living together and that they were engaged to be married. He said the plaintiff called him immediately after the motor vehicle accident had occurred on the morning of May 5, 2010 and that he went to the scene of the accident right away. By that time, the plaintiff was on a stretcher and was soon taken by ambulance to the hospital.

**115**  Mr. Ward recounted his conversation with Ms. Whiteley in the emergency waiting room at the hospital, when she had told him: "I am sorry, it is my fault."

**116**  Mr. Ward said that he had been taking a bachelor's degree program in physical education at VIU, and that he and the plaintiff met while both were attending the physical education program. He described the plaintiff as being a "really active" person, and said that they engaged in numerous recreational and athletic activities together including softball, hiking, biking and swimming.

**117**  He said that when the plaintiff was working as a teacher on call in Port Alberni, she would look to be exhausted and in pain when she got home at the end of the day. He said that the plaintiff did not engage in any significant activities after dinner when she was working, because she seemed to be too tired. He said that the plaintiff had "up and down" days, depending on her level of activity. Mr. Ward said that their sexual relationship was affected to some degree, which frustrated the plaintiff. He said that this "caused some tension . . . we worked through it."

**118**  Mr. Ward testified that he had worked just over one and one-half years with the City of Nanaimo. He said he had previously lived and worked in Campbell River. He said he did not follow up with his earlier interests of being a teacher.

**119**  Mr. Ward said that he and the plaintiff had discussed moving from Nanaimo to the Parksville area so as to shorten the plaintiff's drive to Port Alberni, but that they had not come to any decision about this.

**Karli Van Vliet**

**120**  The evidence of Ms. Karli Van Vliet was given by way of a statement of admitted evidence.

**121**  Ms. Van Vliet has known the plaintiff since they were in grade 10 together in high school at Port Alberni. She has a Bachelor of Education degree with a major in physical education and a minor in social studies. She is now in her sixth year of teaching as a high school physical education teacher. She states that she "created" her own job, to a significant degree.

**122**  Ms. Van Vliet described the vigorous physical activities required of a high school physical education teacher, and said that these activities and sports required twisting, jumping, throwing, running, stooping, grabbing, flexing and rotating.

**123**  Ms. Van Vliet believes that there is some prospect that one or more part-time jobs may become available for high school physical education teachers in the near future, because some teachers are approaching retirement age.

**Dr. Mark D. Adrian**

**124**  Dr. Adrian is a specialist in physical medicine and rehabilitation. He was qualified to give expert opinion evidence in this field, which included the assessment and treatment of soft tissue injuries to the neck and back.

**125**  Dr. Adrian examined the plaintiff at his office in Vancouver on August 8, 2012. He wrote a report on that same date. He later wrote a supplemental report dated December 21, 2012, after being asked by plaintiff's counsel to comment on some of the statements made by Dr. Reebye in his report dated November 26, 2012.

**126**  The plaintiff told Dr. Adrian that her left knee symptoms resolved within several weeks after the accident, and that her headaches resolved within several months thereafter. She said that her neck and lower back pain symptoms had improved to the point where they occurred only intermittently, depending on the degree of her activity. She told Dr. Adrian, in substance, that she experiences "ongoing pain symptoms involving her neck and lower back that occur on a regular basis." The plaintiff said that she experienced lower back pain on most days, depending on her activity levels and which could be triggered by prolonged sitting, prolonged standing, prolonged stooping, and heavy lifting and prolonged running. She said that her neck pain was less severe than her lower back pain, and that the neck pain occurs approximately once or twice a week, depending on her activity levels.

**127**  The plaintiff described for Dr. Adrian the effects of her injury on her abilities to perform the activities of daily living and recreational activities that she had previously engaged in, in a manner consistent with her trial testimony. Her description of her occupational history and her difficulties related to her job of teaching in Port Alberni was similar to her trial testimony, except for the fact that Dr. Adrian reported that she began working as a TOC in January 2011, when in fact she started in January 2012, (this could have been due to a mistake by the plaintiff, or to a typing error).

**128**  The findings made by Dr. Adrian on his examination of the plaintiff included the following (which are reported at page six of his main report):

Ms. Schafer has neutral alignment involving her neck, thoracic and lumbar spine. She has full range of motion of her neck that is pain-free. Tenderness is localized to the mid-cervical spinal segments.

She has full range of motion of her thoracic and lumbar spine. She experiences lower back pain symptoms with motion into backward bending (extension). Tenderness is present over the lowest three lumbar spinal segments. There is no tenderness over the sacroiliac joints. Faber's sign is negative.

**129**  The diagnosis given by Dr. Adrian in his main report was (my summarizing):

1. The accident of May 5, 2010, caused injury to the musculoskeletal structures of the plaintiff's neck and low back.
2. The damage to these musculoskeletal structures has caused and continues to cause her pain, which may be described as chronic mechanical neck and lower back pain.
3. The plaintiff's lower back pain symptoms are more dominant than her neck pain symptoms.

**130**  As to his prognosis, Dr. Adrian stated the following at page 8:

In Ms. Schafer's situation, over two years have elapsed since the accident date. The prognosis for further recovery of her spinal symptoms over time is poor. It is unlikely the injuries suffered in the motor vehicle accident will undergo progressive deterioration over time.

**131**  Dr. Adrian also stated that the plaintiff:

. . . will probably continue to experience difficulty performing employment, recreational, or household activities that involve prolonged sitting; prolonged standing; prolonged stooping; heavy or repetitive lifting; or impact activities. These physical limitations are unlikely to resolve over time. Ms. Schafer is partially disabled as a result of the injuries suffered in the motor vehicle accident.

**132**  Dr. Adrian's final opinion relating to the prognosis is as follows:

In my opinion, there are no medical contra indications for Ms. Schafer to work full-time until the age of 65. As indicated above, however, she will probably experience difficulty performing employment activities that require the above - listed physical components.

**133**  As to recommendations for further investigations and treatment, Dr. Adrian did not recommend further investigations but did recommend an exercise program for the plaintiff, with the involvement of a personal trainer. He said that the frequency of supervision could be reduced and eventually discontinued over time, which he suggested would be three to six months.

**134**  Finally, Dr. Adrian expressed the following opinion:

Ms. Schafer is vulnerable to experiencing ongoing periodic temporary flares of her symptoms into the future. If she suffers a flare of her symptoms in the future that does not resolve in a timely manner (days to weeks), she may benefit with periodic physical therapy treatments with goals of reducing the intensity and duration of the flare. Whether she experiences flares of this degree into the future remains to be seen.

**135**  In his supplemental letter dated December 21, 2012, Dr. Adrian commented on certain of the statements made by Dr. Reebye in his report. I consider the following additional comments of Dr. Adrian to be the most significant:

1. With respect to Dr. Reebye's statement to the effect that the plaintiff should be able to develop better coping strategies, Dr. Adrian's comment included the following:

. . . It is unlikely that further healing into the future will occur. In other words, these damaged spinal tissues will continue to be painful indefinitely. In terms of coping strategies, that is a consideration which should be deferred to a psychiatrist or psychologist.

1. As to Dr. Reebye's recommendation that the plaintiff should incorporate water-based therapy and water running into her exercise program (to increase her running tolerance), Dr. Adrian agreed that water therapy is a suitable exercise but he stated that: "It will not cure Ms. Schafer's pain symptoms."

**136**  Dr. Adrian had previously been requested by defence counsel to attend at trial for cross-examination. But during the trial, that request was withdrawn, and Dr. Adrian was not cross-examined about his opinions or the reasons relied on to support his opinions.

**Greg Jackson**

**137**  Greg Jackson is an occupational therapist and functional capacity evaluator. He performed a functional capacity evaluation of the plaintiff on October 17 and 18, 2012. He prepared a report dated October 24, 2012. Mr. Jackson was well qualified to give expert opinion evidence in the field of functional capacity evaluation.

**138**  Based upon direct clinical observation, clinical testing and testing outcomes, personal interview information and his experience as an occupational therapist, Mr. Jackson expressed the following opinions relating to the plaintiff's physical functional abilities and her physical functional limitations (my paraphrasing except where quotations are included):

1. His clinical findings indicate that the plaintiff's subjective reports of abilities and limitations were both reasonable and reliable.
2. The plaintiff had a sitting tolerance of one hour and twelve minutes, a static standing tolerance of 34 minutes and a tolerance for being on her feet for two hours and ten minutes.
3. The plaintiff could crouch and kneel, but had little tolerance for working with her arms in front of her from either of those positions. Her stooping tolerance was limited to about 30 to 50 seconds at a time, and "were highly symptom provocative."
4. The plaintiff:

". . . is able to meet most physical/functional requirements of elementary and secondary school teachers. The most profound limiting factor for classroom work would be sitting tolerance. However, this limitation could very likely be overcome by exercising postural freedom within the classroom setting and through use of ergonomic devices for paperwork. . . ."

1. With respect to the occupation of a high school physical education teacher (which requires physical activities similar to those required by the occupation of program leader and instructor in recreation and sport), the plaintiff "is able to meet most physical/functional requirements of that occupation," with certain limitations and difficulties. But:

"This is not to suggest Ms. Schafer is completely disabled in her ability to work as a physical education teacher. However, she will have to be careful in her specific chosen occupational path and the level of participation of instruction/demonstration she participates in. Movements, activities, loading patterns, and possibly postures that she will be exposed to in her work will more than likely result in symptom response. Dependent upon the level of symptom response, short-term absenteeism from work may result."

1. Commuting to and from Port Alberni requires sitting for a considerable length of time, and this "is symptom provocative for her."

**139**  It appears from Mr. Jackson's report (Appendix B, page 11) that the plaintiff told him she could drive continuously for 30 minutes, without experiencing pain in her low back.

**140**  Mr. Jackson was cross-examined on his report.

**141**  Mr. Jackson was asked to explain the pain scale (from 1 to 10) that he used to identify the degree or intensity of the pain that the plaintiff had claimed to be experiencing. He said that Level 5 is required in order to disable a person from working, and that the plaintiff did not report any pain that translated into that high of a level on the pain scale. He noted that on the follow-up evaluation of October 19, 2012, the plaintiff was reporting pain levels of two for her low back and one for her neck. Mr. Jackson agreed that the plaintiff's reported pain level of three in her low back at the start of the first day could be explained by her driving from Nanaimo to Victoria that morning. He also noted that, after the plaintiff had stayed overnight, her reported pain levels for both her low back and neck (at the start of the second session) were only at the number one level.

**142**  On being questioned by defence counsel about the plaintiff's working capacities, Mr. Jackson expressed the opinions that the plaintiff was capable of working full time as an ordinary classroom teacher; and that she might be able to work full time as a physical education teacher, although she would have difficulties doing so.

**143**  Mr. Jackson agreed with the suggestion of defence counsel that the plaintiff's subjective reporting of her tolerance for standing still (15 minutes) was considerably less than her demonstrated capacity on testing (34 minutes). He also stated that the plaintiff's subjective reported lifting ability (20 pounds) was less than her demonstrated ability on testing (40 pounds), but added the qualification that such heavier weights had to be handled very close to her body.

**Dr. Rajiv Reebye**

**144**  Dr. Reebye gave evidence for the defence on the issue of damages. He, like Dr. Adrian, was eminently qualified to give expert opinion evidence in the field of physical medicine and rehabilitation.

**145**  Dr. Reebye examined the plaintiff in his office at New Westminster on November 14, 2012. His report is dated November 26, 2012.

**146**  The plaintiff complained to Dr. Reebye that she was experiencing low back and mid-back pain, and neck pain. She described the positions and activities that bring on or aggravate her pain symptoms, in a manner which was generally consistent with her trial testimony. Arguably there was a discrepancy between what she told Mr. Jackson about her driving tolerance (30 minutes) and what she told Dr. Reebye (15 to 20 minutes); and her statement to Dr. Reebye to the effect that "driving more than one hour can increase her left, lower-back pain" (page 11).

**147**  The findings made by Dr. Reebye on his examination of the plaintiff included pain on palpation of the para-spinal musculature in the plaintiff's lower back, and pain on palpation of the right and left upper trapezius musculature. He provoked no pain on palpation of the thoracic para-spinals and no pain on spinous processes in the cervical, thoracic or lumbar regions.

**148**  Having taken a history from the plaintiff and having conducted his physical examination and a review of the relevant documents, Dr. Reebye expressed the following opinions (my summarizing, except where quotes are included):

1. He agrees with Dr. Adrian's opinion that the plaintiff suffered injuries to her neck and lower back from the accident of May 5, 2010, resulting in mechanical neck and lower-back pain symptoms which have become chronic.
2. He agrees with Dr. Adrian's opinion that the prognosis for further recovery of the plaintiff's low back pain symptoms over time is poor. But Dr. Reebye believes that the plaintiff could develop better coping strategies for her pain symptoms in the future.
3. Dr. Reebye agrees with Dr. Adrian's opinion that it is unlikely that the injuries suffered in the motor vehicle accident will undergo progressive deterioration over time.
4. He agrees with Dr. Adrian's opinion that the plaintiff is partially disabled as a result of her injury in that she has physical limitations, namely, difficulty sitting or standing for extended periods, difficulties lifting (and working with) greater than 15 pounds, inability to play sports such as volleyball and difficulty in increasing her running distances. Dr. Reebye says that these limitations are caused by her chronic neck and low back pain symptoms and they affect her quality of life.
5. In the future, the plaintiff will likely have increases in her pain symptoms in her neck and low back with activities involving prolonged sitting, heavy or repetitive lifting and impact activities.
6. Dr. Reebye agrees with Greg Jackson's opinion that the plaintiff is not completely disabled in her ability to work as a physical education teacher.
7. The plaintiff, "will likely have to live with an element of chronic pain symptoms but I am of the opinion that she will be able to develop better coping strategies from her exercises and possibly modifications of her work setting."
8. If the plaintiff increases her working hours, then this may increase her pain symptoms which in turn may require her to modify her work schedule or work environment.
9. The plaintiff "will not be totally disabled from her neck and low back pain symptoms in that she will be able to continue working as a teacher even if she were to increase her work hours. I do not expect her to take periods of time off work secondary to her pain symptoms."

"Modifications in her job such as obtaining an employment closer to her home with a reduction of driving times and a teaching job not requiring increased physical demands will likely reduce some of her pain symptoms and help her better cope with her pain symptoms."

**149**  Part of Dr. Reebye's prognosis is contained in the opinions which I have just set out. At page 5 of his report, Dr. Reebye lists the limitations on the plaintiff's activities which he believes will continue to occur in the future. These limitations are similar to those described by the plaintiff in her trial testimony.

**150**  Dr. Reebye states (at page 5) that:

. . . Ms. Schafer will continue to improve with regard to coping with her pain symptoms with her ongoing exercises but she will also need to incorporate water-based exercises to offload some of her pain symptoms so that she can progress with her land-based running activities.

Ms. Schafer may, however, be limited in participating in some of her sports such as volleyball, softball, and running long distances, as these activities may aggravate her neck and low back pain symptoms.

. . .

Ms. Schafer may have flares of her back and neck pain with increased demands at work and at home with overhead activities, lifting heavier objects greater than 15 pounds or with increased demands of standing and walking in the classroom.

**151**  Dr. Reebye goes on to state (at page 6) that the plaintiff would benefit from ergonomic changes to her work station and that some of her pain symptoms would decrease if she were to find a teaching job closer to her home. At the conclusion of the main part of his report (at page 6) Dr. Reebye gave this opinion:

. . . I feel that with support in her work environment, she will do well continuing with her work as a teacher.

**152**  Dr. Reebye was cross-examined extensively on his report. He was unable to attend court in person due to weather conditions as so he testified by way of video conferencing.

**153**  Although the cross-examination was extensive, in my opinion only a few points were made which affected the opinions that he had given in his report. I will summarize his evidence on those points.

**154**  I understood Dr. Reebye to agree with plaintiff's counsel's suggestions that exercise will not cure the plaintiff's low back pain nor the underlying injury, but will only help to reduce the pain and thereby help the plaintiff to cope with the pain. Water running was included in the exercises being referred to.

**155**  Counsel for the plaintiff challenged Dr. Reebye's opinion as to the plaintiff's ability to work as a physical education teacher. Dr. Reebye said that he had believed that the plaintiff "is a phys-ed teacher by trade," but acknowledged that he did not know the exact job description for a physical education teacher. The doctor allowed that it was possible that the plaintiff will have to take time off in the future due to low back pain but testified that it was "more likely than not" that she will not miss work as a teacher due to low back pain. One of the facts he relied on in forming that opinion was the plaintiff's statement to him to the effect that she had not missed any teaching work, even though she had to travel long distances on each day that she worked.

**156**  Dr. Reebye agreed that increasing the plaintiff's working hours, if accompanied by vigorous activities in teaching physical education, would cause increased pain to the plaintiff. He agreed that increased pain would make it more difficult for the plaintiff to continue working, but he did not agree that increasing her working hours would increase the likelihood that she would have to miss work occasionally due to low back pain.

**157**  At one point in the cross-examination, counsel for the plaintiff suggested to Dr. Reebye that his opinion would change to some extent, if the plaintiff had missed work (as a teacher) in the past due to low back pain and Dr. Reebye agreed with that suggestion.

**The Issue of Credibility**

**158**  Defence counsel does not challenge the plaintiff's honesty. But he submits that the plaintiff's testimony on several issues is not reliable and should not be accepted at face value. The defence challenges the plaintiff's assertions that she could not work full time as an ordinary classroom teacher. It is also argued that the plaintiff's refusal to relocate to Port Alberni (or move to a location closer to Port Alberni), even in the event that she is offered a full-time teaching position (as a classroom teacher) is unreasonable, and amounts to a failure to mitigate her injury.

**159**  Defence counsel does not challenge the credibility of Nigel Ward or Karli Van Vliet (but does not accept Ms. Van Vliet's evidence as to the prospects for work as a physical education teacher).

**160**  The defence does not challenge the opinions given by Dr. Adrian on grounds of credibility but it is implied that his opinion that further improvement is unlikely, is weakened, because the plaintiff admitted to significant improvement in her condition in the two months following her examination by Dr. Adrian.

**161**  The defence not only did not challenge the opinions given by Greg Jackson, but his opinions were relied on to a significant extent.

**162**  Counsel for the plaintiff challenged the opinions given by Dr. Reebye, to the extent that they were inconsistent with the opinions expressed by Dr. Adrian.

**The Credibility of the Plaintiff**

**163**  There are several matters that have the potential to adversely affect the credibility of the plaintiff's evidence relating to the effects of her injury on her ability to work as a teacher.

**164**  First, the plaintiff made a number of statements on her examination for discovery that were said to be inconsistent with her trial testimony on the same subjects.

**165**  There is an inconsistency between the plaintiff's trial testimony to the effect that her symptoms were similar on August 8, 2012, (when she saw Dr. Adrian) and on November 14, 2012, (when she saw Dr. Reebye); and her testimony on discovery to the effect that she had experienced improvement in her symptoms in the few months before her examination for discovery. There is a discrepancy here but "similar" is not equivalent to "exactly the same." As a consequence, I would place little weight on this inconsistency. But there was another inconsistency between the plaintiff's trial testimony (on direct) that there had been no improvement since the discovery, and her trial testimony (on cross) that her neck pain had resolved.

**166**  There is inconsistency between the plaintiff's testimony on discovery to the effect that she had not turned down any work opportunities since the accident, and her trial testimony to the effect that she turned down some work by not answering her phone when she knew her employer was calling. I find the plaintiff's explanation for this discrepancy to be inadequate. The plaintiff had to know that the lawyer questioning her at the discovery wanted to know whether she had missed any work, due to her pain symptoms. That is an important issue.

**167**  The plaintiff denied telling Dr. Myer on June 10, 2010, that she was back to work and had no pain in her neck or back. The doctor was not called to give evidence. As a consequence, it has not been established that the plaintiff made the alleged inconsistent statement.

**168**  I was not persuaded that the plaintiff's conduct in pursuit (and further intended pursuit) of training in special needs education was inconsistent with her professed goal of teaching physical education in high school.

**169**  There was an inconsistency between the plaintiff's discovery evidence to the effect that she had worked almost full time during the period from January to June 2012, and her trial testimony to the effect that she had worked about 70% of the time. I accept her explanation, and find that she was mistaken in giving her discovery evidence and that she found this out after reviewing her employment records. The inconsistency might well have been material, if the records had shown that the plaintiff worked almost 100% of the time, whereas the plaintiff was insisting she could only work 70% of the time.

**170**  The plaintiff firmly disagreed with the opinion of Greg Jackson who said, in effect, that she had the capacity to work full time as an ordinary classroom teacher. Dr. Adrian gave a similar opinion on this subject. These were witnesses called by the plaintiff, and she has given evidence which is inconsistent with their opinions on an important subject. The defence expert, Dr. Reebye, expressed the opinion that the plaintiff was capable of working full time as a teacher. In my opinion, this inconsistency diminishes the reliability of the plaintiff's assertion that she cannot work full time as an ordinary classroom teacher.

**171**  The plaintiff's demeanour when giving evidence was good. She conveyed the appearance of a person who believed in the truth of what she was saying. The defence did not challenge her apparent honesty and I find that she was honest in giving her testimony. However, as a result of the concerns which I have described in some of the preceding paragraphs, I have doubt about the reliability of some of the evidence given by the plaintiff at trial, and in particular her testimony relating to her capacity to work as an ordinary classroom teacher.

**The Reliability of the Evidence of the Lay Witnesses**

**172**  No challenge was made to the honesty of Nigel Ward or Karli Van Vliet. It was not suggested that any of Mr. Ward's evidence was unreliable, and I accept his evidence. Mr. Ward's evidence confirms the plaintiff's trial testimony to some extent, on the issue of the effects of the plaintiff's injury on her ability to engage in her previous physical activities.

**173**  I accept generally the evidence given by Karli Van Vliet, except for the opinion she has expressed relating to the likelihood of the plaintiff being offered part-time employment as a high school physical education teacher. It seemed to me that her evidence on this point was projecting only a possibility.

**The Reliability of the Opinions of Dr. Adrian and Greg Jackson**

**174**  There was no direct challenge to the opinions expressed by Dr. Adrian. I accept that the opinions he expressed based on his examination of the plaintiff on August 8, 2012 were valid and reliable at the time they were given. But the plaintiff has admitted that there was significant improvement in her neck and back pain symptoms, in the months after she was examined by Dr. Adrian. I think the fact of further improvement (which was of course unknown to Dr. Adrian) should be considered in assessing the likelihood of further improvement in the future.

**175**  As mentioned, the defence did not challenge the opinions given by Greg Jackson. I accept the opinions he has expressed including those which relate to the plaintiff's capacity to work full-time as an ordinary classroom teacher.

**The Expert Opinion Evidence given by Dr. Reebye**

**176**  Counsel for the plaintiff challenged the reliability of several of the opinions given by Dr. Reebye. But the doctor did not resile from any of the essential opinions that he had given in his report. Moreover, he had previously agreed with many of the opinions expressed by Dr. Adrian, and in cross-examination he did not expressly disagree with any of Dr. Adrian's opinions.

**177**  I think Dr. Reebye did concede, on cross-examination, that the plaintiff (if working full time) might experience flare-ups of her low back symptoms in the future, which could possibly cause her to miss work as a teacher. That was the main (and perhaps the only) inroad made by plaintiff's counsel on his lengthy cross-examination of Dr. Reebye. I think this concession was made on the assumption that the plaintiff would be teaching as an ordinary classroom teacher. But Dr. Reebye stated that, although possible, it was "more likely than not" that the plaintiff would not have to take time off work.

**178**  When Dr. Reebye gave his opinions, the plaintiff was still complaining of some intermittent neck pain symptoms. At trial, the plaintiff conceded that her neck pain had now basically resolved. I think that fact must also be considered when assessing the chance that the plaintiff's condition may improve in the future.

**What Amount of Damages should be Awarded to the Plaintiff for Non-pecuniary Loss?**

**179**  There is no dispute about the nature of the injuries sustained by the plaintiff as a result of the accident. She suffered minor injuries to her left knee and to her face, and experienced some headaches. These injuries, and the headaches, had resolved within a month or so after the accident.

**180**  I find that the plaintiff sustained injury to the soft tissues of the musculoskeletal structures of her neck and lower back. The injury to these structures has caused pain in the plaintiff's neck and low back. By the time of trial, the plaintiff's neck pain symptoms had resolved, but she continues to experience pain in her low back on an intermittent basis.

**181**  I find that the impact of the collision was violent and that the forces exerted on the plaintiff's body were capable of causing, and did cause significant injury. Although the medical experts did not offer an opinion as to the severity of the injury, I find that the injury was at least moderate in severity.

**182**  The effects of the injury on the plaintiff's life have been significant up to the time of trial. I find that the plaintiff was disabled from working for about one month after the accident, as a result of the pain caused by her injury. During that first month, the injury prevented the plaintiff from engaging in any of the recreational and athletic activities that she had done before the accident. Thereafter, the plaintiff gradually resumed some of her former physical activities, such as softball, soccer and running. But she has not been able to do these activities as strenuously as she had done them previously. She has not even attempted to resume a number of her former activities, for fear of aggravating her low back pain.

**183**  I am reluctant to find that the plaintiff is not capable of resuming some of her activities (such as basketball, snowboarding and skiing). But I do not fault the plaintiff for refraining from engaging in these vigorous activities, for fear of triggering low back pain. Since she has been such an active person, it seems likely that she will attempt to engage in some of these activities in the future. But if she does, it seems unlikely that she will ever be able to do them with the intensity she applied in the past.

**184**  The plaintiff is able to do the regular housework required of her. But she is not able to do any of the gardening and yard work that would be described as heavy.

**185**  The plaintiff's pain symptoms have had some adverse effect on her ability to maintain the sexual relationship with Nigel Ward, that she had in the past.

**186**  Since January 2012, the plaintiff has been working as a substitute teacher on call, in Port Alberni, about 70 to 75% of full time work. She says that, for a number of years, she has wanted to become a high school physical education teacher. But the plaintiff says that she believes she would not be capable of doing the physical activities required of such a teacher, at least not on a full-time basis. I accept the plaintiff's evidence on this issue. I find that she is presently incapable of working full-time as a high school physical education teacher, due to her low back condition. If she were offered a job as a full-time high school physical education teacher, I think it would be unreasonable to expect her to accept that job. On the other hand, the chances that she will be offered such a position in the foreseeable future, seems remote.

**187**  The plaintiff has testified that she would not be capable of performing the work required of an ordinary classroom teacher, on a full-time basis. She says she cannot do more than work about 70% of the time, and that she would refuse any offer of a full-time position as an ordinary classroom teacher.

**188**  I do not accept the plaintiff's trial testimony to the effect that she has missed "a few days" work as a teacher since the accident. I find that, as she testified on discovery (and as she told Dr. Reebye) she has not missed any work opportunities due to low back pain.

**189**  I do not accept the plaintiff's testimony to the effect that she is incapable of performing the work required of an ordinary classroom teacher, on a full-time basis. Her evidence is inconsistent with the opinion evidence given by Dr. Adrian, Greg Jackson and Dr. Reebye. I accept that she would experience some difficulties in doing that work full-time. But it appears that the main difficulty would be caused by the two hours driving to and from Port Alberni each day. It seems to me that whether or not she would continue with this long distance commuting if she obtained a full-time teaching position is a matter of choice for the plaintiff. The difficulties caused by sitting or standing in the classroom for lengthy periods of time can be reduced (but not eliminated) by taking the steps suggested by the expert witnesses.

**190**  The plaintiff's ongoing intermittent back pain will continue to impair her ability to engage in her former recreational activities. The extent of this interference will continue to be significant. But I infer that her ability to resume some of her former activities with more intensity would be increased, if she decided to take steps to reduce her driving time for her employment.

**191**  I find that the plaintiff has taken reasonable steps in an effort to improve her condition. Notwithstanding this, she continues to experience intermittent episodes of low back pain and these episodes will continue to occur in the future, for an indefinite period of time. But I find that there is a substantial possibility that the plaintiff will continue to experience improvement in her condition, in the future. The opinions of Dr. Adrian and Dr. Reebye to the effect that the prognosis for further significant improvement is poor, should be accepted. But I think their outlook for the future would have been less pessimistic, had these doctors known that the plaintiff's low back pain had improved, and her neck pain had resolved, during the period from August 2012 up until the time of trial. Moreover, the plaintiff is strongly motivated to improve her condition, and expressed a positive and hopeful attitude in this regard.

**192**  Nevertheless, the plaintiff has incurred a considerable amount of pain and suffering and loss of enjoyment of life up to the time of trial, and will continue to incur such effects in the future. She must be fairly compensated for the substantial non-pecuniary loss that she has sustained and will continue to sustain. It seems unlikely that she will ever be able to pursue the career that she had wanted most of all. She is a person who enjoyed vigorous physical activity and, I infer, she took pride in her ability to engage in these activities.

**193**  Counsel for the plaintiff 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=) at para. 46, where the court set out a list of factors that trial judges should consider when deciding the amount of an award for non-pecuniary damages. I have already considered all of those factors in making my findings of fact, except for one. Plaintiff's counsel made reference to the principle that a plaintiff's stoicism in handling pain and disability should not be held against him or her. I accept that submission. To some extent, it may be said that the plaintiff has demonstrated stoicism when dealing with the pain from her injury, for example by driving from Nanaimo to Port Alberni and return, on each day that she works.

**194**  Counsel for the plaintiff submitted that the plaintiff should be awarded an amount between $90,000 and $110,000 for non-pecuniary loss. He referred the court to several authorities which he argued supported an award in this range.

**195**  Counsel for the defendants submitted that a fit award for damages for non-pecuniary loss would be in the range of $50,000 to $60,000. He cited five case authorities in support of that position.

**196**  I find it unnecessary to review the cases referred to by counsel on this issue. Every case must be decided on its own facts, and there are always significant differences, even between cases that are somewhat similar. No two plaintiffs will ever be the same in age, previous state of strength and health, occupation and other activities. The injuries sustained by one plaintiff will never be the same as those incurred by another, in kind or severity, and the reaction of any two persons to the pain of a similar injury or to a particular treatment will rarely be the same. Other differences can include the apparent length of the recovery period and, if the plaintiff has not recovered, the kind and extent of residual effects remaining from the injury at the time of trial and whether any of the effects will be permanent.

**197**  In my opinion, having regard to the facts I have found, a fair and reasonable amount of damages for non-pecuniary loss would be $70,000, and I order that the plaintiff be awarded that amount under this head of loss.

**What Amount of Damages should be Awarded for Past Wage Loss?**

**198**  The parties agree that the plaintiff should be awarded $2,000 for past loss of income. That will be the amount of the award for this claim of the plaintiff.

**Should any Award of Damages be made for Loss of Future Earning Capacity, and if so, in What Amount?**

**199**  The leading case on the subject of damages for loss of future earning capacity is *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=). Counsel agreed that this was the leading case, but counsel for the plaintiff argued that a trial judge may still decide the issue of entitlement for damages for loss of future earning capacity, by reference to the four factors originating 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.). Mr. Huntsman also contended that this was the method that the court should use in this case, to decide the issue of entitlement.

**200**  Counsel for the defendants relied on the principles stated in *Perren v. Lalari*, and in particular on paragraph 32 which, stated in part:

A plaintiff must always prove . . . that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earnings capacity, either on an earnings approach . . . or a capital asset approach . . .

**201**  Plaintiff's counsel relied on statements made by judges of this court in *MacKenzie v. Rogalasky* [*2011 BCSC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2RP-00000-00&context=) (Ker J.) and *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=) (MacKenzie J.) as support for his position.

**202**  I think that certain statements made by the trial judges in each of those two cases, if read in isolation, appear to support the submission of counsel for the plaintiff. However, when the reasons are read in context, it is my opinion that those judges also stated the correct test for entitlement, as established in *Perren v. Lalari*. That is the test that must be applied. If, in either of those cases, the trial judge at some point misstated the test for entitlement, it is my opinion that he or she effectively applied the correct test, in deciding that issue.

**203**  It is apparent that the test for proof of entitlement to an award of damages for loss of future earning capacity requires a plaintiff to prove two factual elements, namely:

1. There is a substantial possibility that a future event adverse to the plaintiff will occur; and
2. There is a substantial possibility that, if that event does occur, it will cause a loss of income to the plaintiff (by reason of the injury caused by the defendant).

**204**  In this case, the plaintiff submits that there are three potential future events adverse to the plaintiff that may occur, namely:

1. The plaintiff might be offered a job as a full-time high school physical education teacher in Port Alberni (which she is not capable of doing).
2. The plaintiff might be offered a job in another location such as Courtenay as a full-time ordinary classroom teacher (which she could not accept because of the low back pain which would be caused by the even longer commute).
3. The plaintiff might be offered a job in Port Alberni as a full-time ordinary classroom teacher (which she could not reasonably be expected to accept due to low back pain which would be caused by the increased hours of work and by the two hours of daily driving that would be required. In the alternative, if she should accept, she would have to miss work, from time to time, due to low back pain).

**205**  Counsel for the plaintiff submits that the chance that each of those three future events will occur, is a real and substantial possibility. Counsel then submits that, if any one of those events does occur, there is a substantial possibility that the event will cause a loss of income to the plaintiff.

**206**  Counsel for the defendants submits that (except perhaps for the possibility of a job offer as a full-time ordinary classroom teacher in Port Alberni) the future events postulated by the plaintiff are mere possibilities and that there is no substantial possibility that any of them will occur. In the alternative, Mr. Hutchinson submitted that even if there is a substantial possibility that the plaintiff will be offered a full-time position as an ordinary classroom teacher, then the possibility that increasing her working hours from 70% or 75% to 100% of full time will increase her low back pain to the point where she will have to take time off work, does not amount to a substantial possibility. Counsel argued that therefore, that event, if it occurred, would not result in a loss of income.

**207**  In my opinion, the chance that the plaintiff will be offered a full-time position as a high school physical education teacher in Port Alberni in the foreseeable future does not rise to the level of a substantial possibility. As I see it, the same applies to the chance that she might be offered a full-time teaching job in Courtenay.

**208**  However, in my view, the facts in this case do establish a substantial possibility that the plaintiff will be offered a full-time position as an ordinary classroom teacher in Port Alberni, in the foreseeable future. I am also of the opinion that, if she is offered such a full-time position and accepts it, there is a substantial possibility that she will occasionally experience flare ups of her low back pain symptoms, some of which episodes may require her to take a day off work.

**209**  Greg Jackson opined that the plaintiff might miss work in the future, but he appeared to be assuming that the plaintiff would be working as a physical education teacher. Dr. Reebye allowed, in cross-examination, that it was possible that the plaintiff would miss work in the future due to flare-up episodes, but he said it was "more likely than not" that she would not miss work for this reason. However, I think this opinion leaves room for the co-existence of a substantial possibility. Dr. Adrian noted difficulties that the plaintiff would experience with some aspects of teaching work, but did not offer any clear opinion on the point at issue.

**210**  If the plaintiff suffers a pain episode that requires her to take time off, there is a substantial possibility that she will incur a loss of income as a result of missing work. It may be that full-time teachers are allowed one or more "sick days" per month, which, if the teacher's absence is supported by a doctor's letter, would not result in a deduction from the teacher's salary. If that was so, the sick-day allowance might well cover any future absences of the plaintiff, made necessary by a flare up of her low back pain. However, there is no evidence in this case to prove any terms of the collective agreement between School District 70 and the teachers employed by the school district.

**211**  I conclude that the plaintiff has established a "substantial possibility of a future event leading to an income loss."

**212**  It is impossible to predict with any degree of certainty how often the plaintiff, working full-time as an ordinary classroom teacher, would suffer a flare up of her symptoms; or, if she did, whether the flare up would be serious enough to cause her to take a day off work. It might occur once a month, or even less often. It seems to me that the chance that the plaintiff will incur a loss of income in the future due to her injury, on any regularly occurring basis, is quite small.

**213**  Another complicating factor is that the possibility that the plaintiff will miss work due to flare ups in the future would be increased considerably if she would be driving a motor vehicle for two hours each day. That, of course, aggravates her low back symptoms. According to what she told at least one of the experts, and on her trial testimony, the plaintiff can drive for 30 minutes continuously without aggravating her lower back. If she moved to Port Alberni, or even to Parksville or Errington, it would appear that commuting to and from work would no longer be a source of such aggravation of her symptoms.

**214**  On looking at all of the circumstances of this case, including the evidence given by the plaintiff and Nigel Ward, I think there is some possibility that they may move their place of residence to accommodate the plaintiff in this way, should she be offered a full-time teaching position in Port Alberni. But on the evidence, I am unable to say that this is a substantial possibility at the present time, while the plaintiff is only a substitute teacher. Thus, there remains the possibility that the plaintiff might experience a serious flare-up of her symptoms, even while she is only working about 75% of the time. But I infer from her work history that this possibility is remote.

**215**  The evidence establishes that if the plaintiff was working full time as a teacher she would earn about $51,000 per year. The salary would be the same, whether she was working as a physical education teacher or an ordinary classroom teacher.

**216**  Counsel for the plaintiff submitted that the amount of this award should be assessed using the method of the "capital asset" approach, rather than the "earnings" approach. I agree with this submission.

**217**  The four factors to be considered when applying the capital asset approach are:

1. Whether the plaintiff has been rendered less capable over all from earning income from all types of employment;
2. Whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. Whether the plaintiff has lost the ability to take advantage of all job opportunities which might have otherwise been open to him or her, had he or she not been injured; and
4. Whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

**218**  On the facts of this case, it is my opinion that all of these issues should be answered in the affirmative with respect to the plaintiff. The plaintiff has not lost any income during the year that she has been working part time as a teacher in Port Alberni. But that fact has only limited relevance to this issue. She is yet to be tested for full-time work.

**219**  Plaintiff's counsel suggested that the court should use the method adopted in several case authorities where awards were determined by taking "one or more years" of the plaintiff's projected annual income. Here, counsel submits that the plaintiff should be awarded the sum of $204,000, which would be four years of her annual salary as a full-time teacher. In my opinion, the evidence does not support that approach.

**220**  As stated, the first position of counsel for the defendants was that the plaintiff had not proved entitlement to an award for loss of future earning capacity (because she had failed to prove a substantial possibility of a future event leading to an income loss). The alternative position of the defendants was that any award should be modest, and well below the $50,000 range, because of the relatively small percentage chance that a loss of income would occur. I agree with this submission.

**221**  The court must take into account the positive and negative contingencies. The assumptions upon which an award is based may prove to be wrong. There may be an improvement in health, an opportunity for advancement, a decline in the economy and loss of employment, as well as the usual chances and hazards of life. Ultimately, the award must be one that is fair and reasonable in all of the circumstances of the particular case. See *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.

**222**  I have found that the plaintiff's capital asset (i.e. her capacity to earn income in the future) has been diminished by the injury caused by the defendant's ***negligence***. The degree or extent of this reduction is significant but not substantial. In my opinion, the award that would be a fair and reasonable compensation for the plaintiff's loss is $30,000. The plaintiff shall recover $30,000 for this aspect of her claim for damages.

**What Award should be made for Special Damages?**

**223**  The parties agree that the plaintiff has properly incurred expenses of $1,382.47 up to the time of trial. That will be the award for special damages.

**What Award should be made for the Cost of Future Care?**

**224**  The plaintiff claims in excess of $32,000 for the cost of future care. There was evidence that the plaintiff intends to continue with a regulated and supervised exercise program. The evidence established that this type of program would cost her in excess of $100 per month.

**225**  Both Dr. Adrian and Dr. Reebye agreed that the plaintiff should continue with a structured exercise program, and that she would benefit from the supervision of a personal trainer for some significant (but limited) period of time. I infer from the evidence of these two experts that there is a substantial possibility that flare ups of the plaintiff's low back symptoms will occur in the future and that such episodes, if extended, might require the plaintiff to attend physiotherapy. In my opinion, the chance that such potential flare ups will last so long as to require physiotherapy is quite small.

**226**  The experts have said that the plaintiff should be able to conduct her own exercise program, without supervision, within a time frame that I infer to be one year or less. The evidence showed that the plaintiff commenced this supervised exercise program in July 2012.

**227**  Counsel for the defendants suggested an award in the range of $2,000 to $3,000 for this part of the plaintiff's claim.

**228**  At some point in the cost-benefit analysis, it makes sense for a person in the plaintiff's situation to set up a home gym in which to carry on her exercise program. That would require her to purchase some exercise equipment, the cost of which was not canvassed in the evidence.

**229**  In all of the circumstances, I find that a just award for the cost of future care would be $6,000, and I so order.

**The Defence of Failure to Mitigate**

**230**  In their response to civil claim, the defendants included the following pleadings:

Part 1, Division 3

1. The plaintiff has failed to follow medical advice in respect to treatment or exercise.

. . .

Part 3, Legal Basis

1. The plaintiff could, by the exercise of due diligence, have reduced the amount of any alleged injury, loss, damage or expense, and the defendants say that the plaintiff failed to mitigate her damages.

**231**  It is apparent that this defence alleged that the failure to mitigate consisted in the plaintiff's alleged failure "to follow medical advice in respect to treatment or exercise." There was no evidence whatsoever that the plaintiff failed to follow any medical advice as to treatment or exercise. The evidence is all the other way. The related allegation that the plaintiff failed to exercise due diligence must be taken to refer to the plaintiff's failure to follow medical advice. I conclude that the defendants have failed to establish the defence of failure to mitigate.

**232**  In final argument, counsel for the defendants referred to the plaintiff's commuting to and from Port Alberni when the long drives aggravated her low back pain, as being an issue "of mitigation." It was also said that, if the plaintiff pursued a career in teaching physical education in high school that would also aggravate her low back symptoms, whereas that could be avoided by working as an ordinary classroom teacher. From this foundation, defence counsel argued that "the plaintiff has a duty to mitigate her damages."

**233**  The defence of failure to mitigate was not pleaded in those terms, and in my view, cannot be raised at this late stage. It may be arguable that the plaintiff's failure to take steps to avoid the long drives to and from Port Alberni is, in some sense, a failure to mitigate the effects of her low back injury. However, that matter was argued in the context of the claim for loss of future earning capacity. The expert medical evidence does not suggest that driving long distances is hindering the plaintiff's recovery. Rather, it is to the effect that the plaintiff will likely never recover fully.

**234**  It is unknown whether the plaintiff will continue to commute to Port Alberni if she obtains a full-time teaching position there. At the present time, her decision to continue driving back and forth while working as a substitute teacher might properly be described as stoicism on her part. Her desire to continue living in Nanaimo at the present time is understandable. In any event, the defence of failure to mitigate was not even raised or argued directly, and I reject it.

**Summary**

**235**  I summarize the damages which are awarded to the plaintiff:

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Non-pecuniary loss | $70,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Past loss of earnings | $ 2,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Loss of future earning capacity | $30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Special damages | $ 1,382.47 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Cost of future care | $ 6,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total Damages | $109,382.47 |  |

**Costs**

**236**  It would appear that the plaintiff should have her costs at the usual scale. If the parties have a dispute about costs that they cannot settle, a hearing of the issue may be arranged by contacting the trial scheduling manager. That contact should be made within 10 days of this date.

D.A. HALFYARD J.

**End of Document**

[***Taylor v. Depew, [2012] B.C.J. No. 1967***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S23X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L. Fenlon J.

Heard: April 10-13 and May 22, 2012.

Judgment: September 24, 2012.

Docket: M033167

Registry: Vancouver

**[2012] B.C.J. No. 1967** | 2012 BCSC 1403

Between Sean David Taylor, Plaintiff, and Matthew John Depew, Defendant

(96 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Leg injuries — Fractures — Fibromyalgia or chronic pain — Psychological injuries — Depression — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Pre-existing injury — Contributory *negligence* — Action by plaintiff for personal injury damages allowed — Parties were camping at site accessible by narrow road — Plaintiff's motorbike collided with defendant's dune buggy — Defendant 70 per cent liable, as evidence established acceleration out of blind corner and failure to take immediate evasive action — Despite pre-existing conditions, plaintiff established accident caused chronic pain and depression persisting 11 years later — Plaintiff awarded 70 per cent of non-pecuniary damages of $115,000, special damages of $2,981, costs of future care of $1,740, lost housekeeping damages of $15,000, past wage loss of $70,000, and lost earning capacity of $90,040.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Employment status — Extent of incapacity — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Non-pecuniary loss — Action by plaintiff for personal injury damages allowed — Parties were camping at site accessible by narrow road — Plaintiff's motorbike collided with defendant's dune buggy — Defendant 70 per cent liable, as evidence established acceleration out of blind corner and failure to take immediate evasive action — Despite pre-existing conditions, plaintiff established accident caused chronic pain and depression persisting 11 years later — Plaintiff awarded 70 per cent of non-pecuniary damages of $115,000, special damages of $2,981, costs of future care of $1,740, lost housekeeping damages of $15,000, past wage loss of $70,000, and lost earning capacity of $90,040.**

**Tort law — *Negligence* — Causation — Contributory *negligence* — Apportionment of liability — Action by plaintiff for personal injury damages allowed — Parties were camping at site accessible by narrow road — Plaintiff's motorbike collided with defendant's dune buggy — Defendant 70 per cent liable, as evidence established acceleration out of blind corner and failure to take immediate evasive action — Despite pre-existing conditions, plaintiff established accident caused chronic pain and depression persisting 11 years later — Plaintiff awarded 70 per cent of non-pecuniary damages of $115,000, special damages of $2,981, costs of future care of $1,740, lost housekeeping damages of $15,000, past wage loss of $70,000, and lost earning capacity of $90,040.**

|  |
| --- |
| Action by the plaintiff, Taylor, against the defendant, Depew, for personal injury damages. The parties were part of a group of friends camping at a forest recreation site. The plaintiff's motorbike collided head-on with the defendant's dune buggy on a narrow dirt road as each rounded a corner. The plaintiff's evidence was that the defendant accelerated out of a blind corner leaving no room for evasion. The defendant's evidence was that the plaintiff did not see him because he was looking down at the road, and that his evasive action could not avoid the collision. The plaintiff suffered a fractured femur above the knee. Liability, causation and the amount of damages was at issue. Eleven years after the accident, the plaintiff suffered from chronic pain and depression. He acknowledged pre-existing conditions that impacted his work as a labourer and his recreational activities. The conditions were comprised of chronic elbow pain from a workplace fall, episodic severe testicular pain that required surgery, and episodic hemorrhoids that required surgical removal. The defendant attributed the plaintiff's ongoing issues with his pre-existing conditions.  HELD: Action allowed.  The defendant was 70 per cent liable for the accident and resulting damages. The defendant was warned that the plaintiff was on the road both prior to driving the dune buggy, and again before the blind corner. On his own evidence, the defendant did not brake or steer immediately upon seeing the plaintiff. The witness and photographic evidence supported the plaintiff's account of the accident, occurring at the midpoint of a straight stretch of the road. The plaintiff bore some responsibility for not traveling at a speed sufficiently slow to avoid oncoming traffic. The plaintiff proved that the collision caused significant injuries to his leg and back that continued to cause pain and impair functioning 11 years after the accident and permanently impaired his earning capacity. The plaintiff was awarded 70 per cent of non-pecuniary damages assessed at $115,000, special damages of $2,981, costs of future care of $1,740, lost housekeeping damages of $15,000, past wage loss of $70,000, and lost earning capacity of $90,040. The net award totaled $206,333. |

**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=)

**Counsel**

Counsel for the Plaintiff: H.D.M. Edmonds, J.M. Sarophim.

Counsel for the Defendant: M.G. Bolda, H.S. Roesch-West.

**Reasons for Judgment**

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

**INTRODUCTION**

**1**  Eleven years ago the plaintiff's motorbike collided head-on with the defendant's dune buggy on a narrow dirt road as each rounded a corner. The force of the collision fractured the plaintiff's thigh bone just above the knee. Liability for the accident, causation of the injuries sustained, and the amount of damages are all in issue.

**ANALYSIS**

**1. How did the accident happen?**

**2**  The analysis on liability begins, as it must, with a detailed description of the accident. The collision occurred while the plaintiff, Sean Taylor, the defendant Matthew Depew, and a group of friends were on a camping trip at a forest service recreation site east of Campbell River on Vancouver Island. The only way in and out of the camping site was a single lane dirt road which wound through a forest and connected with the main campground.

**3**  Just before the collision occurred, the defendant was driving the dune buggy away from the group's campsite accompanied by R.B. Baird, who was sitting in the passenger seat. The defendant rounded a 90-degree corner and had just entered a straight stretch. The plaintiff was riding towards the campsite and had just rounded a 60-degree bend before entering the straight stretch. The two vehicles collided in the length of road between the two corners.

**4**  The road was between 6 1/2 to 7 feet wide (78-84 inches) in the stretch where the collision took place. The defendant's dune buggy was 6 feet 2 inches wide (74 inches) and the handlebars on the plaintiff's motorbike were about 2 feet wide (24 inches), so the two vehicles could not have passed each other without one or both moving into the foliage off the road.

**5**  The defendant says he rounded the corner and saw Mr. Taylor coming towards him on the motorbike; he was waiting for Mr. Taylor to make eye contact, but the plaintiff was looking down. When the defendant realized that Mr. Taylor did not see him, he braked hard and steered the dune buggy to the right. He saw Mr. Taylor skid and lay his bike down on its right side so that the front tire of the motorbike came into contact with the right front tire of the dune buggy and became lodged under it. According to Mr. Depew, the collision occurred just as he emerged from the corner.

**6**  Mr. Taylor said that as he came around the 60-degree bend he was navigating a slight dip in the road that drew his attention, then he "saw a flash of yellow" and the two vehicles collided. He was thrown over the handlebars of the motorbike and landed behind the back end of the dune buggy at the edge of the road on his side of the road and in a semi-reclined sitting position facing the way he had come. His left leg was in an unnatural position, resting across his chest towards his right shoulder.

**7**  Having considered all of the evidence, and for the reasons that follow, I find it far more probable that the collision occurred close to the mid-point of the straight stretch and in the manner the plaintiff described.

**8**  First, the evidence of R.B. Baird, who was riding in the dune buggy at the time of the collision, is consistent with the evidence of the plaintiff. Although Mr. Baird was and remains a friend of the plaintiff, I found him to be a credible and careful witness who reported what he remembered and no more, without concern for whether his testimony helped or hindered the plaintiff's case.

**9**  Mr. Baird owned the motorbike and had brought it on the camping weekend for everyone to use. The defendant argues that Mr. Baird's evidence should not be trusted because he was trying to protect his father, who, as the registered owner of the motorbike, would be liable for injuries due to the poor condition of the motorbike, including bald tires and no brakes. I will address the allegations of the poor condition of the bike later in these reasons, but note at this point that Mr. Baird could not be concerned about his father's liability -- the limitation period had long expired and neither the plaintiff nor the defendant had commenced proceedings against Mr. Baird senior.

**10**  Mr. Baird described the defendant accelerating out of the blind corner at between 15-25 kilometres an hour. As they came around the corner, they "saw Sean coming around the other corner, there was a split second and a crash". He recalls the defendant slamming on the brakes "for a second or so" and veering right; he thought the plaintiff was going about the same speed they were. The plaintiff pulled to his right as well and the two vehicles almost cleared but the plaintiff's bike hit the driver's side tire of the dune buggy. Mr. Baird is certain that the plaintiff's bike was upright and was not on its side sliding towards the dune buggy when the collision occurred. He saw Mr. Taylor thrown over his bike and behind the dune buggy. The point of impact, according to Mr. Baird, was on the plaintiff's side of the road, about two feet from the edge of the road on the straight stretch closer to the defendant's corner.

**11**  Second, photographs of the motorbike were put into evidence. While the handlebars were bent, no damage was visible on the right side of the bike as would be expected if Mr. Taylor had laid the bike down and slid across the dirt and gravel road. More importantly, Mr. Taylor, who was wearing shorts and rafting sandals, did not have any abrasions along the right side of his leg.

**12**  Third, the parties entered an agreed statement of evidence of the campground supervisor, Margaret Fix, who arrived on the scene on the day of the accident. Ms. Fix assisted in getting Mr. Taylor to an ambulance out on the highway. She took measurements of the accident site. The straight stretch between the two corners is 31 feet long. Ms. Fix said Mr. Taylor was lying three feet from the defendant's corner. Mr. Taylor is six feet tall, so his feet would be roughly nine feet from Mr. Depew's corner. It is also apparent that he was thrown some distance from the point of contact and landed behind the dune buggy which was 140 inches, or just short of 12 feet long. Based on these measurements, the point of impact must have been 12-15 feet from the defendant's corner. Given that the straight stretch is 31 feet long, that is about the midpoint.

**13**  Fourth, the parties agreed there was a 52-foot sighting distance from the corner Mr. Taylor came around. Using basic speed and distance calculations, the halfway point is 26 feet. At 15 kilometres per hour, it would take 1.9 seconds to reach the mid-point after rounding the corner; at 25 kilometres per hour it would take 1.14 seconds to reach that point. The plaintiff's description of rounding the corner, seeing a flash and then colliding with the dune buggy is consistent with those time and distance calculations.

**2. Who is liable for the accident?**

**14**  I turn now to the question of liability for the accident. Each party argues that the other should be held to a greater degree of liability. If it is not possible to establish different degrees of fault, liability must be apportioned equally: ***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=).

**15**  If this case involved nothing more than two vehicles travelling at the same speed, rounding corners and colliding, I would find both parties equally liable, since both parties had an obligation to drive with due care and attention and at a speed that was not excessive relative to the road conditions, traffic, and visibility. Both the plaintiff and defendant had travelled along this stretch of road a number of times before the accident. They knew that the road was not wide enough for two vehicles to pass. Visibility was restricted. Both should have been proceeding slowly enough to either pull off the road or stop if faced with another vehicle coming from the other direction.

**16**  The plaintiff admits some liability for the accident, acknowledging that he should have been going slowly enough to be able to avoid a collision on the narrow trail. But the plaintiff's position on liability is that the defendant should bear a greater share of responsibility for the accident.

**17**  The defendant argues that the plaintiff is entirely at fault, or at the very least primarily at fault for a number of reasons. First, because the accident occurred just as the defendant emerged from his corner, closer to the defendant's end of the straight stretch, which means that the plaintiff had more time to see the defendant and should have taken action to avoid a collision. For the reasons earlier given, I do not accept the factual assumption that the accident occurred closer to Mr. Depew's corner. But even if the accident occurred somewhat closer to the corner out of which the defendant emerged, there is no basis for concluding that the plaintiff therefore had an opportunity to observe the defendant longer and to take steps to avoid colliding with him -- that would depend entirely on where Mr. Taylor was on the straight stretch when Mr. Depew rounded the corner.

**18**  Second, the defendant argues that the plaintiff was impaired at the time of the accident because he had consumed magic mushroom tea and beer before he rode out on the motorbike. Mr. Taylor admits to having a beer or a beer and a half with lunch before his ride. While he acknowledges that he brought magic mushrooms on the camping trip for the group to enjoy that evening, he denies he consumed any of those mushrooms before his ride.

**19**  A witness called by the defendant, Todd Peacey, who was on the camping trip that weekend and who at that time was a close friend of the plaintiff, testified that he saw Mr. Taylor making mushroom tea. However, I find this evidence to be entirely speculative. Mr. Peacey was 20 feet away from Mr. Taylor when he observed him during lunch. He concluded Mr. Taylor was making magic mushroom tea because he saw him with a Ziploc bag in his hand and observed him putting "something" into a pot of boiling water.

**20**  Having considered the evidence, I find that the plaintiff was not impaired by alcohol or magic mushrooms at the time of the accident.

**21**  Third, the defendant says that Mr. Taylor, Mr. Baird, "along with everyone else on the camping trip" knew that the motorbike had no brakes. The defendant argues therefore that the plaintiff was riding the motorbike at an excessive speed given the condition of the bike.

**22**  The defendant's evidence that the brakes were in poor condition was supported by Todd Peacey. However, both the defendant and Mr. Peacey also testified that the tires on the motorbike were bald, until they were confronted with pictures of the bike which clearly showed tread on the tires. In addition, Sarah Zimmer, Todd Peacey's girlfriend at the time, rode the motorbike during the camping trip and confirmed at trial that the brakes were fine. In the result, I do not find either that the brakes were faulty, or that Mr. Taylor was driving at an excessive speed given the condition of the motorbike.

**23**  Fourth, the defendant argues that quite apart from who caused the accident, greater liability should be apportioned to Mr. Taylor for failing to wear proper safety gear and footwear while riding the motorbike. There is, however, no evidence before me that the wearing of proper gear would have decreased the likelihood of Mr. Taylor suffering a broken femur and his related injuries.

**24**  Having considered the defendant's arguments, I find none to be persuasive. To the contrary, I conclude that the defendant should bear greater responsibility for the accident for the following reasons.

**25**  First, I find that Mr. Depew and Mr. Taylor had discussed the danger of both the motorbike and the dune buggy being out on the trails at the same time, and had talked about it being better to have only one of the vehicles out of the campsite at a time. This conversation occurred after an earlier near miss in which Mr. Depew was driving the dune buggy and Mr. Taylor was a passenger. Mr. Baird was using the motorbike, saw the dune buggy approaching, and pulled off into the bush to permit them to pass. Mr. Taylor was surprised that Mr. Depew had not seen Mr. Baird on the motorbike at all as they drove past him.

**26**  Mr. Depew acknowledges that on the day of the collision he knew Mr. Taylor had taken the motorbike for a ride 10-20 minutes before Mr. Depew decided to go out on the dune buggy.

**27**  Second, Mr. Depew was warned twice immediately before the accident to be careful because Mr. Taylor was out on the road on the motorbike. Mr. Depew admitted that just before the blind corner, Mr. Baird said to him "don't forget about Sean, he's out here somewhere", and Mr. Depew said in response "Yah yah, I know." Sarah Zimmer said that before Mr. Depew left the campsite, she told Mr. Depew to "watch out for Sean" because the road was narrow; there was only one way in and out and they had talked earlier of a near collision.

**28**  Finally, on the defendant's own evidence, he did not brake immediately upon seeing the plaintiff. Mr. Depew testified that as he came around the corner he saw the plaintiff and could tell that the plaintiff was not looking at him but looking down at the road. This accords with the plaintiff's evidence that he was looking down to navigate a dip in the road caused by a dried up waterway just before the collision occurred. The defendant said he did not brake until he made eye contact with the plaintiff and noticed the panicked look in Mr. Taylor's eyes. It follows that Mr. Depew had an opportunity to brake upon seeing the plaintiff and before the plaintiff saw him, but failed to do so or to steer to the right at the earliest opportunity.

**29**  The plaintiff relies on a number of cases in support of his submission that fault for the collision should be apportioned to the defendant in the range of 75-90%. In *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.), an accident occurred on a curve on a dirt and gravel logging road which had one lane with turnouts where two vehicles could pass. The trial judge apportioned liability equally between the parties and the Court of Appeal substituted an apportionment of 75-25% in favour of the plaintiff on the basis that the defendant knew the practice in the area was for vehicles to announce their position on the road to other vehicles by radio and he was driving without one.

**30**  In *Hildebrand v. Musseau*, [*2010 BCSC 1022*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20TT-00000-00&context=), the accident occurred on a dirt and gravel forestry road. The plaintiff and a friend were driving in one direction on dirt bikes and the defendant was going in the opposite direction in a truck. The defendant cut a corner and drove into the path of the plaintiff and his friend who were riding side by side about a foot apart on their side of the road. Upon seeing the truck, the plaintiff had unsuccessfully tried to avoid a collision by crossing the road. The Court apportioned liability 90% to the defendant and 10% to the plaintiff.

**31**  In *Hurdle v. Clarkston*, [*[1990] B.C.J. No. 2355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2HT-00000-00&context=) (S.C.), the plaintiff and a friend were going one way on motorcycles on a gravel road and collided with a truck coming from the opposite direction. The plaintiff and his friend were each travelling in tracks on either side of the centre of the road and as they approached a gentle hill with a curve to their left at the top, the plaintiff eased his bike to the right, standing on his foot pegs to improve his vision as the defendant's truck came into view. The impact occurred in the centre portion of the road and liability was apportioned equally between the parties.

**32**  In *Bearman v. Manchur*, [*[1995] B.C.J. No. 1641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0R2-00000-00&context=) (S.C.), the plaintiff and her friend were riding motorcycles on a dirt road about three miles from their campsite at a B.C. forest service campground when they collided with a pickup truck. The motorcyclists were travelling side by side in the ruts on either side of the centre of the road and as they came to a left-hand curve, the plaintiff slowed down and moved to the right to fall in behind his friend. The defendant came around the corner at 50-53 km/h and upon seeing the motorcyclists, slammed on his brakes, causing him to lose directional control so that he could not steer away from the motorcycles. The collision occurred at the centre of or slightly to the plaintiff's side of the road. The parties were held equally at fault for the accident.

**33**  Ultimately, apportionment of liability turns on the particular facts of each case. In the circumstances of the case before me, I conclude that liability should be apportioned 70% to the defendant and 30% to the plaintiff.

**3. What injuries were caused by the accident?**

**34**  The plaintiff admits that he suffered from three conditions unrelated to the accident and that he is not entitled to be compensated for pain and disability associated with those unrelated medical conditions. As the Supreme Court of Canada 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 para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's ***negligence*** (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. [Emphasis in original.]

**35**  First, Mr. Taylor experienced ongoing left elbow pain before the accident. The elbow pain resulted from a workplace fall in August 2000, about a year before the collision. Mr. Taylor was knocked from a foundation by a hose delivering wet cement to a job site, and landed on rock six feet below. He was compensated for this injury under a Worker's Compensation Board claim. Mr. Taylor returned to work a few weeks after that incident but continues to suffer from chronic pain in his elbow.

**36**  The second pre-existing condition was testicular pain severe enough to interfere with Mr. Taylor's ability to work and to do recreational activities for about two years before the accident. The pain was episodic; Mr. Taylor was able to do lighter work, and engaged in most of his recreational activities in the intervals between flare-ups. He underwent surgery for this condition in the spring of 2001, just before the collision. Both Dr. Bogue and Mr. Taylor testified that the testicular pain appeared to resolve about one year after the surgical intervention. While the plaintiff experienced minor pain referred into his lower back from the testicular problem, it was not in itself disabling and was of a quality and duration far different from the lower back pain experienced following the collision.

**37**  The third unrelated condition was episodic bouts of hemorrhoids that were painful enough to prevent Mr. Taylor from working for a short period of time in 2002. These flare-ups occurred once or twice a year until the hemorrhoids were surgically removed.

**38**  I turn now to the injuries caused by the collision. The defendant admits the plaintiff suffered abrasions and a broken femur in the accident but argues that those injuries healed within months. The defendant attributes the plaintiff's ongoing problems to his pre-existing conditions and earlier injuries, although the defendant led no medical evidence in support of this position.

**39**  I find that the plaintiff has proved that the collision caused significant injuries that continue to cause pain and impair functioning 11 years after the accident. Dr. Brian Bogue, the plaintiff's family doctor, and Dr. Rubin Feldman, a physical medicine and rehabilitation specialist who examined Mr. Taylor in the year preceding trial, provided consistent evidence in support of the plaintiff's claims.

**40**  Dr. Bogue said that the femur is the largest bone in the body and that significant force is required to break it. He described a femur fracture as a severe injury, "one of the worst". Dr. Bogue said that soft tissues are also damaged when a femur breaks and most people experience a lot of problems even after the femur heals. Dr. Bogue described the injuries the plaintiff sustained as "severe" and noted that in addition to the fracture to the shaft of the femur he sustained an injury to the posterior cruciate ligament of the left knee.

**41**  In addition, Dr. Bogue noted that Mr. Taylor's left leg remains scarred and disfigured and his left knee is unstable due to ligament laxity. He said that Mr. Taylor developed lower back pain and right sciatic pain and headache due to his injuries. Dr. Bogue was of the view that Mr. Taylor's main problem is chronic pain, the severity and chronicity of which has caused significant depression and interfered with all aspects of his life, despite the use of pain killers and therapy.

**42**  Dr. Feldman summarized his findings as follows:

This man has had difficulty with a chronic pain syndrome ever since he was involved in a motor vehicle accident in July of 2001. He demonstrates the presence of post-trauma permanent dysfunction of the left knee and of the soft tissues of the left femur together with chronic neuropathic (burning sensation) pain worse in the left thigh but also present to a lesser degree in the right thigh. He also notes a significant decrease in ability to perform heavy physical activity resulting in limitations as have been documented.

A myofascial pain syndrome causing pain in the left low back with the presence of tender nodules in the area were also seen on physical examination.

**43**  Dr. Feldman testified that myofascial pain syndrome is soft tissue injury resulting from trauma to the body. At and near the site of the trauma, nodules of fibrous material are created. Dr. Feldman noted that the onset of Mr. Taylor's low back pain was some time after the collision but stated that it was not surprising that he experienced such an injury given the way he landed in the collision and the injury to the femur, an area of the body that can directly affect the low back.

**44**  Dr. Feldman concluded that the prognosis for recovery is "very guarded now given that it is now 10 years since he has had his initial injury", although he made a number of recommendations which may help to reduce Mr. Taylor's level of pain to the point where he could do more of the recreational activities he enjoyed prior to the accident. Dr. Feldman concluded:

Accordingly, this man is still disabled and it would be my opinion, given the length of time of his symptomatology and its intensity, that this man will undoubtedly end up having a permanent partial disability which will likely continue to give him discomfort for the remainder of his existence. The only hope would be that with the proper management I have suggested, a reduction in his pain might be achieved.

**45**  Both Dr. Bogue and Dr. Feldman hold the view that Mr. Taylor suffers from chronic pain and depression which Dr. Feldman described as "significant". Mr. Taylor received disability status twice for his chronic pain syndrome and depression following the accident, once in July and again in December 2002. Dr. Bogue noted that it was unusual to see a man in his early 30s develop chronic pain.

**46**  I will at this point address the defendant's submission that the plaintiff's physical and psychological problems are due to his pre-existing conditions.

**47**  First, the defendant points to a number of inconsistencies in medical reports filled out by Dr. Bogue and by the plaintiff relating to his W.C.B. claim which stress the problems experienced by Mr. Taylor from the workplace accident and seem to minimize the injuries sustained in the motor vehicle collision. However, I find that those reports were focussed on the state of the plaintiff's elbow, and are not a reason to disbelieve the plaintiff or the other medical evidence supporting the severity of the injuries sustained in the accident.

**48**  Second, the defendant argues that the plaintiff suffered from depression before the collision, and accordingly his current emotional state should not be attributed to the accident. The medical records confirm that Mr. Taylor became despondent as a result of not being able to work and engage in other activities because of his testicular condition, but there is no diagnosis of depression prior to the July 2001 accident.

**49**  Third, the defendant submits that Mr. Taylor's back pain is not the result of the accident because it is caused by two herniated discs that did not manifest until November 2003, more than two years after the accident. The defendant also argues that it is more likely that the herniated discs were caused by the plaintiff's pre-accident fall on the worksite, although there is no medical evidence to support that submission.

**50**  I find that the plaintiff has proved that the accident caused the disc herniations in the lumbar spine at L5-S1. The medical evidence led by the plaintiff established that the force required to break a femur would likely also injure the lower back. Further, Dr. Bogue noted that the plaintiff had begun complaining about his lower back three to four months after the accident. He said that given the location of the injury, problems with the lower back are expected since the lower back "to work properly needs two normal legs under it". Dr. Bogue also noted that it was uncommon to see lower back problems of this type at Mr. Taylor's age.

**51**  Fourth, the defendant submits that some of the plaintiff's ongoing pain is due not to the collision, but to an incident that occurred in early 2002 when the plaintiff helped Mr. Peacey push his car out of the mud after it became stuck. I do not accept this submission.

**52**  The medical evidence establishes that the plaintiff's injury made him more vulnerable to re-injury. I find that Mr. Taylor aggravated his injuries by pushing on the car. That aggravation would not have occurred if Mr. Taylor had been healthy at the time of the incident.

**53**  Nor do I find that Mr. Taylor's decision to assist in getting the car out of the mud amounts to contributory ***negligence*** on his part. Mr. Taylor was faced with a pressing situation. He and Mr. Peacey had been driving in a remote area. It was a cold winter night and dark had fallen. The two men had been stuck for a long time, and it was late in the evening. I do not accept the defendant's submission that Mr. Taylor, about six months after the accident, should have chosen to walk 30 to 45 minutes into town rather than trying to get the car out of the mud.

**54**  The collision need not be the only cause of the plaintiff's injuries as long as the injuries would not have occurred but for the accident. In summary on this issue, I find that the plaintiff has established that the injuries and limitations identified in the reports of Dr. Bogue and Dr. Feldman are due to the accident.

**4. What damages should be awarded?**

1. ***Non-pecuniary Damages***

**55**  Prior to the accident Mr. Taylor was an avid outdoorsman. He was a highly accomplished mountain biker, described by witnesses as a "technical rider" who had extraordinary skill and endurance, tackling long and difficult trails and steep drops with ease.

**56**  Mr. Taylor also hiked, did trail building, and camped extensively. He continued to engage in those activities despite his elbow injury in pain from the fall in 2000 and the testicular problem which had plagued him for a few years prior to the accident. Other than a period of despondency about his inability to work due to the testicular condition, he was an easy-going, self-sufficient and relatively happy individual.

**57**  After the accident, Mr. Taylor's life changed dramatically. In the days immediately following the accident, he underwent surgery to install a rod and pins to stabilize his femur; he remained in hospital for one week. Two further surgeries on his left leg were required: in October 2001 to remove the proximal locking screw; and in March 2003 to remove the remaining hardware in his leg. The recovery from all three surgeries was long and painful, lasting a number of weeks.

**58**  Mr. Taylor required assistance with day-to-day tasks such as cooking, cleaning and bathing during these recovery periods. After the first surgery he had the help of a homecare nurse, and then his friends Sarah Zimmer and Jamie Gonzalez assisted him. The two women helped him again after the second and third surgeries. The surgeries have left Mr. Taylor with marked permanent scarring on his left hip and knee.

**59**  Before the accident, Mr. Taylor had enrolled in an environmental engineering degree program to commence in September 2001. He tried to carry on with his plan to return to school but the pain killers he was taking made it difficult for him to concentrate and his general physical condition and inability to drive made it hard to attend classes. Depression set in and ultimately Mr. Taylor abandoned the environmental engineering program.

**60**  Mr. Taylor has had difficulty dealing with the changes to his life caused by the accident. For a few months he turned to street drugs and alcohol. He became depressed and uses anti-depressants like Effexor to help relieve the symptoms of depression.

**61**  Although Mr. Taylor has seen some improvement in the state of his injuries over time, he still experiences pain on a daily basis. When he sits, stands, or walks for long periods he suffers from pain and numbness in his left leg.

**62**  Mr. Taylor's injuries have affected his relationship with his common law wife; chronic pain has affected his ability to engage in sexual intimacy.

**63**  I find that Mr. Taylor, by 2004, had returned to mountain biking but did so in spite of his limitations. In the words of R.B. Baird, Mr. Taylor "was in a lot of pain, but he loved to ride so he put up with it" and "was never 100% after the accident".

**64**  The defendant made much of a report the plaintiff made to his family doctor one month after the accident that he had been out riding his bike. I accept the plaintiff's evidence that he had ridden a few blocks on the road near his home and was exhilarated by that small achievement. Dr. Bogue said that given the extent of the plaintiff's injuries, it was impossible for him to have resumed trail riding on the date in question.

**65**  Nonetheless, I accept that the plaintiff exaggerated the effect of his injuries on his ability to mountain bike. Facebook communications he shared with Todd Peacey contradict Mr. Taylor's evidence at trial. Mr. Peacey and the plaintiff were once close friends. Their friendship ended shortly before trial over Mr. Peacey sharing private Facebook communications with the defendant, communications in which Mr. Taylor described some of his riding exploits. Mr. Peacey says he felt compelled to tell his friend Mr. Depew about the plaintiff's apparent inconsistent statements about his abilities. The plaintiff said the falling-out occurred over Mr. Peacey's disclosure of information Mr. Taylor communicated to him about his relationship with his wife, a breach of confidence that Mr. Peacey conceded occurred.

**66**  Regardless of the reason for their falling-out, I find that the Facebook postings by Mr. Taylor, as well as the evidence of R.B. Baird about his rides with Mr. Taylor, confirm that Mr. Taylor returned to some level of mountain biking by 2004, although he continues to experience pain when riding and restricts the frequency and duration of those rides. I also find that he is much more limited in his ability to hike and rarely camps since the accident.

**67**  Mr. Taylor has difficulty with house and yard work, relying on his wife to do 85% of it.

**68**  In short, the injuries Mr. Taylor sustained in the accident have had a significant impact on all aspects of his life.

**69**  An award of non-pecuniary damages compensates a plaintiff for loss of amenities, pain, suffering, and loss of enjoyment of life. 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=) at para. 46, the Court of Appeal outlined the factors a trial judge should consider when assessing such damages:

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=)).

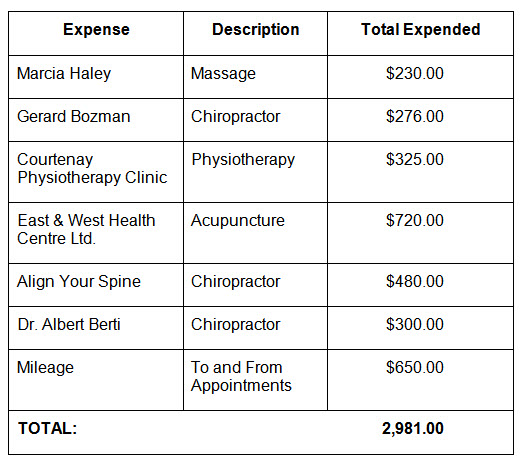
**70**  Based on some months of discomfort during the healing of the original fracture and surgeries, the defendant submits that $45,000 is an appropriate award. The defendant relies on *Krawchuk v. Smith,* [*[1995] B.C.J. No. 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2FG-00000-00&context=) (S.C.), a case in which a 69-year-old plaintiff fractured her femur.

**71**  The plaintiff submits that an award in the range of $115,000-$164,000 is appropriate, and seeks damages of $120,000 to reflect the pre-existing medical issues. The plaintiff relies on: *Legault v. Brock Shopping Centre Ltd.*, [*2010 BCSC 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-634J-00000-00&context=); *Dufault v. Kathed Holdings Ltd.*, [*2007 BCSC 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3VD-00000-00&context=); *McKelvie v. Ng*, [*2002 BCCA 657*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3PR-00000-00&context=); *Rizzolo v. Brett*, [*2010 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2M8-00000-00&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=).

**72**  Awards of damages in other cases provide a guideline only. I must apply the factors listed in *Stapley* to Mr. Taylor's particular case. I conclude that an award of $115,000 is an appropriate sum for non-pecuniary damages. This reflects a discount of approximately $25,000 to reflect the one year of testicular pain which continued post-accident, intermittent hemorrhoid pain, and the chronic elbow pain which persists to this day.

1. ***Special Damages***

**73**  The defence did not challenge Mr. Taylor's evidence relating to out-of-pocket expenses. I award the damages sought except $138 for the recreation centre swim pass and $1,200 for the Sealy Posturepedic bed on the basis that these are expenses Mr. Taylor likely would have incurred even if the accident had not happened. Mr. Taylor was unable to drive for significant periods of time due to his injuries and surgeries, so I would not allow the entire mileage claim of $1,357.05. The expenses allowed are as follows:



1. ***Cost of Future Care***

**74**  In order to recover damages under this head, the plaintiff must prove that there is a real and substantial possibility that he will incur future care costs as a result of the injuries sustained in the accident. Those future expenses do not have to be a medical necessity, but they must be medically justified and reasonable: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.) at 78.

**75**  Based on Dr. Feldman's evidence I find that a TENS machine is medically justifiable and reasonable. A TENS machine is not a cure for chronic pain, but can reduce pain if properly used. It interferes with and distorts the stimulation coming from the thalamus to the area of injury which encourages changes in the way a person perceives pain and results in a reduction in the intensity of the pain. I therefore award the plaintiff $180 to purchase this machine. Dr. Feldman also recommended time with a physiotherapist for instruction on a TENS machine, and I award $100 in relation to that expense.

**76**  Dr. Feldman further recommended antidepressants and group counselling for depression. Although Mr. Taylor could not recall how much he pays for antidepressants, I find it reasonable to provide a sum of $300 in this regard. Group therapy costs approximately $360 according to Mr. Taylor, and I award that sum.

**77**  Dr. Bogue has prescribed massage therapy, acupuncture, pain killers, and chiropractic treatment in an effort to find something that would assist Mr. Taylor. In his view, any of these physical therapies that provide relief are of benefit to Mr. Taylor. Mr. Taylor says that chiropractic treatments two to three times per week have been assisting with his chronic pain. He pays $40 per session. Taking into account the fact that the TENS machine may assist significantly, I would award a further twenty sessions of chiropractic treatments for flare-ups of chronic pain at a total cost of $800.

**78**  In summary I award $1,740 for cost of future care.

1. ***Loss of Housekeeping Capacity***

**79**  Mr. Taylor is unable to perform heavier aspects of housekeeping such as vacuuming, tasks now performed almost entirely by his spouse. In *Kroeker v. Jansen* [*(1995), 4 B.C.L.R. (3d) 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (C.A.), the British Columbia Court of Appeal recognized at para. 9 "that housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family."

**80**  Before the accident, Mr. Taylor shared equally in the household duties with his roommate at the time. He could vacuum and mow the lawn without difficulty. He claims two hours of housekeeping services per week at a cost of $30 per hour for a total yearly expense of $3,120 and advances a total claim of $30,000.

**81**  Mr. Taylor has always done half of the housekeeping, not all of it, and on that basis I would award $15,000 under this head to replace the actual value of what he has lost.

1. ***Past Wage Loss***

**82**  The defendant submits that an award for past or future wage loss capacity is not appropriate in light of the plaintiff's history of low earnings and failure to stay with any particular occupation for long. In addition the defendant submits that the plaintiff was unable to work prior to the accident due to his testicular condition, the injuries from his fall from the foundation, and his hemorrhoids.

**83**  The plaintiff left high school after Grade 11 although he took further courses as an adult. He had worked in a number of physical jobs, including as a tree spacer in 1999 using a chainsaw to cut down trees. In the year or two before the accident Mr. Taylor worked as a salmon enhancement technician for about a year. In the summer of 2000 he helped construct a shop. He had not worked in the year prior to the accident due to his elbow and testicular problems.

**84**  The income tax returns for the five years leading up to the collision showed an average annual income of $13,000. In contrast, in the seven years immediately following the accident Mr. Taylor did not work at all.

**85**  I find that Mr. Taylor would not have worked in the first year after the accident in any event due to the testicular problems. In the remaining six years in which he did not work at all after the accident, I find that he lost income of about $13,000 a year, totalling $78,000, which I would reduce to $70,000 to reflect the likelihood that he would have been off for some of that time due to other health issues such as the severe hemorrhoids.

1. ***Loss of Future Earning Capacity***

**86**  With respect to loss of future earning capacity, I find that the plaintiff's earning capacity has been permanently impaired by the injuries sustained in the accident, and that he will suffer pecuniary loss as a result of that impairment.

**87**  Prior to the accident Mr. Taylor generally performed physical work which he is now precluded from doing. He attempted a number of labour intensive jobs following the accident, including shipping and receiving at KalTire and working for a company that rented large pieces of equipment. Mr. Taylor testified that he had to leave both of these jobs because they required lifting, which he was unable to do, and other tasks which were made difficult by his physical condition and chronic pain.

**88**  Mr. Taylor in the past year has started a tourism business in the Yukon where he now resides. It is his hope to grow this business. He can take breaks when he needs to and controls his work hours. In the first year of operations he earned approximately $5,000.

**89**  At the time of the collision, the plaintiff had been pursuing an education in environmental engineering. I find in light of his previous academic history, and his difficulty in staying with one occupation for any length of time, that there is a low probability that he would have completed that education.

**90**  The plaintiff advances a claim of $150,000 to compensate him for loss of capacity to earn income using a capital asset approach to quantify loss.

**91**  Quantifying loss of earning capacity using a capital asset approach is one of the two approaches that may be used. Garson J.A. observed 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:

[T]he plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, [*[1990] B.C.J. No. 1158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=), or a capital asset approach, as in *Brown*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos*, [*[1995] B.C.J. No. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), and *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=).

**92**  In my view, the loss of earnings approach is an appropriate way to quantify damages in this case, recognizing that the calculation of damages under this head is an approximation rather than a precise mathematical exercise. Based on Mr. Taylor's evidence, I find it probable that his fledgling tourism business will grow by 50%, providing income of $7,500 per year.. Mr. Taylor will therefore experience a loss of about $5,500 per year based on his pre-accident average income of $13,300. Mr. Taylor is now 42. Assuming that he would work to age 65, and based on the income multipliers provided by John Struthers, I would award the sum of $16,371/1,000 x 5,500 =$90,040.50.

**93**  Although the multipliers take into account the contingency of survival only, I would not further discount or alter this sum. Although there are negative contingencies that could affect Mr. Taylor's future earning capacity, including the residual effect of his elbow injury, there are also positive contingencies. In my view in this case the two offset each other. Positive contingencies include the possibility that but for his injuries Mr. Taylor might have finished his environmental engineering degree or returned to the job at the fish hatchery which paid significantly more than $13,000 per year.

**CONCLUSION**

**94**  In summary, the total damages are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages: | $115,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $2,981.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care: | $1,740.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Housekeeping Capacity: | $15,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Wage Loss: | $70,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future Earning Capacity: | $90,040.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL:** | **$294,761.50** |  |

**95**  The plaintiff is entitled to damages of $206,333.05. This represents 70% of the total and reflects the defendant's liability for the accident.

**COSTS**

**96**  In the ordinary course, the plaintiff would be entitled to costs at Scale B. If the parties are unable to agree on costs, they may speak to the issue by setting a date for a hearing to take place within six months of the date of these reasons for judgment.

L. FENLON J.

**End of Document**

[***Wainwright v. Llewellyn, [2014] B.C.J. No. 194***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1P7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

W.J. Harris J.

Heard: September 9-13 and 16-20, 2013.

Judgment: February 4, 2014.

Docket: M126323

Registry: New Westminster

**[2014] B.C.J. No. 194** | 2014 BCSC 177

Between Lisa Wainwright, Plaintiff, and Gregory Llewellyn, Sacha Llewellyn and Deloitte Touche Inc. Being the Trustee of the Estate in Bankruptcy of Gregory Llewellyn, Defendants

(214 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Neck — Whiplash — Soft tissue — Head injuries — Ears — Hearing — Eyes — Impaired vision — Jaw — Headaches — Psychological injuries — Depression — Considerations impacting on award — Pre-existing injury — Action for damages sustained in motor vehicle accident allowed in part — 31-year-old plaintiff had pre-existing bipolar disorder — Accident injured low back/buttocks, exacerbated in subsequent accident, whiplash, headaches, hearing and vision problems, neck, shoulder, hip and jaw pain that all subsided — Accident exacerbated plaintiff's mental disorder, but so did unrelated criminal charges that resulted in loss of driver's license and realtor job — Plaintiff awarded $60,000 non-pecuniary loss, $76,300 past wage loss, $10,337 future care and $3,943 special damages — Plaintiff able to work full-time with accommodation but would likely experience some lost income, so awarded $45,000.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Duration of loss — Employment status — Extent of incapacity — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Loss of profits — Expenses and expenditures — Medical — Medications — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action for damages sustained in motor vehicle accident allowed in part — 31-year-old plaintiff had pre-existing bipolar disorder — Accident injured low back/buttocks, exacerbated in subsequent accident, whiplash, headaches, hearing and vision problems, neck, shoulder, hip and jaw pain that all subsided — Accident exacerbated plaintiff's mental disorder, but so did unrelated criminal charges that resulted in loss of driver's license and realtor job — Plaintiff awarded $60,000 non-pecuniary loss, $76,300 past wage loss, $10,337 future care and $3,943 special damages — Plaintiff able to work full-time with accommodation but would likely experience some lost income, so awarded $45,000.**

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| Action for damages for personal injuries sustained in a 2008 motor vehicle accident. The 31-year-old plaintiff was a single mother with pre-existing bipolar disorder, who had just attained some success as a real estate agent prior to the accident. The plaintiff was waiting to turn left when the defendant struck her vehicle and flipped over it. The defendant pleaded guilty to driving without due care and attention and admitted liability. The plaintiff described the accident as terrifying and testified she immediately experienced a severe headache, back, arm, shoulder, rib and hip pain. The plaintiff returned to work but had difficulty. The plaintiff was involved in a number of subsequent incidents that also affected her functioning: three motor vehicle accidents, fractured foot, impaired driving charge, hospitalization for psychiatric issues, pain medication addiction, end of relationship. The plaintiff testified she had weekly headaches, vision and hearing problems, neck, shoulder, back, hip and knee pain. The plaintiff testified the severe pain diminished gradually, but the pain affected her mood. The plaintiff lost her driver's license because of charges against her and was unable to continue as a realtor as a result. The plaintiff was unemployed for some time but now worked as a sales agent for a developer. The defendant argued the plaintiff was not credible, and disputed the extent of her injuries. The plaintiff sought $100,000 non-pecuniary damages, $208,000 loss of earning capacity, cost of future care, special damages and past wage loss.  HELD: Action allowed in part.  The plaintiff's evidence was vague and self-serving in parts, but was generally a genuine attempt at accurate recall. While the motor vehicle accident exacerbated the plaintiff's bipolar disorder, there was not a substantial connection between the defendant's ***negligence*** and the plaintiff's impaired driving charge, which resulted from her voluntary consumption of more drugs than prescribed. The expert evidence established a 2012 workplace accident exacerbated the plaintiff's motor vehicle accident low back injury. The motor vehicle accident clearly caused the plaintiff considerable pain and discomfort. It caused soft tissue injuries to her low back and buttocks, which diminished until their 2012 recurrence. The plaintiff had since recovered the ability to exercise and work, and managed her pain with over-the-counter medication. The accident caused a whiplash injury that resolved by 2010. The plaintiff had headaches before the accident, but the accident caused them to be more intense for six months. The plaintiff's hearing and vision problems were overstated and quickly resolved. The plaintiff's neck and shoulder pain was resolved by 2010/2011, her hip pain minimal and jaw pain resolved in two weeks. The plaintiff had some bruising and discomfort after the accident. The plaintiff would have had psychiatric symptoms regardless of the motor vehicle accident, but it exacerbated her symptoms. However, the plaintiff's criminal charges and loss of license also had a disastrous effect on her mental health. The plaintiff's mental health was under control by 2010. The motor vehicle accident caused significant disruption to the plaintiff's life and negatively affected the quality and enjoyment, but other facts operated through the post-motor vehicle accident period that affected her functioning. The plaintiff was awarded $60,000 non-pecuniary damages. The plaintiff lost income because of the motor vehicle accident. She returned to work but struggled. However, contingencies had to be made for the fact that she was a new agent in volatile market and the loss of her driver's license had a significant impact on her earnings. The plaintiff's average income was $40,000. The plaintiff was awarded $76,300 past wage loss. The functional capacity assessment found the plaintiff could work full-time as long as she could change positions and take breaks, and was capable of working as a realtor. The plaintiff had lost some capacity, but not to the extent claimed. The plaintiff was awarded $45,000 loss of earning capacity. The plaintiff required an ergonomic chair, kinesiology sessions, gym membership, cognitive behaviour therapy and pain medications. Vocational counselling and other treatments were not necessary. The plaintiff was awarded $10,337 cost of future care and $3,943 special damages. |

**Statutes, Regulations and Rules Cited:**

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

**Counsel**

Counsel for Plaintiff: Judy S. Voss.

Counsel for Defendants: Jonathan Simon.

**Reasons for Judgment**

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| **W.J. HARRIS J.** |

**Introduction**

**1**  At the time of the motor vehicle accident, which is at issue in this case (the "MVA"), the plaintiff, Lisa Wainwright, was a 31 year old single mother who, through determination, was able to overcome the need for social assistance, obtain her realtor's licence and secure employment at an established realty firm. She was enjoying some success in her new career and had just received the largest commission she had ever earned.

**2**  On April 17, 2008, the plaintiff was driving eastbound in her 1991 Isuzu Stylus at the intersection of 108th Avenue and 146 Street in Surrey, British Columbia. She was stopped at a traffic control light in the lane closest to the center line, waiting to turn left. Her five year old daughter, Annya, was a passenger in the vehicle.

**3**  A Ford Mustang driven by the defendant, Gregory Llewellyn, was travelling westbound on 108th Avenue, when it struck the left side of the plaintiff's vehicle. The defendant's vehicle travelled up and over the wheel well of the plaintiff's vehicle, flipped and landed on its roof. Shattered glass from the defendant's passenger side window was strewn at the scene.

**4**  The plaintiff and her daughter were taken to the hospital by ambulance and released later that day. The defendant was also taken to the hospital.

**5**  Both vehicles sustained significant damage and they were subsequently written off.

**6**  The plaintiff and her daughter were wearing restraining devices at the time of the collision.

**7**  The defendant admitted to having been on medication on the day of the collision and was determined to have a blood alcohol content of 262 mg/100 ml. The defendant was initially charged with impaired driving but pled guilty to the lesser offence of driving without due care and attention.

**Issue**

**8**  The plaintiff claims damages and expenses for injuries resulting from the MVA, including non-pecuniary damages; damages for past and future loss of opportunity; costs of future care and special damages.

**9**  The defendants have admitted liability for the MVA. However, the extent of the plaintiff's injuries and the amount of damages to which she is entitled are in dispute.

**Plaintiff's Background**

**10**  The plaintiff was born December 9, 1976.

**11**  She was brought up in Surrey, British Columbia. She did well in school. She had a number of part-time jobs while in high school, including working as a banquet server, catering supervisor, a pharmacy assistant and a waitress. After graduating from high school in 1994, she attended Douglas College for a period and then entered the work force.

**12**  She held various positions after she left college including working for an assistant to a stock promoter, a receptionist, a waitress and a sales person.

**13**  The plaintiff experienced mental health issues and was diagnosed with bipolar disorder in 1998. She described experiencing periods of depression and periods when she was hypomanic - talking quickly, not being selective about who she talked to, being impulsive, not thinking things through, spending money, and being generally agitated. She testified that she took anti-depressants and mood stabilizers.

**14**  She was under the care of a psychiatrist, Dr. Bergen and then in 2008, another psychiatrist, Dr. Catona.

**15**  The plaintiff was also injured in a motor vehicle collision in 1998, although those injuries resolved well before the current MVA.

**16**  In July of 1999, she married Colin Wainwright and in August of 2002, they had a child, Annya.

**17**  The plaintiff's marriage ended in May of 2005, when Annya was two years old. The plaintiff initially went on social assistance and subsequently received CPP disability benefits.

**18**  While on CPP, she enrolled in an online program through the Sauder School of Business to obtain her realtor's licence. She became a licenced realtor in August of 2007. Her goal was to live independently and to provide for her daughter.

**19**  She initially worked for Realty 5000 and then obtained full time work, as a realtor at ReMax. She performed well for the new realtor and made a number of sales. She worked on a commission basis.

**20**  The plaintiff had been on a number of mood stabilizers and anti-depression medications including Wellbutrin, Epival, and Neurontin for her bipolar disorder. Dr. Catona had, just prior to the MVA, adjusted her medications.

**21**  Dr. Catona saw the plaintiff earlier on the day of the collision and her notes indicate that the plaintiff reporting being "productive, "effective" and "coping well". Dr. Catona reported that the plaintiff's mood was stable and she was sleeping well.

**22**  The plaintiff also reports that she was doing well physically and emotionally prior to the MVA. She was "in the best shape she could be" and was exercising 3 to 4 times a week. She was pleased with the sales she was completing.

**After the MVA**

**23**  The plaintiff described the MVA as terrifying: she felt the impact of the collision, heard her daughter screaming, and had difficulty getting out of her vehicle and attending to her daughter. She said that she thought the driver of the other vehicle was dead.

**24**  The plaintiff testified that, although she was able to get her daughter out of the back seat of her vehicle, she was too sore to pick up her daughter. She said she had a "mega headache", and felt pain down her back, legs and knees. She said her jaw and neck were sore, as well as her left foot. She said that the seat belt caused bruising to her chest and there was bruising to her forearms, knee and forehead.

**25**  The plaintiff was given Arthrotec, an anti-inflammatory medication, at the hospital.

**26**  The next day, the plaintiff said she testified that she felt worse. She had a massive headache, her arms, shoulder, ribs and hips were stiff and store. She could not lift her left arm and found it difficult to stand.

**27**  The plaintiff went back to work following the MVA, although she testified she was in considerable pain. She said that the pain from the MVA interfered with her ability to do her work and she had trouble remembering things. She did some work from home as she didn't want people to see her in an impaired state.

**28**  She said she experienced "a lot of suffering" from the MVA in 2008 and 2009. She was experiencing anxiety and nightmares and had difficulty sleeping. She was trying to cope but had to take some time off work. She was taking pain and sleep medications. The medications to control her moods were increased.

**29**  It is not disputed that there were a number of events which occurred after the MVA which also negatively affected the plaintiff:

1. she was involved in three other motor vehicle accidents on June 7, 2008, May 31, 2009 and September 7, 2009. All involved the plaintiff rear ending another car. They were relatively minor collisions;
2. on October 31, 2008, the plaintiff fractured her foot when she slipped at home on her daughter's Halloween costume. She was prescribed medication for the associated pain;
3. on December 25, 2008, the vehicle which she was driving slid into a snow bank, which accident resulted in her being criminally charged with driving while impaired. She was subsequently convicted, after a trial, on May 2, 2011. She lost her driver's licence for a period immediately following the MVA and for a one year period following the conviction;
4. on January 16, 2009, she was admitted to the Cresst, a residential mental health facility, for psychiatric treatment for her manic episodes and depression. She was discharged from Cresst after approximately one month;
5. in March of 2009, the plaintiff was charged with driving without a licence and her vehicle was impounded;
6. in 2009 she became addicted to oxycodone, which had been prescribed as a pain medication. She was advised by her physician in October of 2009 to stop using oxycodone. She subsequently did stop, after which she experienced symptoms of withdrawal;
7. in August of 2009, the plaintiff's relationship with Trevor Morris ended. They had been living together for approximately two years; and
8. in September of 2009, the plaintiff and her daughter had to move out of the townhome where she and Mr. Morris had been living. The plaintiff moved into her father's home.

**30**  The plaintiff testified that the injuries from the MVA continued to cause her problems after 2008 including: weekly headaches, intermittent difficulties with her vision; neck pain; ringing in her ears; hearing that "goes in and out"; restricted left shoulder movement; sore right shoulder; sharp pain behind her shoulder blades; low back pain, numbness in her forearms and fingers; pain in her right hip joint and buttocks; and pain on the top of her right knee.

**31**  She had difficulty being precise as to how long the symptoms lasted. She said that the severe pain diminished gradually, although she continued to have headaches, and pain in her neck, back, hip, buttocks and ears.

**32**  She said that the pain affected her moods, making her frustrated, tearful, angry and sad. She said that she has not been able to function at the same level as prior to the MVA. However, for the most part, she said that she got back up and soldiered on for the sake of her daughter.

**33**  She reported that by 2010 she was getting better. She was working hard at the gym and was also participating in physiotherapy. She found spin classes helpful. When pain would flare up, she took over the counter analgesics and discontinued the physical activity, and rested. She also participated in Alcoholics Anonymous and Narcotics Anonymous.

**34**  The plaintiff started at a new realty firm in late 2009 and partnered with a senior realtor, Richard Beaudry, who had lost his driver's licence. They had an arrangement whereby she would get a share from the sales of the listings she helped him with. This arrangement worked relatively well for her and Mr. Beaudry. She testified that she could not recall any physical difficulties performing her work with Mr. Beaudry.

**35**  The arrangement with Mr. Beaudry came to an end when he got his drivers' licence back. Not long after, the plaintiff was convicted of driving while impaired and lost her driver's licence.

**36**  The plaintiff left Royal LePage and moved to Sutton Realty, where she hoped to carry on as a realtor. Although she worked there for a time, she found it difficult to work as a realtor without a driver's licence. She stopped working at Sutton in September of 2011.

**37**  She was unemployed for a period of time and went back on social assistance and subsequently returned to CPP.

**38**  In November and December of 2011, she testified she was having emotional difficulties due to the various issues facing her, but physically she only had "minor flare ups", mainly in between her shoulder blades, in her hips and some headaches. She said she had been training at the gym and was in "pretty good shape".

**39**  In the latter part of 2011, she worked on a casual basis at a bridal gallery, where she had worked previously. She testified that she injured herself on January 22, 2012, while she was doing some minor cleaning at the bridal gallery. She said something "pinched in her back", she had "shooting pain" down her left leg and she couldn't stand up straight, causing her "extreme agony". She treated the pain with Robaxacet, initially daily and currently a couple of times per week. She said her symptoms are aggravated by physical activities.

**40**  In August of 2012 she started at Vesta Properties, working with her mother, who is also a realtor, on the sale of town homes for a developer.

**Medical Evidence**

**Dr. Green**

**41**  Dr. Green has been the plaintiff's family physician since the MVA. He provided medical reports, dated July 23, 2010 and May 22, 2013, at the request of plaintiff's counsel and gave evidence at trial.

**42**  Dr. Green initially saw the plaintiff on the day following the MVA and confirmed her reports of pain, bruising and restricted movement. Dr. Green described her recovery over the months following the MVA and noted certain improvement.

**43**  He stated that, under normal circumstances, he would have expected that she would take 2 to 4 months to recover, but given the other stressors she was experiencing (e.g. loss of driver's licence, multiple break ups, loss of employment, loss of her real estate licence, financial difficulties, loss of social standing), she developed chronic mechanical back pain.

**44**  His diagnosis with respect to injuries resulting from the MVA in the 2010 report included: grade 2 whiplash to the neck and back; transient left ulnar neuropathy; soft tissue injuries resulting in contusions and restriction in movement; transient exacerbation of her major affected disorder contributing to insomnia and inability to cope with stress; and chronic mechanic back pain leading, along with other factors, to transient opiate addiction.

**45**  His diagnosis in the 2013 report is similar but included "chronic pain syndrome", which he described as not being "bad enough" to be recognized as fibromyalgia. In his opinion, the MVA exacerbated her pre-existing symptoms which progressed into "a complex pain disorder which is expected to persist for the foreseeable future and probably indefinitely."

**46**  In the 2013 report Dr. Green noted that the plaintiff "bicycles everywhere" and "physical constraints [are] not interfering with her ability to continue with her activities of daily living" or her sleep.

**47**  With respect to her mental health, he offered the opinion "that although she has been depressed in the past she does not currently appear to be afflicted by that illness" and "appears to have improved her mental strength and assuredness".

**48**  Under cross examination, Dr. Green confirmed that he did not diagnose any head injury and said the memory problems the plaintiff reported were more likely to be stress related. Dr. Green agreed that her emotional, social and financial difficulties contributed to her pain symptoms. He also agreed that, in his opinion, she was not disabled from being a realtor.

**Dr. Zoffman**

**49**  Dr. Zoffman is a forensic psychiatrist who prepared a medical legal report, dated November 19, 2012. She was called to give evidence by counsel for the plaintiff.

**50**  Dr. Zoffman diagnosed the plaintiff with attention deficit disorder without hyperactivity, although she noted that it is not a "firm psychiatric diagnosis" and referred to the past history provided by Dr. Catona of the plaintiff experiencing bouts of depression and episodes of mild hypomania. She testified that she could not rule out bipolar disorder. However, she noted that she could find no evidence of ongoing psychiatric symptoms and said the plaintiff currently is functioning well, despite "annoying" pain.

**51**  Dr. Zoffman noted that the plaintiff's mood problems worsened in 2008 after the MVA, which brought with it multiple stressors including financial stressors, emotional distress and pain complaints. In her report, Dr. Zoffman stated that the plaintiff's complaints of pain and emotional/psychiatric decompensation would not have occurred had she not suffered the injuries of the MVA. Under cross examination she stated that it is possible that the plaintiff would have had psychiatric symptoms regardless of the MVA, but she reiterated that the temporary exacerbation of psychiatric symptoms in 2008 and 2009 was caused by the circumstances of the MVA.

**52**  In response to a question as to whether the plaintiff's emotional, psychological or psychiatric condition was restricting her activities, Dr. Zoffman stated that the plaintiff's psychiatric condition did not prevent her from pursuing work as a realtor or prevent her from pursing leisure activities - nor did it interfere with social and interpersonal relationships. Dr. Zoffman did not believe any recurrence of a mood disorder would be connected to the MVA.

**Dr. Catona**

**53**  Dr. Catona was the plaintiff's treating psychiatrist just prior to and subsequent to the MVA. She provided a medical legal report dated May 25, 2009. She also gave evidence at trial by way of deposition.

**54**  The plaintiff first saw Dr. Catona in March of 2008. Dr. Catona confirmed the diagnosis of bipolar disorder, of mild to moderate severity, which had been the diagnosis of previous psychiatrists. At that time, Dr. Catona gradually increased the level of her existing mood stabilizers and anti-depression medication (Epival, Wellbutrin and Neurontin) and added Seroquel, Ativan and Zyprexa in March. She noted that the plaintiff reported improvement in her mood and the plan was to discontinue the Seroquel and Zyprexa.

**55**  After the MVA, Dr. Zoffman increased the plaintiff's medication to address her anxiety, sleep disruption, and mood swings.

**56**  Dr. Catona referred to the plaintiff having increased mood fluctuations in 2008, with depression from May to December 2008 and a manic type of episode at the end of December 2008. She said her level of functioning deteriorated after the MVA: she became "more disorganized, unfocused, [her] short term memory declined and [she] subsequently missed sessions and missed medications doses" which may have contributed to the instability of her psychiatric condition. In cross examination, Dr. Catona agreed that the plaintiff reported feeling "so much better" and "normal" in August of 2008 but noted that fluctuations in mood are typical given the chronic nature of bipolar disorder.

**57**  In January of 2009, Dr. Catona recommended that the plaintiff be admitted to the Cresst psychiatric facility and then into a home treatment program.

**58**  Unlike Dr. Zoffman, Dr. Catona opined that it was likely the plaintiff would have experienced psychiatric symptoms regardless of the MVA. She remarked that the plaintiff's psychiatric symptoms have been present, on and off, since at least 1998 and that she could not conclude this was related directly to the MVA. That said, Dr. Catona testified that her psychiatric symptoms were more severe because of the MVA.

**59**  Dr. Catona observed that the plaintiff was only in real estate for seven months at the time of the MVA and her previous employment was not steady. Her bipolar illness "could interfere with steady employment in the best of circumstances".

**Dr. Shuckett**

**60**  Dr. Shuckett is a rheumatologist who prepared a medical legal report, dated March 4, 2012, at the request of plaintiff's counsel.

**61**  Dr. Shuckett diagnosed the plaintiff with soft tissue injuries, muscular ligamentous in origin, and specifically right sided neck pain, headaches, and mechanical low back pain arising in the right sacroiliac ligament regions.

**62**  She noted that the plaintiff's psychosocial issues have been considerable and would have contributed to her perception of pain.

**63**  Dr. Shuckett observed that the plaintiff had "exacerbation or recurrence" of low back pain, neck pain headaches with the 2012 incident while the plaintiff was working at the bridal gallery. Dr. Shuckett's evidence was that the plaintiff reported she experienced an intense pain in her low back radiating down the right leg as a result of lifting wedding gowns.

**64**  Dr. Shuckett said that she could not be certain that the 2012 injury was related to the MVA of 2008, but she believed that the plaintiff's low back, neck and headaches were more vulnerable to exacerbation. Dr. Shuckett also said that, because the plaintiff's pain was in the same region as it was following the MVA, this suggested an exacerbation of the prior MVA injury.

**65**  In Dr. Shuckett's opinion, the plaintiff's symptoms will not totally resolve but she will be able to maintain some remunerative work with a supportive work environment.

**Other Expert Witnesses**

**Paul Pakulak**

**66**  Mr. Pakulak is an occupational therapist who, on May 23, 2013, performed a functional capacity evaluation on the plaintiff. He gave evidence as an expert in the area of functional capacity testing and cost of future care at the request of plaintiff's counsel.

**67**  Mr. Pakulak concluded, based upon his evaluation of the plaintiff's functional capacity, that the plaintiff had the physical capacity to be employable at a light level on a full time basis with certain restrictions on prolonged and repetitive below waist level work; prolonged repetitive overhead work; prolonged position of the neck and shoulders in front of the body; and prolonged sitting.

**68**  In Mr. Pakulak's opinion, the plaintiff was capable of part time work as a real estate agent or full time work with restrictions. In that regard, he explained she was capable of working 40 hours a week in real estate but not the 70-80 hours a week which the plaintiff reported to have worked prior to the MVA. He agreed that her current real estate position was less demanding than her previous position as a real estate agent.

**John Lawless**

**69**  Mr. Lawless is a vocational rehabilitation consultant who was called by plaintiff's counsel to give expert evidence. His report is dated June 14, 2013. His evidence was directed to the plaintiff's pre-injury vocational prospects and her future employability.

**70**  In terms of her pre-injury vocational prospects, Mr. Lawless confirmed that she reported doing well for a new realtor in 2008. However, he noted that many realtors do not remain in this vocation due to the challenges of succeeding in that business.

**71**  With respect to her prospects in real estate, he referred to the financial crisis in the fall of 2008 which negatively affected real estate sales. He also referred to the plaintiff's mood disorder, which has the potential to disrupt her work. He concluded that her prospects in her former career in real estate were limited, and her chances for success are now much reduced, even if she were able to get back her real estate licence and driver's licence.

**72**  In terms of her post-injury prospects, his opinion was that they are worse now with her pain and physical limitations in addition to her pre-existing mood disorder. He recommended that she remain in her current position with Vesta, and then pursue retraining in marketing or as an office assistant.

**Rob Carson**

**73**  Mr. Carson is an economist who gave evidence in relation to the future costs of care for the plaintiff, using the recommendations of Mr. Pakulak.

**Other Witnesses**

**Patrick Lamoureaux**

**74**  Mr. Lamoureaux is the plaintiff's current partner. He testified as to her physical condition after they met in May of 2012. He said she had good days where she had energy and could function well and bad days when she was irritable and tense. He had seen her have difficulty with sitting for long periods and said that he helped her with housework on her bad days.

**75**  He gave evidence as to her participation in spinning classes at the gym and noted that sometimes she could not keep up the pace. He also said that she would use the treadmill, the elliptical machine, the mini universal gym and an exercise ball for core strength. They would go to the gym three times a week as well as biking around the neighbourhood.

**Julia Willmott**

**76**  Ms. Willmott gave evidence of the plaintiff's difficulty with sitting for long periods. She had known the plaintiff for three years, and is her sponsor at Alcoholics Anonymous and socialized with her, including going to the gym, camping and dancing. She used the plaintiff as a realtor in 2011.

**77**  She referred to the plaintiff having good days when she is intelligent, professional, and focussed and bad days when she tends to isolate herself. She testified that the plaintiff's most frequent pain complaint is in her right buttocks.

**Cheryl Tingren**

**78**  Ms. Tingren was a client of the plaintiff in 2009 and is now a friend. She had frequent contact with the plaintiff at the time she sold her house and bought a new house. She said the plaintiff was very professional as a realtor, but she was aware of the plaintiff having pain in her neck and back.

**Davina Kula**

**79**  Ms. Kula is a friend of the plaintiff. She met the plaintiff in approximately May of 2000 when they worked at the bridal gallery together. She testified that the wedding gowns weigh from 10 to 60 pounds, and employees often carry more than one gown at a time. She testified as to the plaintiff's effectiveness in sales.

**80**  Ms. Kula testified that she knew the plaintiff had a mood disorder prior to the MVA but observed the plaintiff was more depressed after the MVA. Ms. Kula noticed the plaintiff becoming agitated and not being able to sit for long during a 2011 visit. She said that when she saw the plaintiff in 2013 she was still subdued. She noticed an improvement in the plaintiff's mood following her involvement in the Alcoholic Anonymous, 12 step program.

**81**  Under cross examination, Ms. Kula agreed that the loss of the plaintiff's driver's licence significantly affected her mood.

**Adrian Langenbach**

**82**  Mr. Langenbach is the plaintiff's father. Mr. Langenbach did not have regular contact with the plaintiff after she left home, until she moved back with him in September of 2009. He said that at that time she was suffering from a traumatic break up with Mr. Morris.

**83**  He testified that the plaintiff was not as happy or active after the MVA as she had been before the MVA, but that she would nevertheless try and exercise to improve herself. He said he became aware of her addiction to oxycodone after the impaired charge and her participation in the 12 step program.

**84**  He said that, since 2010, the plaintiff has been doing "progressively better", learning to live within her means, working, resting, going to the gym and cycling.

**Sahsha Langenbach**

**85**  Ms. Langenbach is the plaintiff's sister. She testified as to the differences she observed in her sister before and after the MVA, particularly the difficulties she had looking after herself and keeping house. She said she helped her sister with child care and housekeeping when she could.

**86**  Ms. Langenbach said that while the plaintiff has improved, she still has difficulties. Under cross examination, she admitted her contact with her sister has been limited.

**Sherri Scott**

**87**  Ms. Scott is the plaintiff's mother. After she left the family home, Ms. Scott did not see her daughter often. Ms. Scott is a realtor.

**88**  She testified that she assisted the plaintiff in getting a sales assistant job at Vesta. Ms. Scott's evidence was that she prefers to work for a property developer rather than in a real estate firm: while the pay is less, the work is easier. She earns $103,000 from Vesta, working approximately 40 hours a week.

**89**  She confirmed that the plaintiff is doing well in the job and that she has the potential to advance. She testified that the plaintiff uses an ergonomic chair and needed to take short breaks from computer work.

**Colin Wainwright**

**90**  Colin Wainwright was married to the plaintiff. They separated in 2005. He continues to see the plaintiff when he picks up Annya.

**91**  He gave evidence of the high and low moods which the plaintiff exhibited when they were together. He referred to her taking medication to control the mood swings.

**92**  He testified that he observed the plaintiff to be depressed and in pain after the MVA, although he said he was mainly focussed on Annya during his visits.

**Richard Beaudry**

**93**  Mr. Beaudry was called by the defence to give evidence. He is a real estate agent who worked with the plaintiff for a year from approximately September of 2010.

**94**  Mr. Beaudry testified they would co-list properties together and she had her own listings as well. He said that the arrangement worked well, that she was a good realtor and detail oriented. He would work with her again.

**95**  Mr. Beaudry testified that he was aware the plaintiff had been involved in a motor vehicle accident and, on occasion, the plaintiff told him she was not feeling well or that she had to go to massage, physiotherapy or the gym.

**96**  He said that she worked six to seven hours a day, while she was working with him.

**97**  Mr. Beaudry testified that he is partially retired, but still earns approximately $200,000, working seven to eight months a year at 30 hours per week.

**Credibility and Reliability**

**98**  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).

**99**  In this case, counsel for the defendants submits that the plaintiff's credibility is a factor which should be considered, as her subjective reports are the foundation of her claim for injury and loss. In that regard, he suggests that the plaintiff's belief in her own narrative at times overwhelms the actual degree of pain and its consequences. He contends that she sought to advocate her position rather than answering the questions asked of her as a means of "covering up for very vague and forgotten chronology".

**100**  I agree that there is a need to exercise caution and to examine all the evidence carefully in a case such as this, which is founded in large measure on subjective evidence. There must be evidence of a convincing nature to overcome the improbability that the pain continued, in the absence of objective symptoms, well beyond the normal recovery period: *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.)); *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.).

**101**  I also agree that the plaintiff's evidence was, at times, vague and self-serving. Her tendency to be tangential and her difficulty in recounting events is a matter also commented on by Dr. Shuckett and Mr. Lawless.

**102**  That said, for the most part, I find that the plaintiff was trying to accurately recall what happened over the course of the last five years, in circumstances where for much of that period she was affected by the medication she was taking; by her mood disorder; and by a number of other psychosocial stressors, as outlined above.

**103**  Where I consider her evidence should not be relied upon or discounted, I will address that issue in the course of my reasons.

**Causation**

**104**  The plaintiff must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to her 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*. As Chief Justice McLachlin 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* [*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=)].

**105**  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.

**106**  As noted in *Blackwater*, the plaintiff is entitled to be placed in the position he or she would have been if not for the defendant's ***negligence*** - no better or no 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 in any event ("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.

**107**  Applying these principles to this case, I must determine whether the MVA caused the plaintiff's injuries and, if it did, whether there were any pre-existing conditions which would have detrimentally affected the plaintiff in the future, regardless of the defendants' ***negligence***.

**108**  There are two particular causation issues raised by counsel, which I will address first.

**December 25, 2008 Impaired Charge and Loss of Driver's Licence**

**109**  Counsel for the plaintiff submits that the plaintiff's December 25, 2008 impaired charge would not have occurred but for the MVA. She suggests that the impaired charge was a result of the plaintiff being in a manic state, caused by the exacerbation of her bipolar disorder.

**110**  While I accept that the injuries from the MVA exacerbated her bipolar disorder, I am not satisfied that there is a substantial connection between the defendant's ***negligence*** and the plaintiff's impaired charge on December 25, 2008.

**111**  The plaintiff testified that she was in a manic state on December 25. However, she also admitted in cross examination that she had trouble remembering what happened that evening. In my view, even if she was in a type of manic state *prior* to driving into the snowbank (which I am not persuaded was established on the evidence), I find that the impaired charge and subsequent conviction was due to the amount of drugs she had voluntarily consumed that day.

**112**  The plaintiff admitted that, prior to driving her motor vehicle on December 25, she had taken three doses of medication within a time period which was significantly less than had been prescribed. She also admitted that she had taken more than the prescribed amount of certain medication. For example, she took five Tylenol number three tablets in four hours.

**113**  I do not believe the plaintiff when she says her doctors had not warned her about the medications she had been prescribed. The medications she was taking on December 25 were the same type of medications she had been taking for some time for her mood disorder and for pain. I accept Dr. Catona's evidence that she had warned the plaintiff about the use of the medications.

**114**  Accordingly, I conclude the plaintiff has not established that her injuries from the MVA caused or materially contributed to her becoming impaired and subsequently convicted of driving while impaired.

**January 2012 Injury**

**115**  Counsel for the defendants submits that the plaintiff has not proven the claim of aggravation in respect of the injury sustained by the plaintiff at the bridal gallery in January of 2012.

**116**  The plaintiff submits that the January 2012 injury is causally connected to the MVA and says this is supported by the evidence of Dr. Shuckett.

**117**  The defendants submit because Dr. Shuckett could not be certain as to whether the January 2012 incident was an exacerbation or a new injury, this falls below the standard of proof necessary to prove the claim of aggravation on the balance of probabilities. He notes that the X-rays and scans support a diagnosis of soft tissue injury as opposed to sciatic or radiculopathic pain.

**118**  I accept that in Dr. Shuckett's report she was initially equivocal as to whether the low back pain experienced by the plaintiff in January 2012 was an exacerbation or a totally new problem.

She had exacerbation or recurrence of low back pain which also seemed to exacerbate her neck area pain and headaches with the incident in 2012 at the bridal salon when she suddenly had her low back go out and had pain radiating down the right leg. This sounds like it was an acute or chronic derangement in the low back that may have represented a re-injury or exacerbation or may have represented a totally new problem.

She did not really make it clear to me that her low back pain went down the right leg between the time of the subject MVA of April 17, 2008 and the episode of 2012. Thus she may have attained a brand new spontaneous episode in 2012 that may have had nothing to do with the MVA of 2008. I do suspect that her low back, neck and headaches were more vulnerable to exacerbation when she strained her low back in 2012, on the basis of the subject MVA.

**119**  However, she then referred to the January 2012 incident as an exacerbation of the MVA symptoms.

I think one want to tease out, as best one can, the relative role of her recent setback in January 2012 as far as activating her post-MVA symptoms up until the present time. I saw her about ten months after this setback. It may very well be that in the next one to two years, she further improves from that 2012 exacerbation. She depicts she was improving from her post-MVA injuries and getting active at the gym and then had a setback with the 2012 back incident. I think that she will be vulnerable to exacerbation of her symptoms. I do not believe that her symptoms will totally resolve but I do believe that she will continue to be able to maintain remunerative employment if she has a supportive work environment.

**120**  Similarly, in her evidence at trial, she said the fact that the pain the plaintiff experienced in 2012 was in the same region as it was after the MVA led her to believe it was an exacerbation of the 2008 injury.

**121**  Based on a consideration of all of the evidence, I am persuaded that it is more probable than not that the injuries the plaintiff sustained in the MVA rendered her more vulnerable to the type of injury to her lower back she sustained due to lifting gowns at the bridal gallery in January of 2012.

**122**  As noted by Dr. Shuckett, the pain the plaintiff described as having occurred at the bridal gallery originated from the same lower back/buttock area which had been the main source of the plaintiff's pain complaints since the MVA. The plaintiff testified that it was the same type of pain she had experienced since the MVA, but more intense. In addition to the evidence of the plaintiff and the evidence of Dr. Shuckett on this point, I note the plaintiff's specific complaints of pain in the lower back/buttocks area following the MVA were confirmed by other witnesses.

**MVA Injuries**

**123**  It is clear that the MVA caused the plaintiff considerable pain and discomfort. After the MVA in 2008 and well into 2009, she was experiencing pain, stiffness, restriction in movement, and was having difficulty sleeping. I accept that the pain experienced by the plaintiff was felt more intensely due to her pre-existing mood disorder. I also accept her recovery was negatively affected by her addiction to the oxycodone pain medication, which she had been prescribed to alleviate the pain from the MVA, as well as endometriosis.

**124**  With respect to the particular injuries claimed by the plaintiff, I find as follows.

***Lower Back/Buttocks Pain***

**125**  The medical evidence supports the plaintiff's claim of a soft tissue injury in the lower back/buttocks area resulting from the MVA. She was physically healthy and active prior to the MVA. I find that the pain in her lower back and right buttock was due to the MVA and that it was initially intense.

**126**  Whether or not sacroiliitis was also a factor in her pain, I accept that the lower back/buttocks area was a focal point of her pain since the MVA.

**127**  I also accept the plaintiff's evidence that the intensity of the pain diminished over time, although it would recur with repetitive or strenuous activity. In that regard, she admitted that, prior the incident in January of 2012, she was only having "minor flare ups". She also admitted that when she worked with Mr. Beaudry in 2010 and 2011, she was active, exercising and in "pretty good shape". She said she didn't recall having any physical difficulty doing her work at that time.

**128**  While, as noted above, I find that she experienced a recurrence of pain in her lower back/buttocks immediately following the incident at the bridal gallery in January of 2012, I am satisfied that she has since recovered to the point where she exercises three times a week and bicycles around the neighbourhood as a means of transportation.

**129**  In that regard, I do not accept the plaintiff's evidence when she says that the pain from the January 2012 incident is now "debilitating" and "getting worse". I note that she has been able to work five days a week with only minor accommodations. She also has also been able to look after her daughter and maintain the household, with only occasional assistance from her partner. Further, while she testified that she found it "difficult to walk" and could no longer work out at the gym, this is inconsistent with the evidence of her partner, her father and Dr. Green that she exercises and cycles frequently.

**130**  Further, although the plaintiff testified that over the counter analgesics no longer "cut it" to manage her pain, I note Dr. Zoffman's evidence is that the plaintiff reported being able to manage her pain by resting or using analgesics, and the plaintiff reported to Dr. Zoffman that she uses analgesics sparingly.

**131**  I find the plaintiff's pain in her lower back/buttocks has mainly resolved and that the plaintiff has been able to manage the residual pain symptoms.

***Mid and Upper Back Pain***

**132**  The plaintiff's evidence was that she experienced a sharp pain in her mid-back following the MVA, which pain she said was resolved by Christmas of 2008, with a flare up in 2012.

**133**  She said she also had pain in her upper back which took longer to resolve. She said that with exercise and physiotherapy it improved through 2009 and 2010.

**134**  I accept that Dr. Green's diagnosis of a whiplash injury to her back supports her claim of pain in the upper and mid back in the period following the MVA. However, Dr. Shuckett's diagnosis was directed to the lower back. I find that the mid and upper back pain had resolved by 2010.

***Headaches / Hearing and Vision Difficulties***

**135**  The plaintiff had headaches prior to the MVA. Nevertheless, Dr. Green's clinical records support the plaintiff's claim that she suffered from "pressure" type headaches following the MVA. While the plaintiff was vague in her evidence as to the nature and duration of the headaches, she said that the headaches got "better" than they were in the period immediately following the accident. She said she gets headaches once a week that are exacerbated by neck pain.

**136**  Dr. Green's evidence is that her headaches were related to muscle tension and anxiety resulting from the MVA. While there were other psychosocial factors which I find also contributed to her headaches, I accept her evidence that she had headaches caused by acute neck pain from the MVA. I find the more intense headaches resolved within six months of the MVA.

**137**  I also accept the plaintiff's evidence that she had headaches intermittently after this six month period due to pain in her neck and back. I find these flare ups gradually diminished.

**138**  With respect to the plaintiff's hearing, she testified that she had ringing in her ears that never went away and that got worse at night and with stress. However, she also described experiencing "sharp screeching sounds" and that it is like she was "underwater". Dr. Green testified to her complaints of decreased hearing in her right ear in June of 2008 and in November 2011, which he diagnosed as tinnitus related to the plaintiff's tension in her head and neck. Although I accept the plaintiff did suffer from ringing in her ear, particularly the right ear, as a result of the MVA, I find the plaintiff overstated her symptoms. I find the symptoms have diminished over time and are no longer intruding on her functioning.

**139**  With respect to the plaintiff's complaint of blurred vision, I accept her evidence that this resolved quickly, within a week after the MVA.

**140**  With respect to the plaintiff's claim of "shaking vision", I find her description of her condition to be imprecise and at odds with her continuing to work and drive following the MVA. I also do not have medical evidence sufficient to support a claim for any significant visual disturbance. The letter from an optometrist, Dr. Johal, who did not give evidence, is insufficient to prove a visual dysfunction resulting from the MVA.

***Neck and Shoulder Pain***

**141**  I accept that the plaintiff experienced neck pain as a result of the MVA. Dr. Shuckett and Dr. Green both support her having sustained a soft tissue injury in the right neck and shoulder girdle region from the MVA.

**142**  As noted above, I accept that the acute phase of the neck pain lasted for approximately six months and that she continued to have flare ups after that period. I find the pain symptoms had largely resolved by 2011.

**143**  With respect to her left shoulder pain, I accept the plaintiff's evidence that at the time of the MVA she could not lift up her daughter when she was crying and that she could not lift her left arm for a period immediately following the MVA. I find that the left shoulder pain was initially intense and accept the plaintiff's evidence that, with exercise, it had largely improved by 2010.

**144**  I also accept the plaintiff's evidence that the soreness associated with the injury to her right shoulder lasted for only a few weeks after the MVA.

***Hip Pain***

**145**  The plaintiff claims pain in her hip joint resulted from the MVA. She said the pain was not constant and she cannot recall how long it took to clear up. Dr. Shuckett referred to the plaintiff having left groin pain with motion of her hip, but Dr. Shuckett noted she was not suspicious of a labral tear. Given the vagueness of the plaintiff's description of her pain, I find that her hip pain was minimal.

***Jaw Pain***

**146**  The plaintiff claims pain and tension in her jaw resulting from the MVA. She states that it is connected to her neck pain. Her evidence is vague on this aspect of her claim and there is no medical evidence supporting any ongoing condition. While I accept that she had some discomfort in her jaw, given the level of pain she was suffering immediately following the MVA, I am unable to find that the jaw pain persisted beyond two weeks.

***Bruising***

**147**  I accept the medical evidence of Dr. Green supporting the plaintiff's claim of bruising to her forearms, chest, abdomen, knees and foot from the seatbelt and the force of the MVA. I find that the associated discomfort lasted approximately two weeks, with the exception of the right knee which took approximately two months to improve.

***Exacerbation of Pre-existing Bipolar Disorder / Memory Loss***

**148**  It is not disputed that the plaintiff had a mental disorder prior to the MVA. However, there is a difference of opinion between Dr. Catona and Dr. Zoffman as to whether the plaintiff had bipolar disorder or attention deficit disorder. They also disagreed as to whether the plaintiff would have experienced psychiatric symptoms regardless of the MVA.

**149**  I prefer the evidence of Dr. Catona in respect of the diagnosis of bipolar disorder. Dr. Catona was her treating psychiatrist in the period before and after the MVA and, therefore, knew the plaintiff better. Dr. Catona's diagnosis was also consistent with the plaintiff's previous treating psychiatrists.

**150**  I also prefer the evidence of Dr. Catona that the plaintiff would have experienced psychiatric symptoms regardless of the MVA. This is consistent with her having had hypomanic episodes and depression at various times prior the MVA.

**151**  That said, I accept the evidence of Dr. Catona that the MVA caused the plaintiff's psychiatric symptoms to be more severe than they would otherwise have been and resulted in some cognitive deficits in terms of her level of functioning in the months immediately following the MVA, including her short term memory.

**152**  I, therefore, find that the plaintiff's pre-existing bipolar disorder was exacerbated by the MVA. I also find the plaintiff's short term memory was temporarily affected. However, as noted above, there were a number of other psychosocial factors which negatively affected the plaintiff's mental health in the period following the MVA. There is no dispute, in that regard, that the criminal impaired charge and loss of her driver's licence had a particularly devastating effect on her mental health.

**153**  With respect to the duration of her psychiatric symptoms, Dr. Catona did not see the plaintiff after June of 2009. However, based on the evidence of the plaintiff, as well as Dr. Zoffman and Dr. Shuckett, I find that the plaintiff's psychiatric symptoms were under control by 2010 and do not currently prevent her from working or engaging in the activities of daily living. That is not to say that the plaintiff does not still have a mood disorder, but simply that the symptoms which were exacerbated by the MVA are no longer affecting her.

**Damages**

**Non-Pecuniary Damages**

**154**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and amenities. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases, although they serve only as a guide to appropriate compensation. Each case must be determined on a consideration of its own unique facts: *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. 145; *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at para. 189.

**155**  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 a non-exhaustive list of factors for consideration when assessing non-pecuniary damages (at para. 46):

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

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

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

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

**156**  Citing the Supreme Court of Canada 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, the Court of Appeal in *Stapley* emphasized at para. 45 that 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 ... 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". [Emphasis in original removed.]

**157**  Further, in *Zacharias v. Leys*, [*2005 BCCA 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2JK-00000-00&context=), the Court of Appeal clarified the distinction between the principles that apply to causation compared to the measure of damages: while a defendant must take the plaintiff as he finds her, damages should be adjusted where there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence*** (at paras. 13-22). In that regard the court in *Zacharias* referred to the judgment of Madame Justice Newbury in *York v. Johnston* [*(1997), 37 B.C.L.R. (3d) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=) (C.A.) at para. 6:

Of course, the judgement as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award, as opposed to the "all or nothing" choice that must be made with respect to causation.

**158**  Counsel for the plaintiff submits that the proper range for non-pecuniary loss in this case is $75,000 to $120,000, with $100,000 factoring in the pre-existing mental health issues. She asserts that the MVA has had psychological, as well as physical consequences for the plaintiff, which have significantly interfered with her enjoyment of life, her ability to function in both social and occupational settings, and her general sense of self-worth.

**159**  Plaintiff's counsel relies on non-pecuniary damage awards in the following cases: *Jones v. Arjun*, [*2013 BCSC 1313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B22Y-00000-00&context=); *Tsalamandris v. MacDonald*, [*2011 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6201-00000-00&context=), costs of future care varied [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=); *Moritz v. Schmitz*, [*2013 BCSC 668*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-204R-00000-00&context=); *Clark v. Kouba*, [*2012 BCSC 1607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2GP-00000-00&context=); *Schnare v. Roberts*, [*2009 BCSC 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S437-00000-00&context=); *Smaill v. Williams*, [*2010 BCSC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-2562-00000-00&context=); *Matak v. Lo*, [*[1995] B.C.J. No. 1412*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62N1-00000-00&context=) (S.C.); *Chaban v. Chaban*, [*2009 BCSC 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B11K-00000-00&context=); and *Cantin v. Petersen*, [*2012 BCSC 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3BS-00000-00&context=).

**160**  Counsel for the defendants submits that an award for non-pecuniary damages should be reduced to account for Ms. Wainwright's ongoing pre-existing condition that would have affected her whether or not the MVA occurred, as well as the other intervening psychosocial factors. He submits that the proper range is between $35,000 and $50,000.

**161**  The defendants rely on the following cases: *Chan v. Lee*, [*2008 BCSC 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DS-00000-00&context=); *Lehtonen v. Johnston*, [*2009 BCSC 1364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B202-00000-00&context=); *Dewitt v. Takacs*, [*2008 BCSC 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1B4-00000-00&context=); *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=); and *Piper v. Hassan*, [*2012 BCSC 189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1V3-00000-00&context=).

**162**  In considering the authorities provided by the plaintiff, I find the most relevant cases to the factual situation in this case are *Jones*, *Chaban*, and *Piper*:

1. In *Jones*, a 59 year old realtor with pre-existing back complaints, was found to have suffered soft tissue injuries, headaches, sleep difficulties, and weakened capacity to cope and was awarded $65,000;
2. In *Chaban*, a 36 year old female in good shape experienced aggravation of a pre-existing depression and anxiety, as well chronic pain, following three motor vehicle accidents and was awarded $75,000; and
3. In *Piper*, a 50 year old parts manager was awarded $50,000 for severe but temporary exacerbation of his pre-existing depression and moderate soft tissue injury causing considerable discomfort and pain.

**163**  I agree with plaintiff's counsel that the MVA caused significant disruption to the plaintiff's life. It negatively affected the quality and enjoyment of her life. Prior to the MVA, she was active and feeling positive about her new career as a realtor. As a result of the physical injuries caused by the MVA, her health deteriorated. She was not sleeping well, she was restricted in her activities and she was experiencing pain. She could not enjoy the same quality of interactions with her family.

**164**  Further, as noted above, I agree that, although the plaintiff would have suffered from her pre-existing mood disorder irrespective of the MVA, the injuries she sustained in the MVA exacerbated her mood disorder. Due to the effects of the MVA and the psychosocial factors, she was admitted into a residential treatment facility in 2009 to bring her mood under control.

**165**  Additionally, as a result of the oxycodone prescribed by her family physician to alleviate pain related to the MVA and to her endometriosis, she became addicted to oxycodone, which further delayed her recovery.

**166**  I accept that the plaintiff went through a "dark time" in 2008 and 2009 and continued to have painful flare ups for a period after that time. Although the pain and psychological effects were largely resolved by 2010, the pain in her back and buttocks was exacerbated by the 2012 incident at the bridal gallery.

**167**  It is to the plaintiff's credit that she took steps to alleviate her physical injuries through physiotherapy, exercise and medication, and by adapting her activities to address pain. She has been tenacious in her efforts to overcome the various obstacles which have confronted her over the last few years.

**168**  That said, I accept the defendants' contention that there were other psychosocial factors, unrelated to the MVA, which were operating throughout the post-MVA period. They also negatively affected the plaintiff's functioning. Without diminishing the significance of the MVA, I must also take these factors into account in determining the appropriate amount of damages.

**169**  In all of the circumstances, and having considered the relevant case law, I conclude that a fair and reasonable award for non-pecuniary damages in this case is $60,000.

***Loss of Earning Capacity***

**170**  The legal framework governing an award for loss of earning capacity was summarized by Madame Justice Dardi 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 paras. 236-240:

The legal principle that governs the assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' ***negligence***: *Lines v. W. & D Logging Co. Ltd*., [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185. It is well-settled that an award for future loss of earning capacity represents compensation for a pecuniary loss:  *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32. Compensation must be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd*., [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=); *X. v. Y*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 188.

The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at para. 19; *X. v. Y.* at para. 183.

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."

***Loss of Past Earning Capacity***

**171**  Compensation for past loss of earning capacity is to be based on what the plaintiff would have - not could have - earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.,* [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at paras. 28-30; *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.

**172**  Pursuant to section 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, a plaintiff is entitled to recover only his or her past net income loss: *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=) at para. 72, aff'd [*2010 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2M8-00000-00&context=).

**173**  The plaintiff's position is that her loss of earning capacity should be determined based upon the net median amount of earning for a real estate agent, as calculated by Mr. Carson. His evidence was that the net median annual income was $59,000. Counsel suggests that the past loss for five years and five months, less actual income, would be $208,000. Counsel submits that, if the court finds that the driving while impaired conviction is solely the responsibility of the plaintiff, then a maximum of 12 months could be deducted but the actual income should not be deducted for that period.

**174**  The defendants' position is that if there was an income loss, it would be limited to 2008 and 2009 as she was working again and feeling better in 2010. Further, with respect to the amount of her income, the defendants' position is that it is too speculative to calculate. She was in her first year of real estate sales and the market changed markedly in the fall of 2008 and into 2009. He relies on the evidence of Robert Carson, Richard Beaudry, John Lawless, as well as the plaintiff's admission, to establish that housing prices declined and that clients were walking away from their deposits and failing to complete sale transactions.

**175**  The defendants contend that it would be wrong to use 2005 statistics to evaluate the income loss because of the negative contingencies affecting the industry as a whole. The defendants also contend that there is still a skewing in the median amount calculated by Mr. Carson, given the relatively small number of agents who are highly remunerated, compared to the large number of agents earning less than the mean average.

**176**  I accept that the plaintiff lost income as a result of the MVA. Although she continued to work after the MVA, she struggled to do so. She was not functioning effectively and missed work opportunities.

**177**  That said, I agree with the defendants that there were significant negative contingencies which would have affected her income regardless of the MVA. While the plaintiff was optimistic about her new career in real estate and had some success, she had only been a realtor for seven months at the time of the MVA and her previous employment record was not steady. As a new agent without an established clientele, it is likely that she would have been affected by the economic downturn to a greater extent than more experienced agents. Further, as Mr. Carson noted, many realtors do not continue in this profession. Currently, the plaintiff does not have her realtor's licence due to fines that were assessed against her.

**178**  More significantly, the loss of her driver's licence due to her conviction for driving while impaired affected her income, given the importance of a driver's licence to a realtor selling residential real estate. She still does not have a driver's licence due to the cost of her insurance.

**179**  Additionally, although I have found the MVA exacerbated her mood disorder symptoms and ability to cope with the pain, it would likely have affected her income regardless of the MVA.

**180**  The plaintiff was unable to work for periods of time in 2008 and 2009. Her income for 2008 was $30,400, for 2009 it was $6,268, and for 2010, the year she worked full time as a real estate agent with Mr. Beaudry, it was $36,324. Her income for 2011 was $4,800, her income for 2012 was $9,500 and current income for 2013 to the date of trial, working 25 hours a week at $18.00 an hour, plus commissions, was $24,000.

**181**  I consider that an average income for the plaintiff of $59,000 is too high in light of the real estate market and her short tenure in real estate. I find an average annual income of $40,000 more appropriate, except for the one year period she lost her driver's licence which would have affected her ability to earn an income. I assess her income for that year at $30,000. Deducting actual income and applying a 20% reduction for contingencies, I award damages for past income loss in the gross amount of $76,300. As the plaintiff is only entitled to recover her net income losses, I direct counsel to carry out the necessary calculations in order to determine the appropriate net loss. Counsel are at liberty to apply, if they are unable to agree as to this amount.

***Loss of Future Earning Capacity***

**182**  As stated in *Midgley*, the plaintiff must demonstrate both impairment in her earning capacity and that there is a real and substantial possibility that any diminishment in earning capacity will result in a pecuniary loss. The assessment of loss must be based on the evidence, and not an application of a purely mathematical formula. The overall fairness and reasonableness of the award must be considered.

**183**  Counsel for the plaintiff submits that the plaintiff has satisfied the test for loss of earning capacity set out in *Midgley*, and reiterated at para. 53 of *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=), as follows:

... a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages.

**184**  Counsel for the plaintiff alleges she has proven a real and substantial possibility that the plaintiff's earning capacity has been impaired. She says the plaintiff can now only work part time, as recommended by Mr. Pakulak, the occupational therapist who testified in these proceedings, and can no longer earn what she could have but for the MVA. The plaintiff claims an estimated loss of future capacity in the range of $200,000 to $300,000.

**185**  Counsel for the defendants submits that the plaintiff failed to meet the burden of proof imposed upon her with respect to a loss of earning capacity by not addressing the negative contingencies of her chronic pre-existing major affective mood disorder and the loss of her driver's licence. He noted, in that regard, her CPP disability claims prior to the MVA.

**186**  Counsel for the defendants also submits that the plaintiff is sufficiently recovered from her injuries to obtain work at least equal to the type of work she wanted to pursue prior to the MVA. He notes that Mr. Lawless, on cross examination, agreed that the plaintiff's current work is within the categories of work that she would be suitable for by aptitude and interest. Counsel disputes the assumption that she can only work part time, and notes that the functional capacity evaluation only limited her from working more than 40 hours per week.

**187**  I agree with the defendants that the functional capacity evaluation does not support the conclusion that she can only work on a part time basis. In his report, Mr. Pakulak said it was his opinion that the plaintiff did not demonstrate the capacity to perform real estate work at the estimated 70-80 hours a week level she was working at prior to the MVA. However, he also said it is likely that she does possess the capacity to complete this work on a full time basis (i.e. eight hour work days) provided she has accommodations which allow her to change positions and take breaks.

**188**  In that regard, I note the plaintiff was working six to seven hours a day for Mr. Beaudry in 2010.

**189**  The conclusion that the plaintiff could work as a realtor is also supported by the opinion of Dr. Zoffman, who stated that her psychiatric condition does not prevent her from working in that capacity.

**190**  While the plaintiff is not licenced to work as a realtor currently, she is working in real estate sales for a developer, where her knowledge of real estate transactions is an asset and would assist her in advancing in that line of work. She is able to fulfill the work requirements with only minor accommodation. While her current hours are not full time, I am not persuaded that she could not work full time in that type of position or as a realtor.

**191**  That is not to say that the MVA has not affected her earning capacity. I find that there is a real and substantial possibility that her earning capacity has been impaired. While the MVA was not the sole factor negatively affecting her capacity to earn an income, I conclude that the injuries caused by the MVA and associated exacerbation of her mood disorder caused disruption to her career path and contributed to her becoming less able to capitalize on her initial success as a realtor and less capable of earning an income in a competitive labour market.

**192**  However, I do not accept the magnitude of loss of future earnings proposed by the plaintiff. I am not satisfied that the plaintiff's future earning capacity is permanently impaired I also agree with the defendants that psychosocial factors would likely have affected the plaintiff's earning capacity.

**193**  I conclude that there is a real and substantial possibility of loss of earnings over the next two to three years period, which I assess at $45,000.

**Cost of Future Care**

**194**  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. 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.) at para. 172, 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.); *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=) at para. 55, aff'd [*2004 BCCA 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-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 para. 30.

**195**  The plaintiff seeks costs for future case based upon the recommendations of Mr. Pakulak, including personal kinesiology sessions; a recreational facility pass; vocational and cognitive therapy counselling; chiropractic sessions; an ergonomic chair; Advil; extra strength Tylenol; Zopiclone; muscle relaxants; ocular exercises; and retraining. The plaintiff relies on the report of Mr. Carson for costs of future care other than one time payments.

**196**  The defendants opposes the payment of costs which do not meet the requirement of medical justification, such as the ergonomic chair and chiropractic sessions.

**197**  With respect to the ergonomic chair, I note that it is recommended by Mr. Pakulak who is an occupational therapist. The plaintiff is currently using a type of ergonomic chair which was provided by her mother. I find the plaintiff requires an ergonomic chair and accept Mr. Pakulak's recommendation as to the type of chair which would be suitable for her.

**198**  I accept the value of the personal kinesiology sessions and a recreational facility pass as a means of managing any residual pain, minimizing the risk of exacerbating previous injury to the plaintiff's back and promoting her health. I award the costs of the 15 kinesiology sessions recommended by Mr. Pakulak and a gym membership for a period of 5 years.

**199**  I decline to award the cost of ocular exercises as I am not satisfied that any need for these exercises arises from the MVA.

**200**  I decline to award the cost of further chiropractic sessions as there is no current recommendation for this treatment. I note Dr. Shuckett does not recommend chiropractic treatment and favoured more active forms of therapy.

**201**  The cognitive behavioural therapy was recommended by Dr. Zoffman to assist the plaintiff in dealing with pain and I award the cost of ten sessions.

**202**  I award an amount for analgesics and muscle relaxants to address residual pain based upon the recommendation of Dr. Zoffman. With regard to Zopiclone, I recognize that both Dr. Green and Dr. Catona have prescribed it previously, but I have no medical evidence that this medication is recommended on an ongoing basis for reasons related to the MVA.

**203**  I decline to award the costs of retraining or vocational counselling as I have found that the plaintiff is capable of continuing to work in real estate.

**204**  I award the following costs:

1. Kinesiology sessions (15 sessions of 90 minutes X $55 per/hour) = $1,237.50
2. Facility pass ($400 per year X 5 years) = $2,000.00
3. Cognitive therapy counselling ($175 per session X 10 sessions) = $1,750.00
4. Analgesics and muscle relaxants = $1,500.00
5. Ergonomic chair = $3,850.00

**Special Damages**

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

**206**  The defendants' submission is that recoverable costs are physiotherapy costs, medication costs related to the MVA, optometrist examination costs and sleeping aid medications. In their submission, the costs which are not recoverable include chiropractic treatments related to the 2012 incident at the bridal gallery, mood disorder medications, orthotics and heel lifts, ICBC fees and debts and other items abandoned by the plaintiff during the trial.

**207**  The plaintiff claims $9,102.04, which includes the subrogated claim of Pacific Blue Cross.

**208**  I accept the plaintiff should be reimbursed for the costs of physiotherapy, Zopiclone and sleep medication, Arthrotec, analgesics, muscle relaxants, gym membership and eye examination.

**209**  As chiropractic treatment had initially been recommended by Dr. Green and the plaintiff reported to Dr. Green that she was benefitting from this type of treatment in 2012, I conclude that the plaintiff should be reimbursed for this cost.

**210**  I agree with counsel for the defendants that the plaintiff should not be reimbursed for costs which arise from her driving while impaired conviction. Similarly, she should not be reimbursed for a missed appointment with Dr. Catona when no reasonable explanation has been provided.

**211**  The plaintiff is, therefore, entitled to reimbursement for special damages in the amount of $3,943.23.

**Conclusion**

**212**  In summary, the total damages assessed amount to $195,580.73:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non Pecuniary Damages | $60,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Loss of Income | $76,300 (less tax) |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Loss of Income | $45,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Costs of Future Care | $10,337.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $3,943.23 |  |

**213**  The plaintiff is entitled to judgment in that amount, together with interest.

**214**  If the parties are unable to agree on costs, they may speak to the issue.

W.J. HARRIS J.

**End of Document**

[***Wong-Lai v. Ong, [2011] B.C.J. No. 1764***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6270-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.J. Sewell J.

Heard: July 4-15 and 21, 2011.

Judgment: September 22, 2011.

Docket: M102490

Registry: Vancouver

**[2011] B.C.J. No. 1764** | [*2011 BCSC 1260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1NB-00000-00&context=) | [*24 M.V.R. (6th) 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1NB-00000-00&context=) | [*2011 CarswellBC 2527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1NB-00000-00&context=) | [*207 A.C.W.S. (3d) 175*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1NB-00000-00&context=)

Between Siu Lan Wong-Lai, Plaintiff, and Jack Hak Min Ong and Pollyanna Shier, Defendants

(125 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Pelvis — Head — Brain damage — Leg injuries — Fractures — Action by pedestrian for damages for injuries allowed in part — While crossing street during rainstorm, pedestrian was struck by defendant's motor vehicle and sustained serious injuries including a brain injury and fractures — At time of accident, defendant was in process of changing lanes and was checking for traffic over his shoulder — Both parties negligent as neither kept proper lookout and liability apportioned 25 per cent to defendant — Plaintiff's damages assessed at $200,000 for non-pecuniary damages, $82,100 for costs of future care, $797 in special damages and $25,000 in trust — Damages reduced by 75 per cent.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Non-pecuniary loss — Action by pedestrian for damages for injuries allowed in part — While crossing street during rainstorm, pedestrian was struck by defendant's motor vehicle and sustained serious injuries including a brain injury and fractures — At time of accident, defendant was in process of changing lanes and was checking for traffic over his shoulder — Both parties negligent as neither kept proper lookout and liability apportioned 25 per cent to defendant — Plaintiff's damages assessed at $200,000 for non-pecuniary damages, $82,100 for costs of future care, $797 in special damages and $25,000 in trust — Damages reduced by 75 per cent.**

**Damages — Assessment of damages — Limiting factors — Contributory *negligence* — Action by pedestrian for damages for injuries allowed in part — While crossing street during rainstorm, pedestrian was struck by defendant's motor vehicle and sustained serious injuries including a brain injury and fractures — At time of accident, defendant was in process of changing lanes and was checking for traffic over his shoulder — Both parties negligent as neither kept proper lookout and liability apportioned 25 per cent to defendant — Plaintiff's damages assessed at $200,000 for non-pecuniary damages, $82,100 for costs of future care, $797 in special damages and $25,000 in trust — Damages reduced by 75 per cent.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Care and control of vehicle — Proper lookout — Crossing road — Pedestrians — *Negligence* — Liability — Civil actions — *Negligence* — Contributory *negligence* — Action by pedestrian for damages for injuries allowed in part — While crossing street during rainstorm, pedestrian was struck by defendant's motor vehicle and sustained serious injuries including a brain injury and fractures — At time of accident, defendant was in process of changing lanes and was checking for traffic over his shoulder — Both parties negligent as neither kept proper lookout and liability apportioned 25 per cent to defendant — Plaintiff's damages assessed at $200,000 for non-pecuniary damages, $82,100 for costs of future care, $797 in special damages and $25,000 in trust — Damages reduced by 75 per cent.**

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| Action by a pedestrian for damages for injuries. While crossing the street with her husband during a rainstorm, the plaintiff and her husband were struck by a motor vehicle driven by the defendant. At the time of the accident, the defendant was travelling at approximately the speed limit and his windshield wipers were in operation. However, just prior to the collision he began the process of changing lanes and was checking for traffic over his left shoulder. An expert in accident reconstruction tendered a report that indicated that the defendant would have had adequate opportunity to stop his vehicle if he had observed the plaintiff and her husband. As a result of the accident, the plaintiff's husband died. The plaintiff suffered fractures to her pelvis, cervical vertebrae, ribs and leg and suffered a brain injury. She was immediately treated at hospital and remained in hospital for approximately five months. She also suffered depression, but it was unclear as to whether it was a result of the accident or her husband's death. At the time of the accident, the plaintiff was 72 years of age. She had long since retired and lived in the basement of her son's home. She was an independent, active senior with an active social life. As a result of her injuries from the accident, the plaintiff had difficulty climbing stairs, required a cane for walker for walking and required homemaking assistance.  HELD: Action allowed in part.  As the plaintiff was crossing a major roadway in a dangerous location on a dark night when visibility was poor and while wearing dark clothing, and did not keep a proper lookout, she bore a greater portion of the liability for the accident. While the defendant had the right of way, he was not keeping a proper lookout as he was distracted by his manoeuvre of changing lanes. Had the defendant been keeping a proper lookout, he would have seen the plaintiff and could have avoided the collision. As a result, liability was apportioned 75 per cent to the plaintiff and 25 per cent to the defendant. Given the plaintiff's marked degree of permanent disability, the loss of independent, and the increased risk of morbidity and mortality, the plaintiff was entitled to non-pecuniary damages of $200,000. In addition, the plaintiff was entitled to damages of $82,100 for costs of future care including medication, acupuncture, rehabilitation, a pool pass, occupational and physical therapy, psychological counselling, homecare assistance, transportation and adaptive equipment and special damages of $767. The plaintiff was also entitled to $25,000 in trust for the personal assistance provided by her daughter-in-law. The total damages assessed were reduced by 75 per cent to account for the plaintiff's liability with the result that the plaintiff was entitled to judgment in the amount of $77,967. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *RSBC 1996, CHAPTER 126*,

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 180*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0HH-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Joan M. Young.

Counsel for the Defendants: Ian Aikenhead, Q.C. and Andrea Jones.

[Editor's note: Corrections were released by the Court December 7, 2011 and January 19, 2012; the changes have been made to the text and the corrections are appended to this document.]

**Reasons for Judgment**

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| **R.J. SEWELL J.** |

**INTRODUCTION**

**1**  November 28, 2009 began as a very pleasant day for the plaintiff Siu Lan Wong-Lai. Ms. Lai and her husband enjoyed a dim sum lunch together. They then went to the Chee Dack Social Club to spend the afternoon playing mahjong with their friends.

**2**  The Chee Dack Social Club is located on the north side of Prior Street in Vancouver. When they arrived at the Club, its parking lot was full, so Ms. Lai parked in a lot on the south side of Prior. They left the Club at approximately 5:30 p.m. to return home for a planned dinner out to celebrate their daughter-in-law's birthday.

**3**  Tragically, their long married life together ended as they attempted to cross Prior Street between Gore and Dunlevy to return to their car. They were struck by a car driven by the defendant Jack Hak Min Ong and owned by his wife, the defendant Pollyanna Shier. Both Ms. Lai and her husband suffered massive injuries as a result of the accident. Mr. Lai died in hospital that evening. Ms. Lai has made a remarkable recovery from her injuries, but continues to suffer serious consequences from them.

**4**  In this case I must decide whether the defendants are liable to compensate Ms. Lai for any portion of the damages she suffered as a result of the accident. To do so I must reconstruct the events which occurred that evening and decide whether Mr. Ong was in any way at fault for the accident that caused Ms. Lai's injuries.

**SUMMARY OF EVIDENCE ON LIABILITY**

**5**  The evidence as to what occurred on November 28 is fragmentary and somewhat contradictory. Neither Ms. Lai, Mr. Ong nor Ms. Shier was aware of the imminent collision until the instant before it actually occurred. However, there were four eyewitnesses who observed some of the events relating to the accident.

**6**  Mr. Ryan Smith was driving his vehicle westbound on Prior Street. He observed Mr. and Ms. Lai attempting to cross Prior Street and had them under observation from the time they left the north sidewalk up to the time of the collision.

**7**  Ms. Shannon Gignac was a passenger in Mr. Smith's vehicle. She observed Mr. and Ms. Lai for a brief time before the collision. Her attention was directed to them when Mr. Smith told her that they were about to be hit by the car being driven by Mr. Ong.

**8**  Aaron Kirchhoffer and Christina Kirchhoffer also observed the moment of impact. They were in a west bound car ahead of Mr. Smith's car on Prior Street. Neither observed Ms. Lai or her husband prior to the impact.

**9**  Ms. Lai and Mr. Ong testified at trial and portions of Ms. Shier's examination for discovery were read into evidence by the plaintiff.

**10**  In addition to the eyewitnesses, Constable Baxter of the Vancouver City Police provided photographic evidence of the scene of the accident and evidence with respect to weather conditions when she attended. Mr. Jonathan Lawrence, a professional engineer, provided an expert opinion report on time, distance and speed. The defendants relied upon a visibility report of Mr. Darrin Richards, also a professional engineer. Both experts were cross-examined at trial.

**11**  Ms. Lai testified that she and her husband were attempting to cross Prior Street at approximately 5:30 in the afternoon. At that time of the year it was of course completely dark by 5:30. Although Ms. Lai said there was only a light rain falling, I accept the evidence of other witnesses that it was raining heavily at that time. Ms. Lai testified that her husband was unable to move quickly because of arthritis in his knees. She said that she was attempting to hurry him across Prior Street. She said that she was slightly ahead of him and had actually reached the sidewalk on the south side of Prior Street prior to the accident. However, she took one or two steps back into the eastbound curb lane to attempt to grab her husband and pull him onto the sidewalk. She testified that in the course of doing so she was hit. She stated that she was unaware of the approaching car before it hit her. She has no memory of events which occurred in respect of the accident after being struck.

**12**  Mr. Ong testified that he was driving his smart car eastbound on Prior Street, having previously traversed the Georgia viaduct in an eastbound direction. He stated that the traffic light at the corner of Prior and Gore, at the east end of the viaduct, was green for cars proceeding onto Prior Street. He was in the curb lane. His evidence was that it was raining heavily at the time of the accident and that he had the windshield wipers in operation. He said that as he passed through the intersection of Gore and Prior he noticed a parked car in the curb lane of Prior immediately to the east of Dunlevy Avenue, the next street east of Gore. No cars were parked in the curb lane of Prior between Gore and Dunlevy. Mr. Ong testified that at the time he was driving no faster than the speed limit of 50 kilometres per hour, although he agrees that he did not look at his speedometer at any relevant time.

**13**  Mr. Ong testified that when he observed the parked car in the curb lane on Prior Street he began the process of changing lanes from the curb lane to the inner eastbound lane. He says that he began this process by checking his side-view mirror to see if there were any cars behind him and then proceeded to do a shoulder check over his left shoulder looking backwards on Prior Street into the inner lane. While he was in the process of doing the shoulder check his wife, Ms. Shier, screamed and he turned his head to face forward immediately before the time the car struck the two pedestrians. He did not apply the brakes on his car prior to the collision. He stated that immediately after the collision he brought his car to a slow and gradual stop on Prior Street immediately east of the intersection of Dunlevy. He says he was taking stock of the situation and therefore slowed deliberately, without any forcible braking. He said he saw no need to apply his brakes forcefully because he was unaware of what he had hit and that after the impact there was nothing in front of him.

**14**  Mr. Smith's evidence is that while driving westbound on Prior Street he noticed two pedestrians crossing the road some distance in front of him. He stated that he observed them stepping off the north sidewalk as his car crossed the intersection one block to the east of Dunlevy and Prior. In cross examination counsel suggested that that was Princess Avenue, but it is in fact Jackson Avenue. In any event, it was one block east of Dunlevy. He says that he observed the pedestrians reach the mid-point of the road and then proceed in a southerly direction towards the south sidewalk. He stated that neither pedestrian reached the south sidewalk before they were struck. He testified that they picked up their pace when they reached the centre line of Prior Street and appeared to be hurrying to attempt to cross before the vehicle operated by Mr. Ong hit him. In cross-examination he agreed with counsel's suggestion that the couple ran in front of the car.

**15**  Mr. Smith was obviously concerned about the safety of the pedestrians and appears to have been paying some particular attention to the events which occurred immediately prior to the impact. He testified that when the pedestrians had reached the midpoint of Prior Street, the car that ultimately hit them appeared to still be on the viaduct or in the intersection of Gore and Prior. While Mr Smith did not say how far west on Prior his car had advanced when he saw the pedestrians struck, he did say that after the accident he pulled onto Dunlevy and stopped his vehicle. From this evidence, I conclude that his vehicle was still to the east of Dunlevy when the impact occurred.

**16**  Ms. Gignac testified that she did not notice the pedestrians crossing Prior Street before Mr. Smith brought them to her attention. However she did testify that once Mr. Smith said words to the effect of "they are going to get hit" she was able to see them. In cross examination Ms. Gignac estimated Mr. Ong's speed at between 55 and 60 kilometres per hour.

**17**  In her evidence she stated that the pedestrians were moving at a slow jog when she noticed them. She did make a statement to the police in which she indicated that they were moving at a fast walk. In cross-examination she acknowledged having made that statement. In my view there is no substantial difference between a fast walk and a slow jog. The evidence of both Mr. Smith and Ms. Gignac therefore is that the pedestrians were moving at faster than a normal walking speed. However, Mr. Smith said they speeded up at the midpoint of the road and Ms. Gignac did not see them until after they had speeded up.

**18**  Neither Mr. nor Ms. Kirchhoffer saw Ms. Lai and her husband cross the road even though their vehicle was ahead of Mr. Smith's vehicle. The first time they noticed Mr. and Ms. Lai was immediately at the point of impact.

**19**  Mr. Richards took a series of photographs of the location of the accident on another evening when the light and weather conditions approximated those of the night of the accident. He also photographed Prior Street from the Georgia viaduct. Several witnesses confirmed that his photographs did approximate the visibility as it was on November 29, 2009. Mr. Richards had two surrogates, who were wearing clothing similar in colour to that of the Lais, stand in the middle of the road when he took the photographs from the viaduct. Those photographs show that the surrogates were visible from the Georgia viaduct from a point immediately to the west of Gore Avenue. They also demonstrate that it would be easy for a driver to miss seeing them unless the driver was paying close attention to the road ahead.

**20**  Mr. Lawrence did not give any material evidence with respect to visibility. His evidence was that, based on the accident debris, the point of impact was approximately 25 metres west of the intersection of Dunlevy and Prior Street. His evidence, which was accepted by both parties, was that in order to stop short of a hazard Mr. Ong would have needed to detect it at a distance of 38 metres if he was travelling 45 kilometres per hour, 45 metres if he was travelling 50 kilometres per hour and 58 metres if he was travelling 60 kilometres per hour.

**21**  Mr. Lawrence also stated that his instructions in preparing his opinion were to assume that Ms. Lai was walking across Prior Street at an average speed or slower for a person aged 73 years old. On the literature that was available to him he assumed that Ms. Lai was walking across Prior Street at a speed of 1.2 metres per second. Based on that assumption he prepared diagrams showing the location at which the smart car that struck Ms. Lai would have been located if travelling at 45, 50 and 60 kilometres per hour respectively at the time when the Lais were at various stages of crossing the road. I will return to Mr. Lawrence's evidence later.

**FINDINGS OF FACT ON LIABILITY**

**22**  The submissions of counsel have identified a number of factual issues on which I must make findings. The most important of these is:

Were the Lais visible to a driver keeping a proper lookout at any time prior to impact, and in particular were they visible at any time that would have given that driver the opportunity to avoid striking them?

**23**  To determine the answer to this question it is necessary to address three underlying issues:

1. What were the respective positions of the Lais and the smart car prior to being struck as the Lais proceeded across Prior Street?
2. At what pace were the Lais proceeding as they crossed Prior Street?
3. How fast was the smart car travelling immediately before and at the point of impact?

**24**  I find that Mr. and Ms. Lai were attempting to cross Prior Street approximately 20 metres to the west of the intersection of Prior and Dunlevy. I also conclude that they were in somewhat of a hurry to cross the road. It seems to me that the most likely scenario is that either Mr. and Ms. Lai assumed that they could safely cross in front of the oncoming smart car driven by Mr. Ong but they misjudged the amount of time and space that they had to successfully get across, or Ms. Lai was distracted by her efforts to hurry her husband along and did not notice the approaching car.

**25**  I do not find Ms. Lai's recollection of having reached the south sidewalk and stepping back into the roadway to be reliable. Her recollection is inconsistent with Mr. Smith's evidence that he observed the couple throughout the entire time that they were crossing Prior Street. Ms. Gignac also observed both pedestrians walk into the path of the vehicle without reaching the south sidewalk. In addition Ms. Shier's examination for discovery evidence that was she saw the right side of the pedestrians' faces immediately before impact. The physical and emotional trauma of the accident would probably have had a significant impact on her ability to recall what happened that evening.

**26**  Mr. Lawrence's reconstruction of the accident concludes that Mr. Ong would have had an adequate opportunity to stop his vehicle short of the impact point, even if it was travelling at 60 kilometres per hour, if he had observed the pedestrians at the midpoint of Prior Street. He arrives at this conclusion by estimating the point of impact from the debris on the road, and calculating where the Lais and the smart car would have been in the seconds preceding the accident. He calculated the probable positions of the smart car if it had been travelling at speeds of 45, 50 and 60 kilometres per hour, when the Lais stepped off the north sidewalk and when they were at the midpoint of Prior Street. His conclusions are however based on the disputed assumption that the couple was moving at a speed of 1.2 metres per second as they crossed Prior Street and approached the point of impact. If they were moving faster, they would obviously have been farther north on Prior Street when Mr. Ong crossed Gore, and Mr. Ong would have had less opportunity to observe them.

**27**  Mr. Aikenhead submits that the evidence is that the Lais were running across the road and that Mr. Lawrence's opinion as to the relative position of the car and the pedestrians is therefore of no value. He postulated that the couple were moving twice as fast as Mr. Lawrence assumed and that therefore Mr. Ong had no real opportunity to observe them in time to stop or slow his vehicle before impact.

**28**  However, I do not think that the evidence supports this conclusion. I have concluded that Mr. Smith's testimony is the most reliable information available to me on the critical question of the relative positions of the Lais and the smart car as the Lais proceeded across Prior Street. As I have already stated, Mr. Smith was paying close attention to the progress of the Lais across Prior because he was concerned about their safety. He had a good view of the relative positions of both the Lais and the defendants' vehicle as they converged. I therefore find that when the Lais had reached the midpoint of Prior Street, Mr. Ong's vehicle was no further east than the intersection of Gore and Prior.

**29**  I also am not satisfied that the couple were moving at anything close to the speed postulated by Mr. Aikenhead. The defence led no evidence to support this submission. Contrary to counsel's hypothesis, the evidence is that they picked up their pace when they reached the centre line of Prior Street. I also note that the impact appears to have occurred very close to the curb, with the pedestrians striking the right side of the windshield. As I read Mr. Lawrence's figure 4, he has placed the point of impact as being in the middle of the curb lane, whereas the damage to the windshield suggests that the Lais were almost at the curb when struck. This would be consistent with the Lais moving at a faster place then assumed by Mr. Lawrence, but not twice as fast as postulated by Mr. Aikenhead.

**30**  More fundamentally however, Mr. Smith places the smart car at a considerable distance from the point of impact when the Lais were at the midpoint of the road. There is nothing in his evidence to support the conclusion that Mr. Ong would have been too close to the pedestrians to stop his vehicle or slow it sufficiently to avoid striking them if he had observed the pedestrians at the midpoint of the road. Mr. Smith's evidence is that he observed the relative positions of the car and the pedestrians over some period of time. He was very definite that there was a considerable distance between the car and pedestrians when the pedestrians reached the midpoint of Prior Street. His attention was focussed on the relative positions of the pedestrians and the car because he was concerned that they would collide.

**31**  I therefore find, on the balance of probabilities, that Ms. Lai had reached the midpoint of the road as the smart car was crossing the intersection of Gore and Prior, or immediately to the west thereof.

**32**  In this case there is no question that Ms. Lai and her husband were crossing a major road on a dark night when visibility was very poor. They were wearing dark clothing. However, I am also satisfied, based on the evidence of Mr. Smith and on the evidence of the defendants' expert Mr. Richards, that Mr. and Ms. Lai were visible, and could have been seen, by the driver of a vehicle coming off the Georgia viaduct when they were at the midpoint of the road.

**33**  Mr. Richards took a number of photographs on an evening with similar weather and light conditions to those of the night of the accident. Of these, the most important to me were the photographs taken from the intersection of Gore and Prior of two surrogates standing in the middle of Prior Street at the same distance west of Dunlevy as the point of impact was from that intersection. The surrogates were wearing similar clothing to that worn by the Lais on November 28. They are visible in the photographs. In cross examination Mr. Richards agreed that the acuity of the human eye would be superior to the lens of his camera and that the surrogates were visible to him at the time he took the photographs.

**34**  I therefore conclude that it would have been reasonably apparent to the driver of an eastbound vehicle that the Lais were present on the road from a distance that would have permitted the operator of the smart car to stop or avoid hitting them had he seen them.

**35**  In reaching this conclusion I rely on the evidence of Mr. Lawrence that the smart car travelling at 60 kilometres per hour could have come to a full stop within 58 metres of the driver noticing a hazard and initiating braking of his vehicle. I also note that there is a significant difference between the distance required to stop at 50 and 60 kilometres per hour. Mr. Lawrence's conclusion that the stopping distances at those speeds were 45 and 58 metres respectively was not challenged. I have therefore concluded that had Mr. Ong noticed the Lais at the same distance at which they were visible to Mr. Richards he could have avoided the accident, even if he had been travelling at 60 kilometres per hour.

**36**  I also conclude that from the time he observed the parked car in the lane of Prior in which he was travelling Mr. Ong's attention was directed to completing the manoeuvre of changing lanes. I find that Mr. Ong would have been able to see the plaintiff and her husband crossing Prior Street had he been keeping a lookout for pedestrians crossing at that point. I find that Mr. Ong was travelling at a speed of between 55 and 60 kilometres per hour and that his attention to other hazards of the road ahead was significantly distracted by his manoeuvre of changing lanes.

**37**  My conclusion with respect to Mr. Ong's speed is based on the distance his car travelled between the time Mr. Smith observed it when the Lais were at the middle of Prior, Ms. Gignac's evidence and Mr. Lawrence's reconstruction based on the distance Mr. Ong's car travelled before it came to a stop after the accident.

**38**  I have also concluded that Mr. Ong was not keeping a proper lookout because he was concentrating his attention on the vehicle in the curb lane some considerable distance ahead of him and in the manoeuvre of changing lanes.

**39**  Mr. Ong was adamant that he was not exceeding the speed limit of 50 kilometres per hour. Mr. Lawrence estimated the speed of the Smart car at impact at between 52 and 60 kilometres per hour. This estimate was based on the assumption that Mr. Ong would have braked hard to bring his car to a stop as quickly as possible.

**40**  Mr. Ong denied that he braked hard after the impact. He said he brought his car to a gradual stop. He testified that after the collision he "took stock of the situation" and that immediately after the accident he did not know that he had hit two pedestrians. However, he did say that his wife, who was a passenger in the vehicle, screamed. In addition, he testified that he had turned and was facing forward immediately prior to the point of impact. From this I take it that his evidence is that he was looking forward when the impact occurred and must have seen the pedestrians hit the windshield of his car.

**41**  Ms. Shier's examination for discovery evidence was that she first noticed two pedestrians immediately in front of the vehicle just before impact. However she was not the driver and had no duty to keep a proper look out.

**42**  I have great difficulty in accepting that Mr. Ong did not take steps to stop as soon as possible after hitting Ms. Lai and her husband. I cannot accept that Mr. Ong was not aware that he had struck pedestrians immediately upon the accident occurring. As I have already indicated he acknowledged that he was facing forward when the impact occurred. It is obvious from the photographs of the Smart car that one or more of the pedestrians actually struck the windshield of the car, which was broken. In addition, Ms. Shier, who was sitting beside Mr. Ong at the time of the collision, would be expected to have said something to him to inform him that he had struck pedestrians. I also note that Ms. Shier was not called to give evidence to support Mr. Ong's evidence that he brought his car to a gradual stop after the impact.

**43**  I was also concerned about Mr. Ong's demeanour and manner in answering questions. I formed the impression that in his evidence he was attempting to distance himself from any responsibility for the accident. In response to a series of questions put to him in cross-examination by counsel for Ms. Lai he repeated that he did not see the two pedestrians at any time prior to striking them, even though that information was not directly responsive to the questions put to him.

**44**  I therefore conclude that I cannot accept Mr. Ong's evidence on two aspects of the case. The first is whether he applied his brakes forcefully immediately after the collision in an attempt to bring his vehicle to a stop as soon as possible. The second is his estimate of the speed at which he was travelling prior to impact.

**45**  I therefore conclude that the Lais were at the middle of Prior Street when the car was at least as far west as the intersection of Gore and Prior, that the Lais were moving at a speed greater, but not significantly greater than 1.2 kilometres per hour, that the smart car was travelling at a speed of close to 60 kilometres per hour in the time up to and including striking the pedestrians. I also find that the presence of the Lais at the midpoint of Prior Street would have been reasonably apparent to the driver of a car crossing the intersection of Gore and Prior if the driver had been keeping a proper lookout.

**46**  Having made these findings of fact I must now determine what legal obligations bound the parties at the time of the impact.

**47**  The issue of the respective rights and obligations of pedestrians and the operator of motor vehicles has been considered in many cases in British Columbia. I do not think that I can improve on the summary of the applicable legal principles relating to that issue set out in the judgment of Madam 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=) [*Hmaied*] at paras. 20-27 as follows:

**The Law**

[20] The relevant statutory provisions are ss. 179, 180 and 181 of the *Motor Vehicle Act* *R.S.B.C. 1996, c. 318* (the "*Act*"). They provide:

**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.
2. If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped.
3. A pedestrian, cyclist or the driver of a motor vehicle must obey the instructions of an adult school crossing guard and of a school student acting as a member of a traffic patrol where the guards or students are
4. provided under the *School Act*,
5. authorized by the chief of police of the municipality as defined in section 36 (1), or
6. if located on treaty lands, authorized by the chief of the police force responsible for policing the treaty lands.

**Crossing at other than crosswalk**

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

**Duty of driver**

181 Despite sections 178, 179 and 180, a driver of a vehicle must

1. exercise due care to avoid colliding with a pedestrian who is on the highway,
2. give warning by sounding the horn of the vehicle when necessary, and
3. observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[21] These provisions do not amount to an exclusive code relating to the rights of way between pedestrians and vehicles. Rather, they supplement the common law duty of all highway users to exercise what constitutes, in all of the circumstances, due care: *Cook v. Teh*, [*[1990] B.C.J. No. 776*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M47G-00000-00&context=) (B.C.C.A.). As Anderson J.A. stated in *Cook*, quoting from the judgment of Estey J. in *British Columbia Electric Company v. Ernest Farrer*, [*[1955] S.C.R. 757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YN-00000-00&context=):

Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care. Swartz Bros. Ltd. v. Wills, [*[1935] S.C.R. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=), Royal Trust Co. v. Toronto Transportation Commssn., [*[1935] S.C.R. 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1C4-00000-00&context=). In the latter case Mr. Justice Davis, with whom the majority of the court agreed, stated at p. 674:

Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street to disregard an apparent danger that confronts him.

[22] When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that other highway users will obey the rules of the road: *Enright v. Marwick*, [*2004 BCCA 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2JK-00000-00&context=) at para. 22. In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way: *Enright, supra* at para. 35; *Ibaraki v. Bamford*, [*[1996] B.C.J. No. 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M397-00000-00&context=) at para. 12-13.

[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=).

[24] The standard required of drivers in responding to pedestrian-created hazards such as jaywalking is not one of perfection. For example, in *Burke v. Leung*, [*[1996] B.C.J. No. 938*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3M0-00000-00&context=) (S.C.) Kirkpatrick J. (as she then was) found the defendant driver was not negligent when he struck a pedestrian who ran, mid-block, into his path, despite the fact that other drivers in the area were able to stop in time: see also *Addison v. Nelles*, [*2003 BCSC 1860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24CX-00000-00&context=), upheld [*2004 BCCA 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0NM-00000-00&context=); *Clifford v. Slater*, [*2007 BCSC 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3V2-00000-00&context=). The applicable standard of care is one of reasonable prudence in all of the circumstances.

[25] Pursuant to s. 180 of the *Act*, a pedestrian must yield the right of way to a vehicle when crossing a highway at a point that is not in a crosswalk. Pursuant to s. 181 of the *Act*, despite s. 180, a driver is obliged to exercise due care to avoid colliding with a pedestrian who is on the highway.

[26] In *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=), Williamson J. held that where a pedestrian has clearly established prior entry to an intersection he or she need not surrender it to an approaching vehicle, even when not crossing at a crosswalk. In *Claydon*, *supra*, Baker J. cited *Funk*, *supra* with approval in the context of a case involving a jaywalking pedestrian and a speeding driver who failed to keep a proper lookout. In so doing, she found that both parties were negligent.

[27] Where a plaintiff pedestrian and defendant driver both fail to meet the requisite standard of care and an accident ensues, the court may apportion liability between them. Before liability will be apportioned, however, the defendant must establish that the plaintiff's fault was a proximate, or effective, cause of the loss: *McLaughlin v. Long*, [*[1927] S.C.R. 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F81W-21X3-00000-00&context=) (S.C.C.). In the words of Groberman J. (as he then was) in *Bevilacqua v. Altenkirk*, [*2004 BCSC 945*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X06X-00000-00&context=) at para. 38:

... It is not enough for the defendant to demonstrate that the plaintiff failed to take reasonable care for his own well-being; the defendant must also demonstrate that the want of care was a causative factor in the plaintiff's loss.

**48**  In this case I conclude that Mr. Ong had the right of way. Section 180 of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* (the *MVA*) makes it clear that a pedestrian crossing a highway at a point that is not a crosswalk must yield the right of way to a vehicle.

**49**  Ms. Lai's counsel submitted that in the circumstances of this case her client had established a prior entry into the highway and therefore had the right of way. I do not agree with this submission. It seems to me that in this case Ms. Lai cannot rely on substantial prior entry. She and her husband were proceeding across a relatively busy city street on a dark night in conditions of limited visibility. They were wearing predominantly dark clothing. I cannot accept that the circumstances were such as to deprive Mr. Ong of his statutory right of way under s. 180 of the *MVA.*

**50**  I conclude that the greater portion of the liability for this tragic accident must be borne by Ms. Lai. In the circumstances that existed on November 28, 2009, it should have been apparent to her that it was inherently dangerous to attempt to cross Prior Street where she did. There was a pedestrian cross walk controlled by traffic lights at the corner of Gore and Prior, less than one block away from the point that Ms. Lai elected to cross the road. I also am influenced by the atmospheric and lighting conditions on the night in question.

**51**  On the evidence before me I am unable to conclude whether Ms. Lai was actually aware of the defendants' vehicle at any time prior to the accident. However she clearly was under a duty to keep a proper lookout and failed to do so.

**52**  That however does not end the analysis. The question remains whether Mr. Ong breached the common law duty of care owed by all highway users to exercise due care in the operation of his vehicle. (*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=), [*[1990] B.C.J. No. 776*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M47G-00000-00&context=) (C.A.). Mr. Ong's counsel submitted that any common law duty owed by his client would have arisen in the circumstances of this case only if his client had actually been aware of the presence of Ms. Lai and her husband on Prior Street. He submits that the uncontradicted evidence is that Mr. Ong was at no time aware of the presence of Ms. Lai and her husband. He therefore says that Mr. Ong was not required to anticipate that Ms. Lai would act in the manner that she did, or indeed to anticipate that there might be pedestrians crossing at that point. Counsel submits that the evidence of Mr. Smith is that Ms. Lai and her husband ran in front of the defendants' vehicle and that this was an action that Mr. Ong could not reasonably have anticipated.

**53**  There is clearly support in the authorities for the proposition that a driver need not anticipate that other persons on the highway will act unlawfully or fail to yield the right of way when they are lawfully required to do so. See the cases referred to by Madam Justice Dickson at para. 22 of *Hmaied*.

**54**  However, all the authorities make it clear that the statements contained within them are made in the context of the specific facts of the case under consideration. For example the statements found in some of the cases that a driver lawfully proceeding on a highway owes no duty to persons against whom he has the right of way are often made in cases in which the innocent party is proceeding through an intersection in which he has the right of way. In those circumstances the driver is entitled to assume that the other vehicle will yield the right of way.

**55**  My view is that the law is as set out in *Cook v. Teh,* following *B.C. Electric Railway Co. Ltd. v. Farrer*, [*[1955] S.C.R. 757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YN-00000-00&context=). That is that, regardless of who has the right of way, both parties have a duty to exercise due care.

**56**  I have concluded that Mr. Ong must bear some of the legal responsibility for the accident. The law is well-settled that a driver of a vehicle owes a duty to keep a proper lookout and to avoid exercising his or her right of way in the face of danger of which he or she was or ought to have been aware. In some cases the expression used is that that person must avoid dangers of which he or she was aware or which were reasonably apparent. I do not think that the defendant in this case can avoid liability merely because he did not see Ms. Lai before impact. The critical question is whether he ought to have seen her or, in other words, whether her presence was reasonably apparent at a point when Mr. Ong could have taken steps to avoid running her down.

**57**  Drivers of motor vehicles are not to be held to a standard of perfection. However I do not think that the possibility that persons may be crossing a highway at a point other than a crosswalk or intersection is so remote that a driver has no duty to take it into account in keeping a lookout. The evidence in this case persuades me that Mr. Ong was not keeping a proper lookout immediately prior to the accident. His own evidence is that he was not looking forward. While it is perfectly permissible and prudent for a driver who is changing lanes to do a shoulder check I think it is also incumbent on such a driver to take the steps necessary to ensure that it is safe for him to do so.

**58**  I have also concluded that Mr. Ong was probably concentrating on the manoeuvre of changing lanes and on the parked car in front of him to the exclusion of keeping a proper lookout. I therefore find that Mr. Ong was negligent and that the defendants must bear some portion of the liability for Ms. Lai's injuries.

**59**  Where a plaintiff pedestrian and defendant driver both fail to meet the requisite standard of care and an accident ensues, the court may apportion liability between them. Before liability will be apportioned, however, the defendant must establish that the plaintiff's fault was a proximate, or effective, cause of the loss: *McLaughlin v. Long*, [*[1927] S.C.R. 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F81W-21X3-00000-00&context=).

**60**  In this case I conclude that the accident would not have occurred but for the ***negligence*** of both Ms. Lai and Mr. Ong. I find that Ms. Lai's want of care in crossing Prior Street at a dangerous location in the light and weather conditions present was a causative factor in the accident. I need hardly add that she failed to keep a proper lookout. Her own evidence is that she did not see a car that had its headlights on and was clearly visible. Whether this was the case or she did see it and misjudged whether she could pass safely in front of it, her want of care clearly was a cause of the accident.

**61**  However, I also find that the accident would have been avoided had Mr Ong been keeping a proper lookout and that the accident would not have occurred but for his ***negligence*** in failing to do so.

**62**  In *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=), [*[2009] B.C.J. No. 1625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624K-00000-00&context=), Cohen J. explained the proper approach to apportionment of liability where more than one proximate cause of a loss has been established. At paras. 106 to 108, he stated:

[106] The ***Negligence*** *Act*, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1), requires that apportionment of liability must be made on the basis of "the degree to which each person was at fault". As stated in *Cempel v. Harrison Hot Springs*, [*[1998] 6 W.W.R. 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), [*43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) at para. 19 (C.A.), the assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness. Courts must gauge 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 of the circumstances.

[107] In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel,* courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.,* [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at para. 46. Finch J.A. (as he then was) described the range of blameworthiness, as follows:

Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[108] In balancing the respective blameworthiness of the parties in the instant case, the plaintiff's conduct constituted a serious departure from the standard of care expected of a pedestrian who lived in the area of the accident and was very familiar with the intersection and the surrounding streets. She appreciated that it was rush hour and traffic was heavy; she entered the crosswalk against the light, and then jogged through the crosswalk in front of vehicles that had the green light. I agree with the defendant that from the time the plaintiff entered the crosswalk and jogged across the street against the light the plaintiff created a risk of harm and that it was her ***negligence*** which came first in time.

**63**  In this case I have no hesitation in concluding that Ms. Lai's actions were more blameworthy then those of Mr. Ong. She and her husband placed themselves in an extremely dangerous position in which their safety was entirely dependent on drivers seeing them and takings steps to avoid striking them. They did not have the right of way. The tragic events that occurred that evening could have been entirely avoided had they taken the simple precaution of crossing at the controlled pedestrian crosswalk at Gore, less than a block away.

**64**  In all of the circumstances I find that Ms. Lai is 75% liable for the accident that occurred and Mr. Ong 25%. Ms. Lai is therefore entitled to recover 25% of the damages she suffered as a result of this tragic accident.

**DAMAGES**

**65**  In this case Ms. Lai suffered very grievous injuries. She was struck by a car which I have found to be travelling at close to 60 kilometres per hour. A good summary of her injuries is found in the report of Dr. Ng. It is as follows:

1. Gross bleeding from urine requiring emergency urological consultation. A CT cystogram ruled out bladder rupture. Ct scans of the kidneys did not show any severe renal damage and she only required observation and support. However angiogram showed the pelvic fractures has ruptured blood vessels and she had bleeding in the blood supply to the pubic bone and these required embolisation to stop the bleeding.
2. Cervical Cl C2 unstable fracture. This required immobilisation and stabilisation in a collar and traction for the first eight weeks. She also has a moderate central cervical disc protrusion at level C6-7 which indented her cervical spinal cord.
3. Chest contusions left upper lobe, right middle lobe, and multiple rib fractures of the left 3 to 6 ribs and left 8 rib.
4. Multiple pelvic comminuted fractures bilaterally, namely superior and inferior pubic rami. She required immobilisation for her neck and leg fractures as well as for these fractures for the first eight weeks. She remained in the intensive care unit for a few weeks for treatment and stabilisation of all her injuries.
5. The left Tibial and left Fibular fractures require manual reduction and internal fixations on December 1, 2009. She returned to the intensive care unit post operatively.
6. Brain injury, which on CT scan showed multiple bleeding present inside areas of her brain and a small subdural hematoma (within the skull but outside the brain), located in between the cerebral hemispheres. There is a large left scalp hematoma. Her conscious levels and neurological state were monitored in intensive care over the next few weeks

**66**  Immediately following the accident Ms. Lai was surgically treated at Vancouver General Hospital and admitted to the intensive care unit there for three weeks. She was then transferred to a general ward, where she remained for two weeks. After this Ms. Lai was transferred to the neuromuscular disease unit at the University of British Columbia Hospital for approximately three months. Following that, Ms. Lai was transferred to Holy Family Hospital for an in-patient rehabilitation program. She was discharged from Holy Family on April 23, 2010, and returned to her home.

**67**  Ms. Lai was born on December 15, 1936 and was just short of her 72 birthday at the time of the accident. Prior to the accident she lived with her husband in the basement suite of a home owned by her son Thomas and his wife. Ms. Lai and her husband had lived in that home or a previous home with her son's family for some considerable period of time prior to the accident. At the time of the accident it was anticipated that she and her husband would continue to live permanently in the basement suite or in other accommodation occupied by her son and daughter-in-law.

**68**  Ms. Lai has made remarkable progress since the accident. Nevertheless she remains permanently disabled as a result of the injuries she suffered. Both parties are in agreement that a substantial award of non-pecuniary damages is appropriate in this case.

**69**  Ms. Lai gave evidence at trial through an interpreter. Her evidence, coupled with the evidence of Dr. Ng and family members has persuaded me that Ms. Lai is a stoical and courageous individual who has made a genuine effort to do everything in her power to improve her capabilities after the accident. Nevertheless it is also obvious that she continues to suffer from significant pain and discomfort and to have serious permanent restrictions on her mobility and enjoyment of life. I accept her evidence that she continues to suffer from frequent headaches and frequent pain in her hip, pelvis and lower back.

**70**  The principal dispute between the parties with respect to non pecuniary damages is over the extent to which Ms. Lai suffered cognitive and personality impairment from her injuries. Related to this issue is the question of whether the agreed depressive symptoms being experienced by Ms. Lai are attributable to the injuries she suffered in the motor vehicle accident as opposed to the grief of the loss of her husband. Counsel are agreed that it would be inappropriate for me to award any damages in respect of the death of Ms. Lai's husband. Such damages, if appropriate, must be pursued in an action pursuant to the *Family Compensation Act*, *R.S.B.C. 1996, c. 126*.

**71**  The evidence given in support of cognitive difficulties arising from the motor vehicle accident consists primarily of the opinion of Dr. Brian Hunt, observations by members of Ms. Lai's family and Ms. Lai's anecdotal evidence. Dr. Hunt's opinion was that as a result of the brain trauma she experienced, Ms. Lai has likely suffered a diffuse axonal injury resulting in the development of frontal lobe dysfunction that is responsible for her mental depression and cognitive difficulties.

**72**  However, I cannot accept that the plaintiff succeeded in establishing these consequences on a balance of probabilities. In this case there is no objective clinical evidence showing actual cognitive impairment on the part of Ms. Lai. Further, the plaintiff presented no psychiatric or clinical neuropsychological evidence to support the conclusion that any cognitive difficulties being reported by Ms. Lai are attributable to the injuries she suffered in the accident. Similarly, on the evidence before me I am unable to determine whether Ms. Lai's depression is primarily attributable to grief from the loss of her husband or to the injuries she suffered in the motor vehicle accident.

**73**  The plaintiff relies on Dr. Hunt's opinion to support the submission that the cognitive problem reported by Ms. Lai and her family are attributable to the accident. However I found Dr. Hunt's evidence to be of little assistance to me in this case. Dr. Hunt 's principal conclusion was that given the severity of the head injuries suffered by Mr. Lai, it was almost certain that she had suffered cognitive impairment and negative personality changes from traumatic brain injury. However he did not perform any cognitive testing or neuropsychological testing of Ms. Lai.

**74**  Regrettably, Dr. Hunt was a most unsatisfactory witness. He was extremely argumentative with cross examining counsel. More than once he gave nonresponsive answers to questions and on one occasion flatly refused to answer a question until I intervened to order him to do so. He acknowledged that he considered himself to be an advocate for the opinion he expressed, although he did maintain that he was impartial. His demeanour in the stand would however suggest otherwise. In answering questions from Ms. Lai's counsel he was relatively direct and straightforward. As indicated above, on cross examination he was argumentative and nonresponsive. He turned his head away from defence counsel when being asked and answering her questions. I have therefore concluded that his evidence does not meet the standard required of an independent expert and that it would be unsafe for me to rely on it unless it is corroborated by other evidence.

**75**  The onus is on the plaintiff to establish a connection between any reported cognitive difficulties and the injuries she suffered. There is simply insufficient evidence before me to conclude that her presently reported cognitive difficulties are attributable to the motor vehicle accident. I therefore am unable to take those cognitive difficulties into account in assessing non-pecuniary damages.

**76**  While I cannot attribute any cognitive impairment to the accident, common sense suggests to me that at least some component of Ms. Lai's depressive symptoms are attributable to the pain she continues to experience from her injuries, the marked deterioration in her mobility and independence and the admitted traumatic brain injury she suffered in the accident.

**77**  Even without cognitive impairment, the accident has had a profound effect on Ms. Lai's quality of life, physical abilities and independence. Prior to the motor vehicle accident she was an independent, active senior with an active social life. She now has great difficulty climbing stairs without assistance, and requires a cane or walker to assist her in walking. Her difficulties in stair climbing are so great that for all practical purposes I conclude she cannot manage stairs.

**78**  She is hampered in performing the tasks of everyday living. She has lost a large measure of the independence she formerly enjoyed.

**79**  In addition, the medical evidence, and in particular the report of Dr. Guy persuades me that the injuries she has suffered will cause permanent disability with no reasonable prospect of significant improvement in her present condition. In summary as a result of this tragic accident, Ms. Lai's quality of life and ability to live independently have been severely compromised.

**80**  The leading case in this province on the proper approach to assessing non pecuniary damages is *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=) [*Stapley*].

**81**  In *Stapley,* Madam Justice Kirkpatrick reviewed the authorities and made reference to *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 para. 45 of her reasons as follows:

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, [*[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.). [Emphasis added in original quotation.]

**82**  I need not repeat the inexhaustive list of factors to be considered set out at paras. 46 and 47 of Madam Justice Kirkpatrick's judgment.

**83**  In my view the most important factors in this case are the severe and painful injuries suffered by Ms. Lai, the marked degree of permanent disability, the loss of independence and the increased risk of morbidity and mortality identified in Dr. Guy's opinion. I also note that Ms. Lai's stoicism and determination to make the best of her predicament should not diminish the amount of damages awarded to her.

**84**  I have reviewed the numerous decisions on pecuniary damages involving serious injuries cited to me by counsel. These cases are all of course fact specific. My review of them, coupled with a consideration of the principles restated in *Stapley*, leads me to conclude that an award of non pecuniary damages in the amount of $200,000 is appropriate in this case.

**COST OF FUTURE CARE**

**85**  The other principal disagreement between the parties with respect to an assessment of damages is what award is appropriate for cost of future care.

**86**  I agree with plaintiff's counsel that the fundamental principle governing assessment of damages is to restore Ms. Lai to her original position insofar as a monetary award is able to do so. In this case, Ms. Lai was long retired at the time of the accident and had no intention of returning to the workforce. Prospective damages therefore are limited to cost of future care and loss of homemaking capacity.

**87**  An award for cost of future care is to be based on what is reasonably necessary to sustain, maintain and promote the mental and physical health of the plaintiff to the extent that the plaintiff's complaints relate to compensable injuries suffered. To be recoverable an item of cost of future care need not be a medical necessity. Rather the test is whether it is reasonably necessary to sustain and promote the mental and physical health of plaintiff. Any award must be based on the evidence presented at trial and must not be based on speculation.

**88**  Dr. Guy's opinion, dated April 8, 2011, is that Ms. Lai will require mobilization assistance on a permanent basis. He is also of the opinion that she will require assistance with the activities of her daily living. In addition I think that the consensus of medical opinion is that Ms. Lai will greatly benefit from ongoing conditioning and exercise to preserve her balance and strength.

**89**  Ms. Jodi Fischer, an occupational therapist, gave evidence on behalf of the plaintiff. Ms. Fischer's conclusion was that Ms. Lai will require rehabilitation assistance services and homecare support in the form of housekeeping assistance on a long-term basis.

**90**  I agree with the conclusions of Dr. Guy and Ms. Fischer.

**91**  The underlying dispute between the parties over the cost of future care is over the likely long term prognosis for Ms. Lai. Ms. Lai's counsel submits that I should make a substantial award based on the reasonable probability that her condition will deteriorate as she ages and that the amount of care she will require will increase significantly. Her counsel also submits that I should make provision for the possibility that at some point in the future Ms. Lai may lose the benefit of the significant family support that she is now receiving and be forced to rely on paid service providers for assistance now being provided by family members.

**92**  The defendants' counsel submits that Ms. Lai's condition is actually improving and that there is reason to believe that she will require less assistance rather than more in the future. In this regard the defendants place considerable reliance on the most recent occupational therapy progress report, dated June 30, 2011, which indicates that Ms. Lai has achieved a 94% reintegration to the normal living index for her. The defendants also submit that there is insufficient evidence to support a finding of any reasonable possibility that Ms. Lai will ever be deprived of the support of her family in the future.

**93**  In addition the defendants submit that the amounts otherwise appropriate for future care should be discounted to take into account the reasonable possibility that Ms. Lai would have required assistance for reasons unrelated to the injuries she suffered in the accident.

**94**  These disagreements result in a wide divergence in the amounts that the parties consider to appropriate to cover the cost of future care.

**95**  I have concluded that the approach that is fairest to both parties and best supported by the evidence before me is to conclude that the injuries Ms. Lai suffered in the accident will continue to require the same level of care presently in place for the remainder of her normal life expectancy.

**96**  In my view the possibility of any significant improvement in Ms. Lai's condition is remote. However, I also am of the view that there is no reasonable possibility that she will ever be deprived of the support of her family. I think that the possibility that she will in the future require some of the items of future care for reasons unrelated to the accident is balanced by the equally reasonable possibility that she will be in future require greater assistance to cope with the injuries that she has suffered. In the result, with one exception, I think it would be inappropriate either to increase or discount the amounts awarded for these heads of damage from an assessment based on the assumption that she will require her present level of assistance throughout her remaining life expectancy.

**97**  I therefore propose to review the recommended future items contained in Ms. Fischer's March 23, 2011 report and determine whether each item is reasonable in light of the conclusions I have outlined above. In so doing I do not give great weight to the conclusion of a 94% recovery contained in the June 30, 2011 occupational therapy progress report. If that report asserts that Ms. Lai has recovered to 94% of pre accident functional capacity I cannot agree with it. It seems to be that the evidence has demonstrated that Ms. Lai continues to suffer from significant impairments in her ability to meet the needs of her daily living and maintain her quality of life and will require future assistance in that regard.

**98**  I therefore turn to a consideration of each of the items of future care identified in Ms. Fischer's March 23, 2011 report. Unless I indicate otherwise, the present value of all of the amounts awarded for cost of future care are calculated in accordance with table 3 of the March 30, 2011 report of Columbia Pacific Consulting.

**99**  Ms. Lai claims the costs of two medications, Arthrotec and Lorazepam, that will be required on a permanent basis. Ms. Lai will require these medications to provide symptomatic relief from her injuries for the remainder of her life. The parties have agreed that the amounts claimed for these medications are appropriate. The present value of the cost of these medications is $2,695. I award this amount.

**100**  Ms. Fischer has also recommended that one course of acupuncture treatments for Ms. Lai's right hand is appropriate. Dr. Ng recommended such a treatment in 2010, but ICBC declined to fund it. In my view, given Dr. Ng's recommendation, it is appropriate to allow the claim for $759 for acupuncture.

**101**  It is also my view that the claim for $1103 for pool sessions with a rehabilitation assistant is reasonable and appropriate. This is for eight additional pool sessions with a rehabilitation assistant to assist with Ms. Lai's transition to exercising at a new facility, Kensington Community Centre pool. Kensington has a specialized class for seniors led by a certified instructor. I therefore allow this claim.

**102**  In addition, I allow the cost of the Kensington pool pass of $275, including HST, annually, with a present value to life expectancy of $2860. In allowing this item, I have not forgotten that Ms. Lai can attend at Killarney pool free of charge. However, the advantage of her attending at Kensington pool is that Kensington offers a specialized class for seniors. The item that I have allowed is based on the cost of an annual pool class to attend the specialized classes.

**103**  I have also concluded that Ms. Lai will require some ongoing rehabilitation assistance. This will assist her to optimize her physical condition which will in turn promote better balance and strength. I consider that one session per week is reasonably necessary. The annual cost of this item is $3,037. The present value of this claim is $35,374.

**104**  Ms. Fischer has recommended that Ms. Lai receive long term occupational and physical therapy and case management services to assist her in coping with the consequences of her injuries. In her March 23, 2011 report, Ms. Fischer recommended $1000 as an annual allowance for these items. In her supplemental report dated April 6, 2011, she increased her recommendation by 100% to $2000 per year. In my view, the original figure is the most appropriate to award and I therefore award Ms. Lai the sum of $11,647, being the present value of $1000 per year plus HST for these services for her remaining life expectancy.

**105**  I also award Ms. Lai the sum of $1984, being the present value of a one-time only course of psychological counselling as recommended by Ms. Fischer.

**106**  There is considerable dispute between the parties with respect to what award is appropriate for future home care. The evidence before me persuades me that Ms. Lai will require ongoing homemaker assistance throughout her life. In my view the amount recommended in Ms. Fischer's March 23rd report is appropriate. I therefore award an annual allowance of $3086.72, including HST for home care assistance. The present value of the annual cost of this item is $32,099.

**107**  The parties are in agreement that a life line emergency response device is appropriate. The annual cost of this item $588. I therefore allow $6115 for this item plus an additional $50 for installation, for a total of $6165.

**108**  In my view, the claim of $1040 annually for Handi Dart is appropriate. This amount represents four trips per week or a total of $1040 per year. The present value of this item is $10,815.

**109**  Ms. Lai has a family physician who has treated her throughout her adult life. Prior to retirement she worked for an elderly couple in West Vancouver and her physician is located there. Handi Dart does not provide transportation services to this physician's office in West Vancouver. The only practical means of travelling to West Vancouver from her home near Knight Street in Vancouver is by taxi.

**110**  The cost of taxis claimed by the plaintiff is $3200 annually. In my view, this is an excessive amount and an amount of $2000 annually is an appropriate amount for taxis. The present value of this award is $20,798.00. I however would reduce this award by 50% to take into account the reasonable possibility that Ms. Lai will in the future lose her ability to operate a car as part of the normal aging process.

**111**  The parties are agreed that Ms. Lai will require the adaptive equipment described in Ms. Fischer's March 23, 2011 Report, as summarized in the Columbia Pacific Consulting Report at table 3 in the total amount of $1586.

**112**  In summary, the amount awarded for Future Care is as shown in the following table:

**Cost of Future Care**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Medications (Arthrotec and Lorazepam) | $2,695 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Acupuncture (one course of treatment | 759 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Pool Sessions with RA | 1,103 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Annual Pool Pass | 2,860 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ongoing OT, PT, Case Management | 11,647 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Counselling | 1,984 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Homemaker Services | 32,098 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Life Line | 6,165 |  |
|  | Handi Dart | 10,815 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Taxis | 10,400 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Adaptive Equipment | 1,586 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ongoing Rehabilitation Assistance | 35,374 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $117,486 |  |

**113**  In arriving at this assessment of the cost of future care, I have not overlooked the submissions of Ms. Lai's counsel that there is a substantial possibility that her health care needs will increase significantly in the future. I have rejected making allowance for that possibility because, on balance, I think that there is an equally reasonable possibility that Ms. Lai would have required many of the items of future care even if she had been injured. I consider that the amounts I have awarded under this head of damages produce a fair result to both the plaintiff and the defendants.

**IN TRUST CLAIM**

**114**  In this case Ms. Lai has received the benefit of considerable assistance from her daughter-in-law, granddaughters and to a lesser extent from her sons in coping with her injuries and disabilities.

**115**  I am satisfied that prior to the accident Ms. Lai was very independent and did not require such assistance from her family members. As a result of the injuries she suffered in the motor vehicle accident however she was forced to turn to her family for assistance with the needs of daily living.

**116**  Immediately upon her discharge from Holy Family Hospital she received a great deal of personal care assistance from family members, including assistance in bathing, toileting and personal care items. As her condition improved she has become more independent. However even up to the time of trial she continued to receive considerable help from family members.

**117**  Ms. Lai's daughter-in-law, Winnie, prepares dinner for Ms. Lai. In addition, she assists with the preparation of lunches. She leaves these lunches in Ms. Lai's refrigerator and Ms. Lai can complete the process of preparing the meal herself. In addition, family members continue to provide transportation assistance and assisted Ms. Lai with her shopping needs.

**118**  There is no serious dispute in this case as to whether some award for these services is appropriate. The principal dispute is over the extent to which the assistance provided by family members resulted in replacing expenses which would otherwise have been incurred by Ms. Lai.

**119**  In this case I am satisfied that Ms. Lai's family has spent a very considerable amount of time assisting her since the accident. However I am also of the view that a portion of that time has been spent in carrying out normal family activities that would have been expected whether or not Ms. Lai was involved in the accident. I must also keep in mind that some of the time spent related to assisting Ms. Lai in coping with the grief and consequences of her husband's death. This time is non-compensable in this case.

**120**  I have concluded that the plaintiff is entitled to an award of $25,000 as an in trust claim. It seems to me the value of the homemaking and personal care assistance provided by her family members from the date of the accident to the date of trial together with the assistance they have given her in regard to her transportation difficulties and assisting her in shopping warrant an award in this amount. I accordingly award $25,000 in that regard.

**SPECIAL DAMAGES**

**121**  The parties are agreed that the special damages payable in this case are $766.50 and I accordingly award the plaintiff special damages in that amount.

**122**  In summary, I assess M. Lai's damages as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a) | Non pecuniary damages | $200,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b) | Cost of future care | 117,486 |  |
|  | c) | Special damages | 767 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d) | In trust award | 25,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total Damages | $343,253 |  |

**123**  In view of my findings on liability the total amount awarded to the plaintiff will of course be reduced by 75%. I therefore order that the plaintiff recover judgment in the amount of $85,813.

**124**  The parties are agreed that they will be able to calculate the appropriate amount of tax gross up on the future care portion of this award.

**125**  If the parties are unable to agree on costs they may make further submissions.

R.J. SEWELL J.

\* \* \* \* \*

Correction

Released: December 7, 2011

The text of the judgment has been corrected at paragraph [89] where the change was made on December 7, 2011.

[89] Ms. Jodi Fischer, an occupational therapist, gave evidence on behalf of the plaintiff. Ms. Fischer's conclusion was that Ms. Lai will require rehabilitation assistance services and homecare support in the form of housekeeping assistance on a long-term basis.

\* \* \* \* \*

Corrigendum

Released: January 19, 2012

[1] I refer to my reasons for judgement dated September 22, 2011, [*2011 BCSC 1260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1NB-00000-00&context=).

[2] Counsel have brought an error in this judgment to my attention.

[3] At paragraph [103] of the reasons for judgment, I assessed damages for the cost of ongoing rehabilitation assistance in the amount of $35,374. Through an oversight on my part, I neglected to include this award in the summary of amounts assessed for cost of future care in paragraph [112]. In fact, that award should be increased by $35,374 to a new total of $117,486. This in turn will increase the total damages assessed to $343,253 and the judgment in Ms. Wong Lai's favour to $85,813, subject to the adjustments set out in paragraph [124] of the reasons.

[4] Accordingly, paragraphs [112], [122] and [123] should be replaced and read as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [112] |  | In summary, the amount awarded for Future Care is as shown in the following table: |  |

**Cost of Future Care**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Medications (Arthrotec and Lorazepam) | $2,695 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Acupuncture (one course of treatment | 759 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Pool Sessions with RA | 1,103 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Annual Pool Pass | 2,860 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ongoing OT, PT, Case Management | 11,647 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Counselling | 1,984 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Homemaker Services | 32,098 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Life Line | 6,165 |  |
|  | Handi Dart | 10,815 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Taxis | 10,400 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Adaptive Equipment | 1,586 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ongoing Rehabilitation Assistance | 35,374 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $117,486 |  |

[122] In summary, I assess M. Lai's damages as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a) | Non pecuniary damages | $200,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b) | Cost of future care | 117,486 |  |
|  | c) | Special damages | 767 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d) | In trust award | 25,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total Damages | $343,253 |  |

[123] In view of my findings on liability the total amount awarded to the plaintiff will of course be reduced by 75%. I therefore order that the plaintiff recover judgment in the amount of $85,813.

R.J. SEWELL J.

**End of Document**

[***XY, LLC v. Canadian Topsires Selection Inc., [2016] B.C.J. No. 1246***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K2W-7K31-F06F-212H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: November 2-6, 9-10, 16-20, 2015;

written submissions, January 18,

2016.

Judgment: June 15, 2016.

Docket: S122330

Registry: Vancouver

**[2016] B.C.J. No. 1246** | 2016 BCSC 1095 | 140 C.P.R. (4th) 101 | 269 A.C.W.S. (3d) 363 | 2016 CarswellBC 1648 | 30 C.C.L.T. (4th) 204 | 59 B.L.R. (5th) 60

Between XY, LLC, Plaintiff, and Canadian Topsires Selection Inc., Fraser Biomedical Inc., Ai De Diagnostic Co. Ltd. (also known as Aide Diagnostic Co. Ltd.), Sire Lodge Inc., GenerVations Inc., Technoterm Integrated Services Ltd., International Newtech Development Incorporated, IND Embryontech Inc., IND Diagnostic Inc., 497244 BC Ltd., Barry Dong Sheng Cheng, Kevin Chung Li Xu also known as Kevin Chun Li Xu, Abbotsford Veterinary Clinic & Hospital Ltd., Canadian Pacific Genetics Center Ltd., Richard Vanderwal, Zhenyu Zhang, Jesse Zhu (also known as Jia-Bei Zhu and Jesse Jia-Bei Zhu), Shu Li Wang (also known as Shuli Wang), Shu Xi Wang (also known as Peter Wang and Peter Shu Xi Wang), Jin Tang (also known as Tang Jin), Selen Zhou (also known as Cui Feng Zhou and Selen Cui Feng Zhou and Selen Cheung), James Yang, Alice Lin, Cheng Li (also known as Li Cheng), Fu Qi (also known as David Qi and David Fu and Fu (David) Qi), Zhigang Wang (also known as Gary Wang and Zhigang (Gary) Wang), Shu Qing Wang, Xiahong Xu (also known as Xu Xiahong and Xiahong (Amy) Xu), Maggie Hu, Jane or John Does #3-10, IND Pharmaceuticals Inc., John Doe (Company) #2, and John Doe (Company) #3-10, Defendants

(417 paras.)

**Case Summary**

**Commercial law — Unjust enrichment — Elements — Enrichment — Deprivation — Unfairness — Remedies — Recovery of benefits — Damages — Constructive trust — Concurrent or alternate remedies — Torts — Action by plaintiff for damages and injunctive relief against defendants for conspiracy, breach of confidence and unjust enrichment allowed — Defendants hid their use of plaintiff's technology after original judgment against them — Used confidential information from trial in original action to retrofit technology — Defendants wrongfully misused plaintiff's confidential information — Civil conspiracy and unjust enrichment also established — Plaintiff entitled to disgorgement of profits totaling $269 million — Damages of $60 million awarded against Tang and Zhang — Injunctive relief granted — Punitive damages totaling $500,000 awarded.**

**Damages — For torts — Conspiracy — Action by plaintiff for damages and injunctive relief against defendants for conspiracy, breach of confidence and unjust enrichment allowed — Defendants hid their use of plaintiff's technology after original judgment against them — Used confidential information from trial in original action to retrofit technology — Defendants wrongfully misused plaintiff's confidential information — Civil conspiracy and unjust enrichment also established — Plaintiff entitled to disgorgement of profits totaling $269 million — Damages of $60 million awarded against Tang and Zhang — Injunctive relief granted — Punitive damages totaling $500,000 awarded.**

**Damages — Types of damages — Exemplary or punitive damages — Where high-handed, malicious, arbitrary or highly-reprehensible misconduct — Punishment and deterrence — Action by plaintiff for damages and injunctive relief against defendants for conspiracy, breach of confidence and unjust enrichment allowed — Defendants hid their use of plaintiff's technology after original judgment against them — Used confidential information from trial in original action to retrofit technology — Defendants wrongfully misused plaintiff's confidential information — Civil conspiracy and unjust enrichment also established — Plaintiff entitled to disgorgement of profits totaling $269 million — Damages of $60 million awarded against Tang and Zhang — Injunctive relief granted — Punitive damages totaling $500,000 awarded.**

**Information technology — Intellectual property — Trade secrets and confidential information — Breach of confidence — Remedies — Action by plaintiff for damages and injunctive relief against defendants for conspiracy, breach of confidence and unjust enrichment allowed — Defendants hid their use of plaintiff's technology after original judgment against them — Used confidential information from trial in original action to retrofit technology — Defendants wrongfully misused plaintiff's confidential information — Civil conspiracy and unjust enrichment also established — Plaintiff entitled to disgorgement of profits totaling $269 million — Damages of $60 million awarded against Tang and Zhang — Injunctive relief granted — Punitive damages totaling $500,000 awarded.**

**Tort law — Conspiracy — Nature and elements of tort of conspiracy — Remedies — Injunction — Action by plaintiff for damages and injunctive relief against defendants for conspiracy, breach of confidence and unjust enrichment allowed — Defendants hid their use of plaintiff's technology after original judgment against them — Used confidential information from trial in original action to retrofit technology — Defendants wrongfully misused plaintiff's confidential information — Civil conspiracy and unjust enrichment also established — Plaintiff entitled to disgorgement of profits totaling $269 million — Damages of $60 million awarded against Tang and Zhang — Injunctive relief granted — Punitive damages totaling $500,000 awarded.**

|  |
| --- |
| Action by the plaintiff for damages and injunctive relief against the defendants for conspiracy, breach of confidence and unjust enrichment. The plaintiff owned intellectual property rights and technology relating to the sexed sorting of bull semen. Judgment had already been granted against several defendants. In 2012, the plaintiff had been granted judgment in another action against many of the same defendants including Zhu and his companies for breach of a licence agreement. The trial judge from the previous action granted a prohibitory injunction against the defendants to prevent future use of the plaintiff's confidential information. Zhu and his companies continued to hide their use of the plaintiff's technology after the original action by having seemingly independent companies purchase the technology on their behalf. They used confidential information from the trial in the original action to retrofit the technology. The defendants utilized the technology to make copies to continue operations in China. They had not complied with several production orders.  HELD: Action allowed.  Zhu used his corporate vehicles to hide his true activities and make false representations. Zhu had developed a concerted plan of action to steal the plaintiff's confidential information for his own financial ends, executed by himself and his employees. Zhu and the other defendants were aware the plaintiff's technology remained confidential. They had wrongfully misused the plaintiff's confidential information. Zhu, as a director of the corporate defendants, was personally liable for the acts of the corporations. The defendants worked together to achieve their goals of stealing the plaintiff's confidential information for their own use and were liable for civil conspiracy. Unjust enrichment had also been made out as the plaintiff had suffered a deprivation, the defendants had been enriched through the breaches of confidence of the plaintiff's confidential information and there was no juristic reason for the enrichment. Since the defendants had made it impossible to determine the extent of their operations, an inference was drawn that they used the technology at full capacity. The plaintiff was entitled to a disgorgement of profits totaling $269 million. Damages of $60 million were awarded against Tang and Zhang. Injunctive relief to prevent future misuse of the plaintiff's confidential information was also granted. All confidential information in the possession of the defendants was impressed with a constructive trust for the plaintiff's benefit. The defendants' highly reprehensible actions were deserving of punishment and denunciation. Punitive damages, which also served the objective of deterrence, of $300,000 were awarded against Zhu and the corporate defendants and $100,000 against each of Tang and Zhang. The defendants' deliberate failure to disclose their documents supported an award of special costs, to be assessed. |

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, [*R.S.C. 1985, c. B-3, s. 38*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9F1-FGY5-M2C5-00000-00&context=)[*, s. 158*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5RB3-WJ71-JPGX-S02X-00000-00&context=)[*, s. 159*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9X1-FFMK-M030-00000-00&context=)[*, s. 198*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9X1-FFMK-M0P2-00000-00&context=)[*, s. 200*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB01-F2F4-G072-00000-00&context=)[*, s. 201, s. 201(1)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB01-F2F4-G07F-00000-00&context=)[*, s. 204*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB01-F2F4-G09F-00000-00&context=)

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

Foreign Money Claims Act, [*R.S.B.C. 1996, c. 155, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-FCCX-61SW-00000-00&context=), s. 1(2)

Supreme Court Civil Rules, Rule 12-5(21), Rule 12-5(25)

**Counsel**

Counsel for the Plaintiff: C.S. Wilson, G.M. Bowman, K. Smiley.

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**Reasons for Judgment**

|  |
| --- |
| **S.C. FITZPATRICK J.** |

**I. INTRODUCTION**

**1**  This action, commenced in March 2012, concerns the continuing efforts of the plaintiff, XY, LLC ("XY"), to enforce its intellectual property rights and technology relating to the sexed sorting of bull semen. These efforts follow from XY's successful prosecution of earlier proceedings against many of the defendants in this action.

**2**  On March 2, 2012, Justice Kelleher issued reasons after trial in the earlier B.C. Supreme Court proceedings (the "Original Action"). There, XY had advanced claims including breach of contract, conspiracy, deceit, breach of confidence and unjust enrichment.

**3**  Justice Kelleher granted judgment in favour of XY against JingJing Genetic Inc. ("JingJing"), Jesse Zhu ("Zhu"), and two of his employees, Jin Tang ("Tang") and Selen Zhou ("Zhou"), in the amount of approximately $8.5 million on the basis of breach of contract, breach of confidence, conspiracy and deceit. He also granted a permanent and mandatory injunction designed to protect XY's intellectual property and technology rights: *XY, Inc.* v. International Newtech Development Incorporated, [*2012 BCSC 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6265-00000-00&context=) (the "Trial Reasons"); rev'd in part *XY, LLC* v. Zhu, [*2013 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23D-00000-00&context=) (the "Appeal Reasons").

**4**  The responses to civil claim filed by the major defendants in this action, including Zhu, and various companies related to him, have now been struck. Two defendants related to Zhu, being Ai De Diagnostic Co. Ltd., also known as Aide Diagnostic Co. Ltd., ("Ai De"), and Zhenyu Zhang ("Zhang"), though served, have failed to defend. Only the response to civil claim of Tang remains extant, although Tang did not attend this trial. Other defendants have settled with XY, and the action as against them has been discontinued.

**5**  Accordingly, the liability portion of this trial concerns only Tang, Zhang and Ai De. The other major issue is the determination of damages with respect to: firstly, Tang, Zhang and Ai De, if liability is established; and, secondly, the other defendants against whom liability has already been established. XY seeks compensatory damages arising in the period after that considered by this Court in the Original Action (i.e. after the end of 2008), on the basis of conspiracy and breach of confidence. XY also seeks disgorgement of profits on the basis of unjust enrichment, injunctive relief, a constructive trust, punitive damages and special costs.

**6**  I have been greatly assisted in preparing these reasons by the extensive oral and written submissions of XY at the conclusion of this trial. Any similarity between these reasons and those written submissions is entirely intentional on my part: *Cojocaru v. British Columbia Women's Hospital and Health Centre*, [*2013 SCC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X238-00000-00&context=) at paras. 36 and 75.

**II. THE MAJOR DEFENDANTS / THEIR STATUS**

**7**  It will be apparent from the style of cause that there is a significant cast of characters composed of both individual and corporate defendants.

**8**  Zhu is said to be the person who leads the IND group of companies (the "IND Group"), which operate either in Canada and China. The IND Group includes the defendants:

1. Canadian Topsires Selection Inc. ("CTS");
2. Fraser Biomedical Inc. ("FBI");
3. International Newtech Development Inc. ("IND");
4. IND Embryontech Inc. ("IEI");
5. IND Diagnostic Inc. ("IDI"); and
6. Ai De.

**9**  On June 1, 2015, I granted an order striking the responses to civil claim of Zhu, CTS, FBI, IND and IEI based on their non-compliance regarding document production. Judgment was granted in favour of XY with damages to be assessed: *XY, LLC* v. *Canadian Topsires Selection Inc.*, [*2015 BCSC 912*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21K5-00000-00&context=). On June 10, 2015, Kelleher J. struck the response to civil claim of IDI based on IDI's contempt of this Court's order: *XY, LLC* v. *Canadian Topsires Selection Inc.*, [*2015 BCSC 988*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2D8-00000-00&context=). In August 2015, I refused to allow the participation of all these defendants at this trial, given the ongoing defaults in respect of their compliance with the *Supreme Court Civil Rules* (the "*Rules*") and certain court orders: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2015 BCSC 1840*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H6V-87H1-JCJ5-245J-00000-00&context=). I understand that all of these orders are under appeal.

**10**  The defendant, Shuli Wang ("Ms. Wang"), is Zhu's wife and a shareholder of the defendant 497244 B.C. Ltd. ("497"). 497 owns a building at 1629 Foster's Way, Delta, B.C., where one of the laboratories in issue is located (the "Foster's Way Lab"). XY has settled its claim against Ms. Wang and 497 and the action has been discontinued as against them.

**11**  Ms. Wang's brother, and Zhu's brother-in-law, is the defendant Shu Xi Wang (aka Peter Wang). He was a former director of FBI and is now deceased. It does not appear that the pleadings were served on him and, therefore, XY does not seek any relief at this trial as against his estate.

**12**  The other laboratory relevant to this action was located at 131-5589 Byrne Road, Burnaby, B.C., which was owned and/or operated by FBI and CTS (the "Byrne Road Lab"). Employees of the Byrne Road Lab included the following defendants:

1. Tang -- semen and embryo manager. Tang was in charge of the work in the Byrne Road Lab from 2005 until February/March 2012. She was responsible for organizing the employees who did the semen sorting;
2. Zhou -- IND accounting manager. She started working for the IND Group in 1997 and worked there until March 2013. She was initially hired as a bookkeeper, and by the time she stopped working for the IND Group she was the accounting manager. Zhou testified that she worked for the Canadian companies that were under the control of Zhu and Ms. Wang, including IND, IDI, 497 and others. She referred to them generally as "IND". Zhou was aware of Zhu's various Chinese companies, but she did not handle any of those activities. She was, however, involved in dealings between the Canadian and Chinese companies, such as transactions relating to money transfers. Zhou considered that both Zhu and Ms. Wang were her bosses, although Zhu was the ultimate decision-maker;
3. James Yunjian Yang ("Yang") -- IND office manager. He was initially hired by the IND Group in 1999 and worked as a general labourer. From 1999 to 2004, he worked in a variety of roles for the various companies. In 2004, Yang was temporarily laid off for approximately ten months. Around 2008, Yang became the key contact with the government. By 2010, Yang was the business manager for IEI and also worked for CTS. He was the main contact person for government agencies and helped IEI and CTS obtain necessary permits and certificates. He was also the main contact for semen and ovary suppliers in Canada. He developed the CTS business, including assisting in finding a new location for the semen-sorting machines in 2010 (which was ultimately the Byrne Road Lab). Between 2012 and 2014, the vast majority of Yang's time was focused on semen, embryo and dairy production, including the IND Group's business-development efforts in Uruguay and California;
4. Kevin Chunli Xu ("Xu") -- head lab technician who worked for the IND Group from April 2006 to October 2014. Xu holds both a Bachelor's degree and a Master's degree in electrical engineering. He was initially hired to do industrial electrical work as a machine maintenance worker under the supervision of James Jihai Wang. By October 2006, Xu was responsible for maintaining semen-sorting equipment and was supervised by Tang who, in turn, reported to Zhu. He operated the semen-sorting equipment;
5. Barry Dong Sheng Cheng ("Cheng") -- lab technician working for the IND Group from May 2004 until October 2014. Tang became his supervisor and remained so until he was laid off on October 15, 2014; and
6. David Qi Fu ("Fu") -- lab technician for the IND Group from 2003-2006 and 2007 to October 2014. Fu was educated as a medical doctor in China. He was initially hired as an embryo lab technician and worked in Quebec and Pennsylvania making IVF bovine embryos. While working in Quebec, Fu was employed by IEI. When he was re-hired in 2007, he was hired to operate cytometers for sorting bovine semen in B.C. Cheng trained him how to operate the cytometers. In both roles, he was supervised by Tang.

**13**  XY served Tang with a notice of intention to call her as an adverse witness at the trial. Nevertheless, she did not attend. At the commencement of the trial, XY's counsel brought to my attention that Tang had asserted to them that she lacked funds for legal fees. She also advised XY's counsel, by email, that she was having mental-health issues. Nevertheless, XY does not seek judgment against her based on her failure to attend pursuant to Rule 12-5(25), nor does XY ask this Court to draw any adverse inference as against her based on her failure to testify.

**14**  Zhou settled with XY in February 2014 and Yang, Xu, Cheng and Fu settled with XY in November 2014. I will collectively describe all these individual employee defendants (not including Tang) as the "IND Employees". As part of that settlement, the IND Employees agreed to cooperate in providing both documentary and oral evidence in this proceeding. All of them gave testimony at this trial.

**15**  The IND Employees and Tang were all employed by the IND Group in relation to the previous laboratory operated by JingJing (also known as IND Lifetech, Inc.), which was the subject matter of the Original Action.

**16**  Finally, Zhang is recorded in the corporate documentation of CTS as its director and shareholder.

**17**  Both Ai De and Zhang were substitutionally served, pursuant to court order, with the notice of civil claim in late May 2014, but neither filed any response to civil claim. XY did not earlier seek default judgment against them. However, XY now seeks judgment at this trial as against them, contending that these defendants have now admitted the facts alleged by XY in its pleading by reason of their failure to respond.

**18**  In summary, this trial is only directed at the following defendants: the individuals Zhu, Tang and Zhang, and certain IND Group companies, being CTS, FBI, IND, IDI, IEI and Ai De.

**III. XY'S BACKGROUND**

**19**  XY owns certain technology, and the intellectual property rights associated with that technology, which permits the separation of X (female) and Y (male) chromosomes in bovine sperm. This is valuable technology for the dairy and other livestock industries in that it allows these businesses to elevate the chances of a cow having either a female or male offspring, as they might desire.

**20**  For an historical description as to how XY came to develop this technology, see the Trial Reasons at paras. 50-55.

**21**  The central aspect of XY's technology involves the use of a cytometer, which is a machine that analyzes and sorts cells. XY has developed a specific version of a cytometer, called an "SX cytometer", which uses specialized parts or equipment to analyze and sort bovine sperm into either X or Y cells. Some of the specialized parts used in an SX cytometer include beam-shaped optics (BSOs), a nozzle or tip assembly and Summit software, all of which are proprietary technology developed by XY. XY's intellectual property also includes the manner in which a SX cytometer is configured and certain protocols as to the use of the SX cytometer in the sorting process.

**22**  Three employees of XY or XY's parent company were called to give evidence. They were Mike Evans and Thom Gilligan, both of whom testified at the trial in the Original Action, and XY's chief financial officer, Scott Holland. Mr. Holland gave evidence that XY's technology is really the only commercially-viable method of producing "sexed semen" on the market. In addition to producing sexed semen, this technology also allows for the use of sexed semen in the production of "sexed embryos", which also provides a higher likelihood of selective reproduction in cattle.

**23**  Since 2007, the market for sexed semen and sexed embryos has grown very fast. Demand has significantly increased as the quality of the product has improved. Mr. Holland's evidence was that sexed semen has become a trusted product which adds considerable value for XY's customers.

**IV. THE ORIGINAL ACTION**

**24**  To fully understand this action, it is necessary to review the issues addressed in the Original Action and the results. The details are fully set out in the Trial Reasons; however, I will summarize them here.

**25**  The Original Action concerned a licencing arrangement between XY and JingJing, one of Zhu's companies. XY granted a licence to JingJing in February 2004 (the "Licence"), which required JingJing to pay certain royalties to XY for its use of its technology relating to sexed semen and sexed embryos. In accordance with arrangements between the parties, JingJing originally acquired two SX cytometers for use in its semen-sorting business. XY terminated the Licence in November 2008 after disputes with JingJing arose.

**26**  As I will discuss in more detail below, two events occurred in the lead-up to the trial in the Original Action that have some relevance to this action.

**27**  Firstly, in January 2008, there was a sale of the shares in JingJing to two persons, one of whom was Shu Xi Wang (Ms. Wang's brother). Justice Kelleher described the sale as a "curious one" lacking "commercial reality", and noted that Zhu acknowledged that it had been done to avoid liability to XY (Trial Reasons at paras. 118-121). Secondly, in August 2010, JingJing assigned itself into bankruptcy. This bankruptcy was not directly addressed in the Trial Reasons, but Kelleher J. did make certain interlocutory orders regarding the disposition of JingJing's assets by JingJing's trustee in bankruptcy that are relevant here, as I will describe below.

**28**  The trial in the Original Action took place over many days commencing on October 18, 2010 and continuing to March 11, 2011. One of the issues that arose at the trial, as with this trial, was an order that certain testimony of XY's representatives and related documentation be sealed to protect aspects of confidentiality as it related to XY's intellectual property rights and technology. An issue arises here from the disclosure of that testimony in the Original Action, as I will discuss below.

**29**  The Trial Reasons were issued on March 2, 2012. Justice Kelleher made the following findings:

1. JingJing was in breach of the Licence (Trial Reasons at paras. 187-200) by reason of:
2. a concerted effort to under-report its use of XY's technology by which royalties were due, including the intentional falsification of its records in furtherance of the plan to do so; and
3. its misuse of XY's confidential technology by allowing IEI to use the technology to produce sexed embryos in Quebec;
4. JingJing, Zhu, Tang and Zhou had been involved in a widespread misuse of XY's technology amounting to a breach of confidence (Trial Reasons at paras. 201-229);
5. JingJing, Zhu, Tang and Zhou had intentionally deceived XY by reason of the false reporting to XY (Trial Reasons at paras. 237-262). As the Court noted in the Appeal Reasons at para. 12, "[t]he relationship between the contracting parties was marred by dishonesty on the part of JingJing from the very beginning"; and
6. Zhu, Tang and Zhou had conspired to cause financial loss to XY by reason of the false reporting (Trial Reasons at paras. 263-277).

**30**  It remains relevant that Kelleher J. found that Zhu, Tang and Zhou were not credible witnesses (Trial Reasons at paras. 175-184).

**31**  The relief granted by Kelleher J. included damages for breach of contract, deceit and conspiracy. These damages were assessed at $8,507,891, being the royalties that XY would have received in respect of JingJing's semen and embryo production to December 2008 (Trial Reasons at paras. 281-296). Punitive damages were not awarded; special costs were awarded (Trial Reasons at paras. 341-362).

**32**  Justice Kelleher found that XY's technology included certain confidential matters, the "Confidential Information", which was defined in Appendix A to the order made after trial (the "Trial Order"). The Confidential Information included: firstly, a number of specified components of the SX cytometer, including its configuration; secondly, XY's protocols, and all other information and techniques imparted from XY during training, or otherwise, to any of the defendants in the Original Action or their employees relating to the use and operation of SX cytometers; and, thirdly, XY's confidential patent information: Trial Reasons at paras. 209-217.

**33**  Having found a breach of confidence by the widespread misuse of XY's technology and protocols, Kelleher J. issued a prohibitory injunction against the defendants, including Zhu and others, to prevent future use of the Confidential Information, either directly or indirectly. Justice Kelleher also issued a mandatory injunction by which Zhu, Tang and others were to deliver all Confidential Information in their possession, power or control to XY: see Trial Reasons at paras. 322-340.

**34**  Justice Kelleher dismissed XY's claims of deceit and civil conspiracy against IND, IEI and other corporate defendants within the IND Group: Trial Reasons at paras. 297-318. This conclusion was upheld on appeal; however, the Court of Appeal remitted XY's claims of unjust enrichment against these defendants for a retrial: Appeal Reasons at paras. 82-97.

**35**  Zhu's appeal from Kelleher J.'s judgment in the Original Action was heard and the reasons were issued in July 2013. Those efforts were largely unsuccessful. The only change made by the Court of Appeal was to slightly amend the provisions of Appendix A of the Trial Order, by which the "Confidential Information" was defined.

**V. XY'S CLAIMS**

**36**  XY now advances claims in breach of confidence, civil conspiracy and unjust enrichment.

**37**  The foundation of XY's present claims rests on its now-proven allegations that the defendants in the Original Action were in possession of information confidential to XY, and that they breached their duty in respect of that confidence. In particular, XY relies on Kelleher J.'s findings concerning what he defined as XY's "Confidential Information" in the Trial Order.

**38**  In this action, XY alleges that Zhu and Tang continued to breach that duty of confidence to XY after the events that were addressed in the Original Action, and even during the trial itself and beyond. In addition, XY alleges that many other persons, being the other defendants in this action, assisted Zhu and Tang in breaching this duty, and they also benefitted or were unjustly enriched from their actions, although in differing degrees. XY also says that the defendants in this action conspired to harm XY by their actions and that they succeeded in doing so.

**VI. DOCUMENT PRODUCTION ISSUES**

**39**  Despite the lack of opposition at this trial, XY has not engaged in any shortcuts in proving its case; rather, it has introduced detailed and comprehensive evidence as was available. There is voluminous documentary evidence before the Court as to the operations and activities of the defendants (in both actions), both before and after the issuance of the Trial Reasons.

**40**  However, as I will discuss in more detail below, XY has been hampered in proving its case, particularly regarding the post-March 2012 operations of the IND Group given the lack of full document production by the defendants. This is a similar refrain to Kelleher J.'s observation that Zhu's failure to produce documentation in the Original Action "had a substantial impact on [XY's] ability to prove its case": Trial Reasons at paras. 9, 278-280.

**41**  The documentation introduced at this trial has been, in large part, obtained by XY through seizures under an Anton Piller order granted in this action in April 2012 (the "APO"), and by disclosure in the Original Action. Some of that documentation has been before the Court on various interlocutory applications since late 2012.

**42**  The evidence discussed by the Court in the earlier interlocutory decisions in this action has largely foreshadowed the evidence produced at this trial. Arising from the document production since the commencement of this action, including recent document production by the IND Employees after settlement and just prior to the start of this trial, a definite, yet somewhat incomplete, picture emerges. That picture indicates surreptitious and wrongful activities of Zhu, his companies, and the other defendants in relation to XY's intellectual property rights and technology, even as early as 2008, which were not known to XY at the time of the Original Action.

**43**  I agree with XY that the document disclosure by Zhu and the various defendant companies and his employees has been wholly inadequate.

**44**  The settlements between XY and the IND Employees required them to make full disclosure to XY. They did so, and the extent of their previous default in document production is more than evident by the fact that they produced an additional list of documents of over 800 pages only after that settlement.

**45**  Yang testified that he was involved in assisting the IND Group with document production in this case after the lawsuit started. Yang was the main contact person for the other employees, the companies and their legal counsel. Yang was aware, along with the other IND personnel, that XY had made a number of demands for document disclosure, and that various orders had also been granted compelling document disclosure in the period from 2012-2014. These demands are outlined in my reasons at *XY, LLC* v. *Canadian Topsires Selection Inc.*, [*2015 BCSC 912*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21K5-00000-00&context=) at paras. 12-55.

**46**  On June 1, 2015, I struck the responses to civil claim of Zhu, IND, IEI, CTS and FBI on the basis of a failure to comply with document disclosure obligations and orders.

**47**  What was not known to XY or the Court at the time was that these defaults in document production were deliberate and part of a highly-organized, concerted and extensive attempt by the IND Group companies and individual defendants to thwart XY's efforts in this litigation.

**48**  Yang testified, at this trial, that following each of XY's demands or the granting of court orders for document production, the IND Group purposely did not take any steps to comply with the required document production.

**49**  Yang stated that no action was taken to respond to XY's counsel's demand of August 27, 2013 for production of documents. I would note that a supplemental list was prepared on December 19, 2013, which I assume was a cursory attempt to disclose some further documents. He stated that nothing was done to comply with the Court's order of May 30, 2014 which imposed a deadline for further document production by August 19, 2014. It was only on August 28, 2014 when the Court refused an extension of the deadline under the May 30, 2014 order, at the request of newly-retained counsel, that the IND Group took any steps to produce further documents. Even so, Yang testified that he was explicitly told by Anna Huang ("Huang"), a lawyer hired by Zhu to manage the litigation, that he was to restrict document production. Yang was explicitly told not to produce or show to the IND Group's external legal counsel certain documents that were clearly relevant and producible. Yang's email to Zhu of September 15, 2014 clearly advises Zhu that Huang denied the existence of certain relevant documents to their own counsel. There is no evidence as to Zhu's response but these documents were never produced.

**50**  Zhu also exercised complete control over the document disclosure of the IND Employees prior to their settlement with XY.

**51**  Xu also testified that Huang provided him with a list of the categories of documents that should or should not be disclosed by him in the litigation. Zhu also requested that Xu give him a copy of all the documents that he was going to produce so that he could produce the same documents. When Xu was asked whether Zhu produced any documents, other than what Xu and the other IND Employees provided to him, he confirmed that Zhu had not.

**52**  Similarly, Yang testified that he asked Zhu, on many occasions, to produce emails or documents from his computer. He said that Zhu always responded that he did not have the time or money to produce these documents. Finally, after the May 30, 2014 document disclosure order, Yang asked again and Zhu responded by asking him to send any emails that Yang and Xu were listing which contained Zhu's email address, so that Zhu could use this for his list of documents. Yang and Xu carried out these instructions.

**53**  Yang testified that he reviewed Zhu's September 1, 2014 list of documents, which is attached to Zhu's affidavit, verifying the list of documents sworn on September 2, 2014. Upon reviewing all of the emails listed under item 1.203 (entitled "folder of emails from the computer of Jesse Zhu"), Yang confirmed that all of the emails listed were only ones that he and Xu sent or received (either directly or as an attachment to another email).

**54**  Yang further testified that Zhu's laptop was not disclosed to his lawyers in order to search for relevant documents. In addition, he was not aware that any of the following documents were ever produced: (i) any documents, other than emails, from China; (ii) semen and embryo records from China; (iii) records of semen or embryo use; or (iv) records showing the revenues of Zhu's Chinese companies (other than in business plans attached to emails).

**55**  Zhou testified that, before the Trial Reasons were issued in the Original Action, Zhu gave her a new laptop and took away her old laptop. He permitted her to put information from the old laptop onto an external hard drive so that she could continue to access the information she needed for her daily work. On the first day the APO was executed, the external hard drive was in Zhou's purse in her office. After work that day, she purchased a USB, and that night or the next morning, copied some important documents to the USB so that she could keep it, as she was still a defendant in the Original Action. The next day, she gave the external hard drive to James Wang, the IT manager. Zhou did not believe that the external hard drive was seized or mirrored during the execution of the APO.

**56**  Following the APO, Zhou testified that Zhu specifically asked her to create a "gmail.com" email address and to use that for work purposes instead of her "selen@ind.ca" email address. When Zhou stopped working for the IND Group, she gave the password to this new account to James Wang and never accessed it again. She did not produce any emails from this "gmail.com" account during the course of this action.

**57**  It is also more than apparent that Tang's document disclosure has been incomplete.

**58**  Given their non-participation in this action, Zhang and Ai De have not disclosed any documents.

**59**  As XY contends, it is readily apparent that one of the themes of this litigation (just as in the Original Action), has been the failure of the defendants to comply with their disclosure obligations under the *Rules* or court orders, all in a concerted effort to frustrate XY's pursuit of relief.

**60**  I find that Zhu knowingly and deliberately orchestrated and directed the withholding of relevant documents in this action by not only himself, but also the IND Group companies, the IND Employees and Tang. These instructions were carried out by Zhu's employees, including the IND Employees. Some further and proper document production by the IND Employees did not occur until after the settlements with XY; however, Zhu, CTS, FBI, IND, IEI, IDI and Tang remain in default of their document disclosure obligations under the *Rules* and court orders granted in this action.

**VII. THE IND GROUP**

**61**  There is little doubt that the IND Group includes various companies, including the defendant companies noted above. I find that Zhu owns and controls these companies, either directly or indirectly. This finding arises principally from the evidence of Yang and Zhou, which I accept on this point, and the relevant documentation.

1. **Canadian Companies**

**62**  The Canadian companies include IND, CTS, FBI, IEI and IDI.

**63**  Zhou indicated that Zhu was the 100% owner of IND.

**64**  CTS was set up by Yang to carry out the semen-sorting activity for the IND Group on the instructions of Zhu. Although Yang was instructed to indicate Xuanfeng Chu as the shareholder of CTS, this was later changed to Zhang by Zhu. Zhang, an IND Group employee in China, was simply a nominee owner of CTS.

**65**  Yang testified that CTS was set up to appear as if it had no connection with the IND Group so that the IND Group could hide its semen-sorting operations from XY. Accordingly, it is clear that CTS was specifically formed to permit the IND Group to conceal its operations which involved the improper and ongoing use of XY's intellectual property rights. To the knowledge of Zhu, Tang, Zhang and the IND Employees, CTS also operated for a short time in early 2012 in breach of the Trial Order.

**66**  FBI was initially set up for immigration purposes in order to provide an investment vehicle for Chinese people who wanted to immigrate to Canada. In reality, the money that these people invested came from loans from Zhu, and they paid some fees to Zhu for the loans. As such, this was arguably a fraud against the Canadian government. Again, nominee shareholders were used for FBI, being Shu Xi (Peter) Wang and a person named Ito. Both Yang and Zhou indicated that they never actually managed FBI.

**67**  The IND Group used FBI to conduct some financial transactions. Zhu instructed his employees that FBI would be the entity to enter into the lease for the Byrne Road Lab, which it did in February 2010. FBI purchased some materials for CTS and paid for its employees for some of the time.

**68**  IEI's ownership is said to be IND Lifetech Group Inc., a Cayman Island company. IND Lifetech Group Inc. is, in turn, owned indirectly by IND through another company incorporated in the British Virgin Islands. IEI was, or is, in the business of manufacturing embryos. As of 2010, IEI's main laboratory for embryo production was located in Drummondville, Quebec.

**69**  Zhu's wife, Ms. Wang, was the director of IDI and its ostensible shareholder. However, Yang testified that Zhu had full power over IDI. Further, Yang more generally testified that if there were ever different opinions on a matter between Zhu and his wife, the employees always followed Zhu's decision, even on IDI business. Ms. Wang was not involved in the sperm-sorting operations, although she did deal with the payroll and she also signed FBI's lease for the Byrne Road Lab.

1. **Foreign Companies**

**70**  The IND Group also operated through a number of companies incorporated in jurisdictions outside of Canada.

**71**  A number of these are summarized in the chart titled "IND Group Company Structure and Shareholders" which Zhou prepared in 2008/2009 to keep track of the various companies and to allow her to carry out Zhu's instructions regarding the various companies he controlled. This chart indicates a number of companies formed in the Cayman Islands or British Virgin Islands which appear to be holding companies.

**72**  Yang testified that the IND Group had various businesses in China, including diagnostics, manufacturing and sales, the semen and embryo business, and interests in the dairy farm business. Yang was aware that the IND Group had two head offices in China, in Beijing and Qing Dao. However, none of the IND Employees had much personal knowledge about the activities of the IND Group in China.

**73**  Ai De is a Chinese company also owned indirectly by Zhu. The sole shareholder of Ai De is a British Virgin Island company (Unique Way Technology Limited) which, in turn, is owned by IND, which is owned by Zhu. In September 2010, Zhu filed a proof of claim on behalf of Ai De in JingJing's bankruptcy proceedings. In that proof of claim, he signed as "the owner" of Ai De.

**74**  There were also companies located in the United States. In 2013 and 2014, Yang was involved in helping the IND Group develop businesses in California.

**75**  Yang also testified about the IND Group's business development efforts in Australia.

**76**  In Uruguay, Yang helped set up IND Lifetech Uruguay. He testified that this was for the dairy business as Zhu intended to ship dairy heifers from Uruguay to China. When they set up the company, Zhu told Yang that he did not have time to be there himself so he told Yang to be a director of this company. Yang insisted on a second director because he did not want all of the responsibility. Accordingly, Edward Richard, a consultant, also agreed to act as a shareholder. Although Yang was indicated on paper as "owning" 95% of the shares in IND Lifetech Uruguay, he never considered himself to be the owner of the company; rather, Zhu was.

1. **Corporate Structure**

**77**  In a prescient comment of what would ultimately be proved at this trial, Justice Voith stated in his reasons, defined as the APO Reconsideration below:

[63] I am further troubled by the apparent free flow of people between the IND companies and by the various references to the "IND Group" or to "our companies" in the material. The members of the group do not appear to operate with the clarity of identity that counsel for [IND] argues in favour of.

**78**  That concern has been decidedly proven here to be valid. Although the various companies appear to have been set up for different purposes, they were, from Zhu's point of view, interchangeable as his wishes dictated.

**79**  The IND Employees did not distinguish between the Canadian companies. The IND Employees testified that they did not always know who their actual employer was, that they were transferred between companies without their prior knowledge or consent, and that their roles did not change when they were transferred. They were often unaware that they had been transferred until they received a paycheque from a different company. They regarded the various companies as one group (i.e. the IND Group), all owned and controlled by Zhu and, to a lesser extent, Ms. Wang.

**80**  Yang testified that when he worked in the human resources and purchasing departments for the IND Group, the departments were not specific to one company. He did work for various companies including IND, IDI, JingJing and others. Yang also testified that in 2006, although he was technically employed by IND, he was actually doing work for IDI and JingJing. He understood that this arrangement of using multiple companies was so that IND could obtain more government grants to cover part of his salary.

**81**  Yang also testified that, although he moved from one company to another, he did not receive any new contract upon such a move. He testified that the company would just tell him that starting from this moment, he would go to "that department", and have a different supervisor.

**82**  Similarly, when testifying about the bankruptcy of JingJing, Fu referred to JingJing as "the department of IND that was sorting semen that went bankrupt".

**83**  Tang testified, at her discovery, that she felt the various companies were the same and that there was no difference between them. She was unsure which company had been paying her support payments since September 2014.

**84**  I accept XY's position that the companies were not regarded by Zhu or his employees as separate entities. I also accept XY's position that they were not separately managed or controlled but, rather, they were all under the common control and direction of Zhu as he dictated for his own purposes. As I will explain below, those purposes included concealing his scheme and true activities in breaching XY's intellectual property rights and protecting himself against any claims that might be advanced by XY.

**85**  Also, as I will note below, it has been shown that Zhu used these corporate vehicles to hide his true activities from and make false representations to this Court through the "shield" of FBI.

1. **Nominee Shareholders**

**86**  Zhu frequently used nominee shareholders and directors for various companies in the IND Group. Zhou assisted Zhu in setting up many of these companies. In her corporate chart, Zhou confirmed that many of the shareholders listed were only shareholders "on paper" and that, "in reality", Zhu owned these companies.

**87**  Xu testified that Zhu asked him to be listed as the owner of one of his companies; however, he declined because he was aware that Zhu had many companies in China for which he had asked other people to be the legal representative. Xu stated that, after working in China in 2012, he had heard that many of these companies had legal problems.

**88**  With respect to another company, Shenbang Biomedical Technology Ltd., Xu confirmed that Wang Chen is only the owner on paper and that Zhu was the real owner.

**89**  As above, Yang and Mr. Richard's shareholdings in ING Lifetech Uruguay are another example of this fictitious recording of the true ownership in these companies.

**90**  Zhou testified that Zhu used nominee shareholders for various purposes, in particular, in aid of:

1. evading payment of Canadian taxes (organizing offshore companies to have non-Canadian shareholders and directors to avoid being considered Canadian-controlled);
2. obtaining government grants (by organizing Canadian companies to have shareholders not ostensibly directly related to him in order to qualify for further grants or tax credits);
3. securities regulations issues (organizing companies to appear to be owned or controlled by others to allow Zhu to create the appearance that a company is widely held); and
4. litigation issues (nominating others to be the "legal person" for companies involved in litigation or likely to be involved in litigation).

**91**  I accept XY's submissions that any so-called "independent" ownership or control (by directors and officers) of the companies within the IND Group, whether in Canada or China is, in reality, a mere guise to conceal Zhu's true ownership and control of such entities.

**VIII. A BRIEF SUMMARY**

**92**  As an overarching comment, it is difficult to express the degree and scope of Zhu's wrongdoing in relation to his concerted plan and actions to steal XY's Confidential Information for his own financial ends, as now more fully revealed in the extensive oral and documentary evidence introduced at this trial. Others, including Tang, Zhang, and the IND Employees, actively assisted him in doing so. This wrongdoing has been exacerbated by numerous misrepresentations made to this Court, all in accordance with this plan and in aid achieving Zhu's ends.

**93**  The battle in the Original Action and the battle in this action are only indicative of the larger conflict that Zhu envisages with XY. This conclusion was supported by the later document production arising from the order of Justice Skolrood just before this trial began. WeChat transcripts of Zhu's comments to Xu in May 2014 indicate a business plan (or more accurately, scheme) to steal XY's intellectual property and technology to the point where XY's market would collapse:

... the focus of our fight with [XY] would no longer be the question of \*\*CTS\*\* and Canada. For sure it would turn towards an expedition on market industry and the related legal matters. Due to [XY]'s adopting various means to ban independent research and development of technologies relating to cytometers. Total bankruptcy. What they will be facing is the huge threat by the new system to their existing products and market, especially their business model. ... If the new system is swiftly marketed, causing the overall sexed semen production cost to fall by twice as much, how do you think they are going to live from now on? ... So I propose using about 3 years in making [XY] collapse or be acquired cheaply. Of course this is a huge project that can only be accomplished through the joint efforts of people of ideals and integrity and people of kindness in all respects.

...

Settling with [XY], that is not my goal. My goal is when I should acquire it and at what opportunity, using the simplest fashion to promote sexed semen technology worldwide and develop industrialization to the maximum extent. breaking [XY]'s conservative and selfish business model in one fell swoop, letting this system favour the human world all around as soon as possible. ...At the most opportune time, to acquire [XY] using the best price should be our basic strategy. Before that, we shall engage in attrition with them, drag them on as much as possible, drag them down, to let them feel all the time the sword of Damocles is on their heads. For this, we have already designed a comprehensive operational scheme ...

**94**  Although somewhat melodramatic, these statements support that, as early as 2009, Zhu developed a plan to steal XY's technology for the use and profit for himself and his IND Group companies which plan he and his employees executed. Given the deceit in abiding by the terms of JingJing's Licence from as early as 2004, one might reasonably conclude that Zhu's scheme began even years earlier.

**95**  Zhu has been nothing but persistent in his efforts to derail this litigation so that he may continue to execute his scheme without further distraction. On Monday, November 2, 2015, the first day of this trial, Zhu's then newly-hired counsel applied for an adjournment of the trial. I dismissed the application citing Zhu's continual disregard for court orders, and the fact that the application was brought at the last possible minute. My reasons on the application referred to my conclusion that such a tactic was not new in this litigation and was indicative of the many actions or inactions on Zhu's part designed to frustrate XY's efforts: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2015 BCSC 2284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HKY-0HS1-JPP5-200D-00000-00&context=). I awarded special costs against Zhu, IND and IEI.

**96**  In the next sections, I will address the individual claims of XY and my further findings of fact arising from the evidence as to the various defendants' activities. These activities span the considerable timeframe of some five years, beginning in 2007 when the Original Action began, up to the spring of 2012 when this action began.

**IX. BREACH OF CONFIDENCE**

1. **The Law**

**97**  In the Trial Reasons, Kelleher J. described this cause of action as follows:

[202] The general principle underlying breach of confidence is that where a person obtains information in confidence, the person may not use the information for activities detrimental to the person who makes the communication: *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* (1959), [1960] 5 R.P.C. 128 (C.A.). It is an equitable cause of action, rather than a tortious one: *Economic Interests in Canadian Tort Law* (Peter T. Burns and Joost Blom (Markham: LexisNexis, 2009)) ("*Economic Interests*") at 213. ...

**98**  An obligation of confidence can, of course, arise from a contract (such as in the Original Action). In the absence of a contract, such as in this action, the test for breach of confidence consists of three elements: (a) the information conveyed was confidential; (b) it was communicated in confidence; and, (c) it was misused by the party to whom it was communicated: *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 at 47 (U.K. Ch.D.), cited by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=) at 635-36; Trial Reasons at para. 202.

**99**  Confidential information may be comprised of materials available to the public, yet remain confidential. What makes the information confidential is "the fact that the maker of the document has used his brain and, thus, produced a result which can only be produced by somebody who goes through the same process": *Saltman Engineering Co. Ltd. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.) at 215; *Lac Minerals* at 610; Trial Reasons at para. 203.

1. **Is XY's Technology Confidential?**

**100**  The evidence of Mr. Evans and Mr. Gilligan on the confidential nature of XY's technology imparted to JingJing, Zhu, and his employees, was accepted by Kelleher J. in the Original Action. He found that the confidential information included the SX cytometers, the specialized parts found on the SX cytometers, XY's protocols and XY's training and techniques: Trial Reasons at paras. 209-215.

**101**  Appendix "A" to the Trial Order contains an extensive definition of the "Confidential Information". This included various components of the SX cytometers and their configuration which the Court accepted were confidential to XY: Trial Reasons at para. 210; Trial Order, Appendix "A", para. (a). The confidential SX cytometer components included:

1. the PMT detector circuitry/circuit board;
2. nozzle or tip assembly;
3. the BSO;
4. the detector system;
5. laser beam steering towers, stages and optics;
6. the Summit software with Cytrack;
7. the pulsed laser;
8. the illumination chamber;
9. the strobe assembly; and
10. the pinhole strip.

**102**  Even licensees are not taught how to add or modify most of these components: Trial Reasons at para. 211.

**103**  Justice Kelleher also accepted that XY's protocols were confidential to it: Trial Reasons at paras. 213-215; Trial Order, Appendix "A", para. (b).

**104**  The Court of Appeal modified the definition of Confidential Information to remove from it any information that might become available to the public, other than by disclosure by the defendants in the Original Action: Appeal Reasons at paras. 110-114.

**105**  Justice Kelleher also found that all improvements made by JingJing, its successors or related companies, and all those over whom Tang and Zhu exercised control, directly or indirectly, were confidential and included within the definition of Confidential Information. This included all research and development regarding the use of sexed semen by any of the defendants in the Original Action internally or with the assistance of third parties: Trial Order, Appendix "A", para. (e) and definition of "Improvements" in (e)(i).

**106**  Justice Kelleher granted a mandatory injunction to the effect that all Confidential Information was to be returned to XY on or before March 16, 2012. In addition, he granted a prohibitory injunction that JingJing, Zhu, Zhou, Tang and others, including their agents, employees, servants, affiliates, joint venturers, subsidiaries and related companies, were restrained from any further use of the Confidential Information: Trial Reasons at para. 229; Trial Order, paras. 15-16.

**107**  Given the passage of time since the trial in the Original Action concluded (March 2011), and when the Trial Order was issued (March 2012), two matters must be addressed as to the present state of the confidentiality of the "Confidential Information".

**108**  Firstly, Mr. Evans and Mr. Gilligan both confirmed that nothing has changed since they testified at trial in the Original Action with respect to what is Confidential Information: Trial Reasons at paras. 211-215. Both Mr. Evans and Mr. Gilligan confirmed that XY's parts, protocols, training and techniques remain confidential today and have not been disclosed to the public.

**109**  In addition, XY remains very diligent about the matter and takes active steps to protect the confidentiality of this information. Both Mr. Evans and Mr. Gilligan testified:

1. all employees sign confidentiality agreements;
2. only XY employees, including Mr. Evans, service the cytometers;
3. only XY is authorized to sell the SX cytometers and parts;
4. formerly, DakoCytomation Ltd. ("Dako"), a supplier of the cytometers and parts, was permitted to sell the parts pursuant to confidential agreements between XY and Dako;
5. XY employees, including a former employee, Todd Cox, were not permitted to sell SX parts personally (see Trial Reasons at paras. 219-221 re Mr. Cox assisting in the earlier breach of XY's confidentiality);
6. the BSO was sealed with epoxy to prevent tampering by licensees; breaking the epoxy voided the warranty. Mr. Evans explained that he or another technician adjusts the BSO before the part leaves XY based on the type of sperm the licensee is permitted to sort (i.e. adjusted for different species). The particular adjustment is not disclosed even to licensees;
7. all licensees sign confidentiality agreements;
8. the protocol books are prominently stamped "CONFIDENTIAL" on the cover; and
9. the research bulletins are marked as confidential.

**110**  Both XY witnesses testified that XY has always treated its technology as being confidential. Employees are reminded, from time to time, not to discuss XY's technology with anyone, unless and until they had signed non-disclosure agreements. Visitors are not allowed access to the laboratory and are only given a "glazed over" description of XY's technology, unless and until they have signed confidentiality documents.

**111**  Both XY witnesses also testified that XY publishes numerous patents and scientific papers about its technology. Those aspects of its technology are protected by the patents themselves. In addition, XY protects some aspects of its technology as a trade secret without publishing it in a paper or a patent application.

**112**  Secondly, in my earlier reasons for judgment issued in this action, I ordered that the principles of *res judicata* and abuse of process apply, such that it is not open to CTS, FBI, Cheng, Xu and Yang to re-litigate the issue of whether the Confidential Information, as defined in the Trial Order, was confidential to XY as of March 11, 2011, (the date of the close of the defendants' case at the trial of the Original Action): *XY, LLC v. Canadian Topsires Selection Inc.*, [*2014 BCSC 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0MW-00000-00&context=) at paras. 117, 127. Justice Kelleher's findings of confidentiality apply, of course, to Zhu, Tang, IND and IEI as parties to the Original Action.

**113**  Although not argued before me on the facts presented in this trial, I see no reason why a similar finding would not be supportable in respect of Zhang (as a nominee shareholder of CTS), IDI and Ai De on the basis that they are privies to the defendants in the Original Action: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2014 BCSC 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0MW-00000-00&context=) at paras. 88-116.

**114**  I am satisfied, and find as a fact, that there has been no change, to this point in time, as to the confidentiality of what was previously defined as Confidential Information in the Trial Order, as amended by the Court of Appeal.

**(3) Was the Information Communicated in Confidence?**

**115**  Justice Kelleher found that the Confidential Information was imparted to JingJing in circumstances importing an obligation of confidentiality. JingJing expressly agreed that the information was confidential under the Licence: Trial Reasons at paras. 205-208.

**116**  It can be seen from Kelleher J.'s discussion in the Trial Reasons, and my following description of the misuse of this Confidential Information, that there can be no doubt that Zhu and his employees were well-aware of the confidential nature of XY's technology and information. There is also no doubt that Zhu and his employees were aware of their obligations concerning that confidentiality in relation to the information and parts provided to them by XY under the Licence. Of course, Kelleher J. found that Zhu, Tang and Zhou had express knowledge of the confidentiality of XY's information.

**117**  I agree with XY that IND, IDI, IEI, CTS, FBI and Ai De, being companies owned and controlled by Zhu, received the Confidential Information impressed with the knowledge, through Zhu, that XY's information and parts were confidential. Similarly, Tang, Zhang and the IND Employees received the Confidential Information and had express knowledge that XY's information and parts were confidential.

**(4) Was there Misuse of the Confidential Information?**

**118**  In the Original Action, Kelleher J. found that there had been "widespread misuse" of XY's Confidential Information: Trial Reasons at paras. 218-229. He found that this misuse was in order to (para. 221):

... develop and improve on XY's confidential information in breach of the [License], in order to undermine XY's market position as the provider of the technology and know-how to efficiently sort bovine semen.

**119**  As the evidence now adduced at this trial shows, XY -- and hence the Court -- were not fully aware of the misuse that was occurring at the time of the Original Action. Only much later would Zhu's plan, conceived perhaps almost concurrently with the execution of the Licence, be more fully revealed. Indeed, it is somewhat ironic that, to some degree, Zhu used the course of the Original Action to aid in the execution of his plan, assisted by the non-disclosure of his true activities. In doing so, Zhu would be instrumental in making various misrepresentations to this Court in many respects, as I will outline below.

**120**  To some extent, I will repeat events that were addressed by Kelleher J. in the Trial Reasons, but only to provide more context for the bigger picture that emerged at this trial.

1. ***The Original Action (2007-2010)***

**121**  Around 2003, Zhu entered into discussions with XY to obtain a licence to use sex-selected bull semen to mass produce sex-selected cattle embryos by *in-vitro* fertilization: Trial Reasons at paras. 57-59.

**122**  In February 2004, JingJing entered into the Licence, by which XY gave JingJing the right to use XY's technology to create sex-selected semen to use for IVF purposes and for sale directly to end-users for artificial insemination: Trial Reasons at para. 66. By July 2007, JingJing had purchased three cytometers from Dako, the supplier of SX cytometers, based on direct arrangements between Dako and XY.

**123**  A dispute developed between JingJing and XY arising from allegations that JingJing was not providing any or accurate royalty reports. XY commenced an action in 2007; the relief sought included an injunction preventing JingJing from transferring or selling the SX cytometers (which JingJing was threatening to do), or disclosing the confidential information that XY had provided to it. A limited injunction was granted on October 12, 2007 which restrained any disposition of the SX cytometers and their parts: *XY, Inc. v. IND LifeTech Inc.*, [*2007 BCSC 1666*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1Y6-00000-00&context=); Trial Reasons, paras. 115-116.

**124**  XY commenced a second action in March 2008 claiming damages for conspiracy, breach of confidence, deceit and breach of contract. This action was consolidated with the first one and became the Original Action.

**125**  In February 2008, an email to Zhou from Shu Xi Wang confirmed that JingJing had a number of nozzles, BSOs and nozzle tips on hand, and that a number of these had been obtained by Mr. Cox, an ex-employee of XY, who had acquired them contrary to XY's prohibition on unsanctioned sales of SX parts.

**126**  In July 2008, XY applied to expand the injunction, contending that JingJing was planning, with various other IND companies, to set up sperm-sorting operations in China. Zhu opposed this application, swearing under oath:

I categorically state under oath that I have no plans, individually or through any company of mine, to produce sex-selected semen in China.

IND Embryontech Inc. is no longer engaged in the production of embryos.

**127**  The application was dismissed largely based on Zhu's sworn evidence: *XY, Inc. v. IND Lifetech, Inc.*, [*2008 BCSC 1215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M3CR-00000-00&context=) at paras. 83-88. In what would be a harbinger of things to come, Zhu's sworn evidence would prove to be entirely false: Trial Reasons at paras. 131-133,137, 227-228.

**128**  As I described above, another of Zhu's strategies to defeat XY in the Original Action was the sale of JingJing's shares to his brother-in-law, Shu Xi Wang, and his friend, Zhen Hong Liu ("Liu"), both of whom were in China. This would prove to be a persistent strategy employed by Zhu for a variety of reasons, as I noted above in relation to the use of nominee shareholders. In this regard, Zhu admitted that the sale of the JingJing shares was done to avoid liability in the Original Action: Trial Reasons at paras. 118-121.

**129**  XY officially terminated the Licence in November 2008. The relief sought and granted in the Original Action was premised on JingJing and the other defendants having stopped producing sexed semen and sexed embryos around that time. Despite noting the lack of documentation produced by the defendants, Justice Kelleher calculated the damages based on that premise: Trial Reasons at para. 296.

**130**  After November 2008, and during the continuation of the Original Action, Zhu was presumably content to let XY think that JingJing's operations had stopped as a result of the termination of the Licence. To further perpetuate this deception, JingJing filed a counterclaim in the action in February 2009 claiming damages for XY's alleged breach of the Licence.

**131**  During the course of the Original Action, Zhu and the other defendants continued to assert that JingJing had been put out of business. What XY did not know was that the IND Group continued to use the three cytometers in their possession to sort semen during the course of the Original Action, despite termination of the Licence. It appears that Zhu considered the termination of the Licence, in November 2008, to be entirely irrelevant. It was business as usual for Zhu's semen-sorting operations after November 2008.

**132**  Both Fu and Cheng testified that the IND Group was sorting semen between late 2009 and mid-2010 by operating the SX cytometers at full capacity. This occurred until the bankruptcy of JingJing, as I will now discuss.

1. ***The Bankruptcy Shell Game***

**133**  Yang's evidence was to the effect that Zhu considered XY his "biggest enemy". Further, Yang stated that even with the lawsuits ongoing, Zhu thought that he could continue his semen-sorting business. As noted above, Zhu did just that. However, Zhu was anxious to hide his activities. He was also concerned that he could not go to the market to sell or export the sexed semen that the IND Group employees continued to create without XY finding out and taking action to stop him.

**134**  In late June 2010, Zhu conceived of another strategy to assist in defeating XY in the Original Action, namely, to put JingJing into bankruptcy. As matters unfolded, this strategy would ultimately allow him to improperly retain confidential SX cytometer parts. Importantly, this strategy also assisted Zhu in ostensibly cleansing him and the IND Group companies from any involvement with the SX cytometers and XY's protocols and their use, all in aid of continuing his deception of XY in terms of his ongoing use of its technology.

**135**  Zhu instructed Chen Fang ("Chen"), another lawyer who assisted him from time to time, to look into the option of JingJing declaring bankruptcy immediately. On July 4, 2010, Chen confirmed, in an email, that the bankruptcy was conceived "mainly due to strategic considerations regarding the lawsuit with XY". To a large degree, the intention was also to avoid document disclosure requirements in the Original Action.

**136**  Throughout July 2010, Chen reported on a number of issues and Zhu and some of his other employees, such as Zhou and Yang, debated the pros and cons of putting JingJing into bankruptcy. Even by this time, Zhu had identified the possibility of buying the SX cytometers back from the bankruptcy estate for use in his semen-sorting operations. On July 28, 2010, Chen commented on potential concerns arising from a "fraudulent bankruptcy (conceptually and outwardly)". Zhu was steadfast in quelling these concerns, advising his employees not to "get all nervous".

**137**  By August 21, 2010, Zhu had concluded that the bankruptcy would proceed in order to "create variables and waver to XY's basis and confidence". This was, as Zhu stated, in aid of being "able to defeat the American aggressor and wild ambitious wolf!".

**138**  On August 20, 2010, Tang held an important meeting with Cheng, Xu and Fu in which she set out the work plan for her semen-sorting team after JingJing's bankruptcy. This included conducting research into remodelling ordinary cytometers back to SX cytometers, a task specifically assigned to Xu.

**139**  On August 30, 2010, two months before the trial in the Original Action was scheduled to commence, JingJing declared bankruptcy. Meyers Norris Penny Limited was appointed as the trustee in bankruptcy (the "Trustee"). Patricia Wood was the licenced trustee at the Trustee's offices overseeing the file.

**140**  Quickly thereafter, on September 8, 2010, IND and Ai De filed proofs of claim with the Trustee advancing unsecured debt claims against JingJing.

**141**  The Trustee was unaware of any relationship between JingJing and the other IND Group companies, including IND and Ai De. The Trustee was also unaware that Zhu owned and controlled all the IND Group companies, which had included JingJing.

**142**  On September 25, 2010, Zhu quickly moved to advise the Trustee of his intention to appoint an inspector to the estate based on his contention that IND and Ai De were creditors of the estate. Typically, inspectors are representatives of creditors of the estate and they provide advice and guidance to a trustee in bankruptcy in terms of the administration of an estate. This strategy would ultimately allow Zhu to have not only inside knowledge of the bankruptcy administration, but also some influence and control over the Trustee's decisions and actions.

**143**  Understandably, XY was concerned about the Trustee taking over and possibly selling the SX cytometers and other assets in the hands of JingJing. XY considered these assets to be confidential and subject to the injunction that it had obtained in October 2007 which prevented any disposition of these assets without a court order.

**144**  In late September 2010, Mr. Evans attended JingJing's facility, being the Foster's Way Lab, to look at the SX cytometers. He intended to find out what type of equipment was there, which software was on the system, which parts were there, and generally assess what aspects of JingJing's assets included XY's Confidential Information. Mr. Evans inspected the three SX cytometers and prepared a report regarding his site visit.

**145**  Mr. Evans' later report, dated October 10, 2010, would note his observation that despite each SX cytometer coming with a small tool kit, which includes spare parts, including a full assembly of the SX nozzle, he only found one spare nozzle tip. The backup or spare nozzle assemblies and nozzle tips for each system were not found.

**146**  On October 1, 2010, XY's counsel wrote to the Trustee asking about a number of specific parts noted as missing by Mr. Evans, including SX nozzle assembly serial #24578, four extra SX nozzle assembly tips and SX BSO serial #2196 and #2169 (the "Missing Parts"). XY asked the Trustee to locate the Missing Parts immediately. These specific parts had been earlier identified by a defendant in the Original Action, Richard Remillard, on behalf of JingJing, as being located at JingJing's premises in January 2008.

**147**  The Missing Parts were, of course, part of XY's Confidential Information, as would later be defined in the Trial Order.

**148**  XY's counsel's letter of October 1, 2010 came to Zhu's attention on October 11, 2010 through his counsel in the Original Action.

**149**  On October 12, 2010, Ms. Wood, on behalf of the Trustee, emailed Zhou and Cheng Li (another IND Group employee) asking about the Missing Parts.

**150**  Around October 12, 2010, Cheng Li, Tang, Zhu, Zhou, Chen and Yang discussed what "reasonable explanation" they might give to the Trustee about the Missing Parts. In response, Tang suggested the explanation of "normal wear and tear". Chen noted that "[i]t is logical that such parts have been thrown away. XY should know this." Cheng Li expressed the hope that the "trustee will not ask and be done with it".

**151**  Zhu agreed with the strategy of obfuscation and deceit with respect to the Missing Parts in relation to both the Trustee and XY. Tang then circulated a draft "explanation", which Cheng Li translated and circulated for approval before ultimately sending to the Trustee. Cheng Li's email, ultimately sent to the Trustee on October 22, 2010 states "all the parts mentioned had damaged [sic] or worn out since those machines had been used since 2004".

**152**  This, of course, was a lie, as later events would disclose. Clearly, Zhu's strategy, executed by his employees, was intended to avoid having to return the Missing Parts to the Trustee (and XY), given that the IND Group intended to use the Missing Parts in the future.

**153**  The matter of the Missing Parts was but one aspect of the deception employed by Zhu and his employees in regards to the Trustee, the bankruptcy, and the related proceedings. In fact, the Missing Parts were anything but "missing" in that Zhu's team, particularly Tang, had possession of them. Zhu and his employees had every intention of using them in the IND Group's semen-sorting business. Astoundingly, Cheng Li's email of October 22, 2010 suggests to the Trustee:

... you might have to look for them harder and more carefully, since they are tiny.

**154**  All of these strategies can be described as Zhu and his employees attempting to distance themselves from JingJing, while also attempting to improperly obtain information and benefits from the bankruptcy proceedings.

**155**  Some of the further deceptions by Zhu and his employees arising from the bankruptcy can be summarized as follows:

1. there was a misrepresentation to the Trustee about the source of funds for the retainer for the bankruptcy. It was stated that Nina Li was the person to pay the funds but, in fact, IND Pharmaceutical Inc., another IND Group company, provided $25,000 to Li for that purpose;
2. Zhu filed false proofs of claim on behalf of Ai De, IND, IDI and IEI. The email traffic before this occurred indicates that weeks before the bankruptcy, fictitious credit arrangements were created in order to support that these companies were owed monies by JingJing;
3. the proofs of claim of Ai De, IND, IDI and IEI and their resulting status as creditors allowed them to arrange for the appointment of Zhou and Chen as inspectors of the estate in October 2010 in advance of the sale of the cytometers. Ms. Wood was aware of a previous relationship between Zhou and Chen and JingJing. However, as noted above, she was unaware that Zhu, who filed or caused to be filed proofs of claim on behalf of various IND Group companies, also owned and controlled JingJing. The IND Group employees did not disclose to the Trustee the true current relationship between Zhou and Chen on the one hand, and Zhu and the IND Group companies on the other, to avoid any suggestion that the IND Group companies were related to JingJing and, thus, in a conflict of interest (more on this later); and
4. the IND Group employees put forward Liu as the JingJing representative to be examined by the Trustee with the express intention of concealing Zhu's true interest. This was all in aid of contradicting XY's potential argument toward making "the Trustee and ultimately the court believe that even though JingJing's shareholder was switched to [Liu], the controller is still [Zhu]". The emails indicate clearly that Liu had no idea about the operations of JingJing. Just before the bankruptcy, on August 14, 2010, Zhu approved his employees' plans to prepare points for Liu to learn in order that he could respond to possible questions from the trustee in bankruptcy to be appointed. Liu's translator, Xiao Ji, was equally coached for this exercise to make sure the "right" answers were given.

**156**  The most striking deception in the bankruptcy, however, was yet to come and would yield the most benefits for Zhu through the means of the bankruptcy.

**157**  By February 2010, FBI had been incorporated. In that month, FBI entered into the lease of the Byrne Road Lab.

**158**  By email dated August 18, 2010, just before the bankruptcy, Yang advised the Canadian licencing authorities that JingJing would transfer its business, including the facility, equipment, employees and production to IEI. Following the bankruptcy of JingJing at the end of August 2010, the IND Group continued to take steps to transfer JingJing's semen-sorting operation to a new company. Needless to say, this was not disclosed to the Trustee by the IND Group employees who knew that the Trustee was statutorily mandated to deal with and, if possible, realize on the assets of JingJing.

**159**  By mid-September 2010, the Trustee was taking steps to sell JingJing's equipment, including the three SX cytometers and the SX parts in the Foster's Way Lab. Zhu and his employees were keen to acquire the cytometers. Tang confirmed that, by this time, Zhu's intention was to obtain the SX cytometers so he could continue with his semen-sorting business.

**160**  The difficulty facing Zhu and the IND Group was XY, who remained alive to the fact that XY's Confidential Information was part of what was held by JingJing. Zhu was aware of possible issues with XY that might prevent the Trustee from selling the cytometers directly to the IND Group. He, therefore, concluded that it was necessary to conceal his actions by taking steps to avoid any connection between the IND Group and any purchase of the equipment. The IND employees, therefore, set out to find someone "more reliable" in order to make the purchase.

**161**  Ultimately, the IND Group employees arranged for Technoterm Integrated Services Ltd. ("Technoterm"), a local Vancouver used medical-equipment retailer, to be the ostensible purchaser of JingJing's equipment. On September 27, 2010, as organized by Chen, Technoterm expressed to the Trustee its interest in purchasing the cytometers. This was a tactic well-known to Zhu and his employees since something similar had been done in earlier negotiations with XY: Trial Reasons at paras. 111-112.

**162**  On October 13, 2010, FBI paid $54,000 to Xu Di, a friend of Tang. The documents indicate that Xu Di was described as a representative of Futonghua Bio-tech Co. Ltd., one of Zhu's Beijing companies. Ultimately, the IND Group employees arranged for Technoterm to pay these monies to the Trustee as a deposit on the purchase of the three cytometers for the sum of $360,000 in accordance with a formal offer to the Trustee dated October 13, 2010.

**163**  By mid-October 2010, the Trustee was required to consider Technoterm's offer in relation to the cytometers. Zhu then moved to appoint Zhou and Chen as inspectors of the estate, which he would have reasonably anticipated would result in the Trustee seeking their input on the proposed sale.

**164**  The trial in the Original Action began on October 18, 2010. However, Zhu and his employees' actions toward stealing XY's rights and technology continued unabated.

**165**  Despite Yang's attempt to transfer JingJing's semen-sorting licence to the new laboratory (ostensibly IEI's at the time), he was ultimately told by the regulatory authorities that the licence could not be transferred and that the new licensee would need to go through the application process again.

**166**  Accordingly, in anticipation of the purchase of the cytometers, on October 27, 2010, CTS was incorporated by Yang. Yang picked Zhang as the nominee shareholder of CTS to avoid any suggestion of the IND Group/Zhu's involvement. Zhang agreed to this deception. Later, on November 26, 2010, Zhang would joke with Tang about his holding of these shares in stating:

Haw-Haw --- which one is the number company? Are those the documents signed by me before Mr. Zhu came back to Canada last time? Is it safe?

**167**  The Trustee accepted Technoterm's offer to purchase the cytometers. Because it was prevented from completing any sale by reason of the October 2007 injunction granted in the Original Action, the Trustee applied to vary that order. XY ultimately agreed to the sale being approved by the Court on the condition that the confidential SX parts (identified by Mr. Evans during his September 2010 visit), would be removed by XY prior to completion of the sale and replaced with non-SX parts. On November 5, 2010, Kelleher J. granted the order that approved the sale and the removal of the SX parts.

**168**  In the face of that order, Technoterm later refused to complete the sale. It did not object to XY removing the parts; however, it demanded a discount ostensibly relating to issues relating to the cytometers' functionality arising from the removal of the SX parts. This "objection" was carefully crafted by Chen to be sent by Technoterm to the Trustee. The Trustee held meetings with Zhou and Chen, as the inspectors of the Estate, to discuss the objection. Ultimately, with the disingenuous agreement of Zhou and Chen, as the ostensible "independent" inspectors of the Estate, but really only the shills of Zhu, the Trustee agreed to a 12% discount by reason of Technoterm's "objection". That revised purchase price was later approved by order of Goepel J. (as he then was) on December 10, 2010.

**169**  I find that Zhu and his IND employees involved in the bankruptcy process were well-aware that both court applications were made, and that the resulting court orders granted were based on false premises (i.e. that Technoterm was the purchaser of the cytometers) and involved the active deceit by Zhu and his employees of both XY and the Court.

**170**  Later still, in March 2011, Zhou was instrumental in arranging a sale by the Trustee of semen held by JingJing to Qing Dao Jiahua Biotech Co. Ltd. Zhou was very familiar with this Chinese company as one of Zhu's companies in the IND Group. There is no indication that she disclosed her connection to this company to the Trustee in relation to her status as an inspector of the estate (which would have indicated a conflict) and, in doing so, deceived the Trustee in relation to that sale also.

1. ***The Retrofitting Process Begins***

**171**  As stated above, the trial in the Original Action began on October 18, 2010. Zhu's strategy of making misrepresentations to this Court continued during the hearing.

**172**  On October 19, 2010, Mr. Evans was giving his evidence at the trial. At some point, the Court granted a sealing order with respect to his testimony as to the confidential aspects of XY's technology. On October 19, 2010, counsel for the defendants in the Original Action proposed that Xu remain in the courtroom while Mr. Evans' evidence was given. Counsel for the defendants made the following statements to Kelleher J.:

So, My Lord, in the context of that order, I'd now like it noted that my clients will be leaving the courtroom. The only person who will remain, at least from our side, is Mr. Kevin Chung Li, C-h-u-n-g, Li, L-i, Xu, and Mr. Xu is a former employee of JingJing prior to its demise. He now works for a company called Fraser Biomedical Inc., which is no ownership connection at all to any of the IND companies. They make --they raise mice, and they use mice fluid for medical resources and medical device purposes. And so IND, the various components of the IND diagnostic company or group of companies, IND pharmaceuticals, purchase the mice fluid from Fraser Biomedical Inc., and there was a connection since then; at one point in time they were in the same building, but there's no ownership or other connection to IND. He is, however, a former employee of IND but is no longer an employee of IND.

[Emphasis added]

**173**  Justice Kelleher then said:

Yes. Kevin Chung Li Xu is going to be hearing evidence that's confidential, and he's instructed not to disclose any of the confidential information to any person who is not present here, and so on that basis, the parties who are -- the parties or persons or future witnesses who are leaving the courtroom for this purpose are -- cannot expect to speak to him about this matter.

**174**  There is no suggestion that defence counsel was aware that his representations to Kelleher J. were inaccurate.

**175**  Xu confirmed, in his evidence at this trial, that Zhu had instructed him to remain in court on October 19, 2010 to hear Mr. Evans' confidential sealed testimony on the false pretenses that he had no relationship with the IND Group and that FBI had no relationship to the IND Group.

**176**  Indeed, the IND Group took immediate steps after Xu heard this evidence to avoid anyone drawing a connection between FBI and the IND Group. On October 20, 2010, Tang emailed Zhu and Zhou and directed Zhou to:

... switch the company's [FBI's] financial system from direct control to indirect control, ostensibly to break away from the management by [Zhu, Shuli Wang, Zhou and Tang]...

**177**  With the purchase of the three cytometers from the Trustee in hand, Zhu and Tang began to assign tasks to the IND Employees regarding the retrofitting of those machines once physical possession of the cytometers was obtained. In accordance with Kelleher J.'s November 5, 2010 order, Zhu knew that XY would remove the Confidential Information from the SX cytometers. Accordingly, Zhu needed to be able to retrofit the machines back to SX cytometers once they were physically back in the hands of the IND Group to the point where they could recommence semen-sorting operations.

**178**  Specifically, Tang assigned Xu the task of retrofitting the dismantled cytometers back to SX cytometers based on XY's Confidential Information. Xu would eventually accomplish this by:

1. his knowledge of the machines through his previous maintenance of the SX cytometers;
2. his notes and photographs taken before the machines were dismantled, based on Tang's instructions to him on December 16, 2010 to "make a record of the location and model of each part of the machine, so that we may know in the end what parts are replaced by XY";
3. his knowledge gained through the training that he had received on the operation of the cytometers;
4. his knowledge of Mr. Evans' confidential testimony on October 19, 2010; and
5. his use of certain SX parts which Tang had supplied him, being certain of the Missing Parts that had been withheld from the Trustee.

**179**  On December 5, 2010, Tang confirmed that arrangements had been made for the payment of funds to the Trustee for the purchase.

**180**  In anticipation of the closing of the sale of the cytometers on December 21, 2010, Mr. Evans returned to the Foster's Way Lab. Pursuant to Kelleher J.'s order, he removed the SX parts from the three cytometers and replaced them with non-SX parts. He also reconfigured the cytometers to adapt them to regular cytometers. All available SX specific parts were boxed, sealed, and prepared for shipment before he left the Foster's Way Lab. Mr. Evans confirmed that he received those parts in due course.

**181**  In anticipation of getting the machines back, Tang stated, on December 30, 2010, that "[n]o matter what the result is, we cannot question \*\*trustee\*\* and \*\*XY\*\* on ***this machine***" (emphasis in original). On that same date, after the removal of the SX parts by Mr. Evans, but before delivery to Technoterm, Xu confirmed to both Zhu and Tang that he had done a detailed analysis on the machines, including noting what parts had been changed. This was possible because Zhu and the IND Group employees still appeared to have full access to the machines at the Foster's Way Lab, although technically these assets were in the possession of the Trustee. There is no indication that the Trustee knew that Zhu and his employees were dealing with the machines in this fashion.

**182**  Xu's task, ahead of retrofitting the machines back to SX cytometers, was clear enough and was what he described as the "remodeling difficulties".

**183**  In December 2010, the IND Group also arranged to purchase two additional ordinary cytometers from BioSurplus with the intention of retrofitting these into SX cytometers using XY's Confidential Information.

**184**  In early January 2011, the purchase of JingJing's cytometers, ostensibly by Technoterm, completed. The Trustee's employees supervised the departure of the cytometers in a truck which they were told, by the IND Group employees, was destined for Technoterm. In fact, the truck just drove around the block, and immediately after the Trustee's representative left the premises, the truck returned to the Foster's Way Lab with the cytometers.

**185**  With the delivery of the cytometers and with the Missing Parts on hand, Zhu's plan, within the context of the bankruptcy proceedings, was complete.

1. ***The Retrofitting Continues in 2011***

**186**  By January 2011, the IND Group's employees, specifically Xu and others, were poised to begin the process of reinstating JingJing's cytometers to their past status; namely, SX cytometers (which included XY's confidential parts and configurations) capable of sorting semen using XY's Confidential Information. This process included taking steps to retrofit the cytometers and copy XY's parts.

**187**  By this time, the IND Group was in possession of certain key assets and aspects of XY's Confidential Information that would allow them to do so:

1. the three cytometers, which had been studied by Xu in terms of what modifications had been made by XY and what was needed to retrofit them back to SX cytometers;
2. as I will describe in some detail below, certain of the Missing Parts, which Tang gave to Xu for that purpose;
3. XY's protocols, which remained in their possession. For some reason, these were not addressed by either XY or the Trustee as part of the bankruptcy proceedings and XY made no efforts to obtain them from the Trustee; and
4. skilled employees who had been trained in the use of the SX cytometers.

**188**  In the meantime, on February 7, 2011, the trial in the Original Action continued (after adjourning from late November 2010). On that day, Zhu gave evidence and was specifically questioned about the Missing Parts. His testimony was evasive and vague. Later evidence would prove him to be a complete liar as to his claim that he did not know what happened to the Missing Parts. Incredibly, as did Cheng Li, Zhu suggested to XY's counsel at the trial that "[XY] didn't try hard" to find them.

**189**  Zhu attempted to shore up his knowledge as to the lies and evasive statements told to the Trustee and XY about the Missing Parts when, at his request, an employee gathered up the previous emails between the IND Group employees the very day after his testimony at the trial on the issue. Cheng Li explained what happened to the Missing Parts in an email she sent to Zhou and Zhu on February 8, 2011:

Upon xy found the missing parts, he [presumably a reference to the trustee who sent the e-mails] then sent us (selen and me) several e-mails to enquiry the situation; the related e-mails have been forwarded to Jia Bei, Tang Jin, etc.;

First, we intended to ignore, but later we worried about that the litigation will be effected. We had planned to return some parts back to them, but we worried about that the numbers on nozzle maybe bought from mike (terry?), or the numbers were bought illegally (the numbers were not originally recorded), so xy knew this thing. So we discussed whether the numbers should be removed. At one night, when I and selen were preparing the information in the law firm, Jia Bei and Tang Jin called and told us that the attached numbers are difficult to be removed (they said, if the number are not intentionally tore off, the numbers can not fall off); Finally, the results that we decided was that I sent an E-mail to trustee, cc to selen. I also forwarded the e-mail to Bei and Tang Jin.

Trustee didn't ... further inquiry after receiving the e-mail. We never mentioned this matter again.

My opinion is to base on the last reply we sent to trustee, all the parts are easy to wear; if there is no part, the part is lost after being worn (xy do not ask us to keep the damaged parts, and we also do not have the obligation). If there is one part, it must be in the goods delivered to the trustee (or in the corner of a box, they can go to find the part if necessary. Still we do not have the obligation.)

But I do not know whether you put the part in the box -- although we negotiated to put the part in the box, we worried about that they will have something on the numbers, so we didn't put the part in the box. Tang Jin and others can recall that situation.

I will continue to look for whether there is something else left.

**190**  On February 15, 2011, Zhu met with a group of employees, including Xu, to divide the work "between the Chinese and Canadian teams" to set out the overall objectives for the retrofitting process. The meeting minutes state:

... First of all, in terms of copying the classic semen sorting machine type, the job of having a complete set of the parts on the existing machine has been completed, to start with. Before the end of May, to complete the existing machine, [for it] to be able to proceed with the objective of preliminary semen sorting. Secondly to manufacture \*\*IND\*\*'s own sorting machine...

At the meeting, a clear division of work was done in terms of the collaboration between the Chinese and Canadian teams:

\* The Vancouver team will [consist] mainly of XU Chun Li, to be assisted by WANG Zhi Gang, with other personnel to act in concert [with them.]

\* The Chinese team will [consist] mainly of GUO Hai Sen, to be assisted by Xiao OU, with other personnel to act in concert [with them].

\* It has yet to be determined who is to be in charge of the whole machine (meaning the chief eng [engineer])

The relevant division of work is as follows:

XU Chun Li:

1. focusing on completion of equipment transportation before February 28;
2. debugging \*\*PMT\*\* equipment
3. purchasing of electronic device
4. taking advantage of the existing frozen semen, strive for being able to start proceeding with semen [sentence incomplete] ...

[Emphasis added]

**191**  The retrofitting efforts continued in both China and British Columbia throughout 2011. Examples of these extensive and detailed efforts are as follows:

1. March 2011:
2. two of the cytometers, one being from JingJing and one from BioSurplus, were shipped from Vancouver to Ai De in Qing Dao, China;
3. Kevin Yuan exchanged emails with Tang, Xu and another person regarding the parameters of a lens for the laser to be used with the BSO. Xu testified that he gave the parameters to another employee in China to arrange for the lens to be purchased there (for price reasons). The BSO had been sent to China for IND Group employees to copy;
4. Xu exchanged emails with other IND employees concerning the need for precise details of the BSO, having confirmed earlier that the BSO he had "was a copy" and he didn't know the parameters for it; and
5. an IND employee emailed Zhu and others regarding a patent filed by a third party for a cytometer nozzle tip. In part, that email contained a proposal that XY's tip be copied in the meantime:

Subject: Re: RE: Not \*\*XY\*\*'s cytometer nozzle patent

...

Lately I am thinking about designing our own \*\*tip\*\* that is different from that of \*\*XY\*\* ... The difficulty is the processing technique. ... Before a new one is designed, it is proposed to still copy \*\*XY\*\*'s first (the plan made by everyone the last time I went to Qing Dao.) To gradually improve after debugging the machine[/s].

[Emphasis Added]

1. April 2011:
2. Xu exchanged emails regarding the need to purchase a signal gain card from Dako (the manufacturer licenced by XY to make SX cytometers and parts under a confidentiality agreement). The employees took measures to hide the fact that the buyer was affiliated with IND Lifetech. They also took steps to contact another manufacturer (Beckman) to purchase a signal gain card. Xu emailed Tang and Zhu: "Well it seems American imperialism is very cunning, suggest to make an imitation one ...", clearly referring to XY. Zhu replied:

The law is strong, but the outlaws are ten times stronger.

1. May 2011:
2. Xu reports on an "in-depth test of the assembled machines";
3. Tang confirms that Zhu and Xu were to go to Dalian, China to source four SX cytometers which were to be transported to Qing Dao after testing. Xu was tasked with setting up these machines.
4. June 2011:
5. Two machines had been installed. In Zhu's email, he refers to continuing efforts to manufacture gain boards, lenses, BSOs, tips and nozzles;
6. Zhu emailed Xu with meeting minutes from June 2 and 3, 2011, confirming use of Mr. Evans' confidential testimony which he heard during the trial for the purpose of applying for a patent:

[Xu] combined the patent \*\*XY\*\* applied for in China and on the basis of the confidential information provided in court, [and] according to our technology development, wrote our patent summary===obtain priority===and then patent application details.

Xu testified at this trial that he had not authored the patent summary, and suggested, during his testimony, that he had not used any confidential information or did not understand what Mr. Evans had said in court. I reject this aspect of Xu's evidence and find that he did, on the instructions of Zhu, use that evidence for the purposes of the IND Group knowing full well that it was confidential, and that his imparting of that information to others in the IND Group was in violation of the direction and order of Kelleher J. at the trial of the Original Action. On this point, I accept XY's submission that it is free to suggest that Xu's testimony be rejected on this point even though he was called as a witness by XY: *R. v. Biniaris* [*(1998), 104 B.C.A.C. 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S240-00000-00&context=) (C.A.) at para. 16; rev'd on other grounds [*2000 SCC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44K-00000-00&context=).

1. July-August 2011:
2. Tang asks the IND employees, including Cheng, Fu and Xu to vote on the "Qing Dao semen sorting centre domain name";
3. the retrofitting process continued, with Xu, who was working on testing of the cytometers with the Summit 4.0 software, writing:

I studied XY's patent carefully today, several improvements shall be made on circuit board of control unit. I will improve control unit and test tomorrow.

1. on August 6, 2011, Zhu reports on a "major breakthrough" on the equipment remodelling with one machine having been completed. Xu's trip to China is reported to have resulted in "great gains". Zhu states that hopefully production can start by end of July/early August. Zhu advises on the shareholdings, directors and officers, and employee roles within CTS.
2. September 2011:
3. Liang Ziyuan (an IND Group employee in China), forwarded a revised business plan which had been proposed by Zhu and Zhang. This business plan is in the name of Beijing Futonghua Investment Co., Ltd. and refers to it and its subsidiary, CTS, as exploring development of the sexed-semen industry. The plan refers to the development of "new efficient flow cytometer"; and
4. Jimmy Liang exchanged emails with a Chinese patent agency, copied to Xu, with instructions to "please apply for patent application priority as soon as possible". The patent summary begins,

This invention makes public a type of semen cytometer, that relates to the field of cell biotechnology. The said cytometer includes: nozzle, the lower part of the said nozzle connects to the tip, the tip head of the said tip being wedge shape, the internal of the said nozzle being flat oval. This invention improves on the foundation of the conventional flow cytometer, substantially increasing the efficiency and accuracy of semen sorting. ...

1. October 2011:
2. Tang confirms that they have five machines but they only have three usable tips and need to manufacture more. Other than that, she indicates that "the progress of the machine[/s] has been smooth sailing. The main problem[/s] has[/ve] been well solved". Tang identifies that there is risk in discussing the matter of the tips with a potential manufacturer of the tips if "XY would soon learn about the information". The IND employees work on preparing drawings for this purpose which is aided by "seeing the real thing" and "by referring to the real sex-controlled \*\*tip\*\* object" (emphasis added). I find that this was a reference to XY's tip, which was part of the Missing Parts.
3. December 2011:
4. the IND Group arranged for Small Precision Technologies ("SPT") to manufacture SX nozzle tips. In order to hide their true identity, Xu, Tang and Zhu discussed the risks of bringing samples for copying by the factory in China. During this discussion, Xu states:

Another problem: we communicate with the Wu Xi manufacturer in the name of Aide Diagnostic. If we bring the samples over, will it involve patent issues, will it cause \*\*XY\*\* to track us down.

Zhu agreed with Xu's proposal but nominates the arrangements with SPT to be in the name of Nuo Ya [Noah] Yan Ke [Scientific Research]; and

1. in aid of the manufacturing process, an IND employee indicated that they are "breaking up a damaged \*\*Nozzle\*\* ourselves, to analyze what it is like inside". I also find that this was a reference to one of XY's tips.

***(e) The Retrofitting Completes in January 2012***

**192**  On January 18, 2012, Tang reported to Zhu and Zhou that:

Since the \*CTS\* company was set up, [and] due to the efforts of everyone, remodeling of the machine has now been completed.

This communication, sent in a congratulatory tone, suggested that there would be a "wage adjustment" for the IND Group employees in recognition of this effort.

**193**  Accordingly, by January 2012, two cytometers at the new Byrne Road Lab, now retrofitted as SX cytometers, were capable of sorting semen at the same speed as they had been before Mr. Evans dismantled them in late 2010. Xu testified that the IND Group employees got raises around this time due to their success in retrofitting the cytometers back to SX cytometers which included XY's Confidential Information on them.

**194**  On February 2, 2012, the Canadian regulatory authorities approved the Byrne Road Lab as a semen-sorting lab. Yang wrote to Zhu, Tang and Zhou that:

All the laboratories have passed the CFIA accreditation, [and] can commence producing formally! Hahaha, when the boss comes back to give a treat, eh!"

**195**  The "boss", namely Jesse Zhu, wrote back, "[f]or sure, for sure."

**196**  Cheng testified that, by February 2012, semen sorting by the IND Group was underway in British Columbia after the temporary suspension of operations arising from JingJing's bankruptcy earlier in August 2010.

1. ***XY Discovers CTS's Operations***

**197**  The Trial Reasons, released on March 2, 2012, indicated that a mandatory injunction had been granted which required Zhu, Tang and Zhou to deliver the "Confidential Information" to XY (para. 329). These individuals took absolutely no action after that date to comply with that order.

**198**  Just days after the release of the Trial Reasons, XY received a tip that Zhu and Tang had set up a new company, FBI, for the purpose of secretly producing sexed semen using XY's technology.

**199**  That information led to private investigators conducting surveillance at both the Foster's Way Lab and the Byrne Road Lab in late March 2012. Those private investigators also collected physical evidence from garbage bags found at both locations. Photographs were taken of people coming and going from both locations and the items seen in their possession. In particular, an Asian woman, later identified as Tang, was seen transporting items from the Byrne Road Lab to the Foster's Way Lab in her BMW vehicle.

**200**  During hearings held March 30 and April 2, 2012, XY applied to this Court for an Anton Piller order (earlier defined as the "APO"), allowing the seizure of evidence from both the Foster's Way Lab and the Byrne Road Lab. The APO was granted by Voith J. against CTS, FBI, Tang, IND and IEI as the "Implicated Defendants", on April 2, 2012: *XY, LLC v. Canadian Topsires Selection Inc.* (2 April, 2012), Vancouver S122330 (B.C.S.C.). The APO was executed on April 2-4, 2012, as I will describe in more detail below.

**201**  The APO would later be reviewed and reconsidered by Voith J. As a result, the APO was set aside as against IND and IEI: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2012 BCSC 1797*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2VR-00000-00&context=) (the "APO Review"), and later reinstated as against IEI: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2013 BCSC 780*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CT-00000-00&context=) (the "APO Reconsideration").

**202**  In accordance with the APO, Roger Lee, assisted by David Spratley, was appointed as the independent supervising solicitor ("ISS") to record the execution of the APO with respect to the Foster's Way Lab. John Singleton Q.C., assisted by Ian Jones, was appointed the ISS to record the execution of the APO with respect to the Byrne Road Lab.

**203**  Both ISSs seized various items, defined in the APO as "Evidence for Seizure", and removed those items from the premises for safekeeping. Materials removed from the Foster's Way Lab included various documentation and hard drives. Items removed from the Byrne Road Lab also included various documentation and computers, including hard drives (although not the hard drive from Zhou's old laptop which was in her purse, as noted above in para. 55). All of these hard drives were eventually mirrored, and the computer and hard drives were returned to the appropriate defendant.

**204**  Also of significance, regarding the Byrne Road Lab, was the discovery of three cytometers and related equipment. Two of these machines were functioning and had data displayed on them similar to SX machines. Fu would later identify a screen shot on one of these machines as probably a semen production record from early 2012. The third machine was not functioning.

**205**  The machines at the Byrne Road Lab were seized by Mr. Singleton. After being secured, that equipment was removed to the premises of Accurate Bailiff Ltd. (the "Bailiff"). This equipment remains at the Bailiff's premises to this day, and includes the original hard drives located at the various work stations where the cytometers had been placed.

**206**  Prior to removal of the equipment from the Byrne Road Lab, Mr. Evans assisted in inspecting and dismantling the equipment. Mr. Evans noted:

1. two of the cytometers were the very ones that JingJing had obtained through XY as part of the licencing arrangements which he had dismantled (by removing the SX parts) back in December 2010. Tang later confirmed that these had been purchased from the Trustee;
2. the two operational machines were running XY's proprietary software with Cytrack and they had been modified to operate as an SX cytometer. These modifications include changes to the PMT controller; installation of SX nozzle assemblies; installation of SX BSOs; and placement of parts in the configuration necessary for sperm sorting;
3. with respect to the third, non-functional cytometer, Mr. Evans noted BioSurplus labels (Tang confirmed that this cytometer had been purchased from BioSurplus). Mr. Evans testified that this machine was in the process of being retrofitted to operate as an SX cytometer;
4. he located spare parts, in particular, SX nozzle assemblies and SX nozzle tips, which appear to have been purchased from SPT;
5. he located XY's confidential protocols, derivatives and improvements to them as made by IND personnel; and
6. he discovered that the equipment included false labels which appeared to have been made up by the IND Group. Xu would later confirm that the IND Group employees had created these labels themselves.

**207**  Most disconcerting was that Mr. Evans located SX BSO serial #2196 and SX nozzle assembly #24578, both of which were identified as among the Missing Parts, at the Bryne Road Lab. The original BSO #2169 was never found. Many counterfeit tips and SX nozzle assemblies, apparently purchased from SPT, were also seized.

**208**  In the APO Review, Voith J. described the results of the search as follows:

1. three cytometers were found at the Byrne Road location, including two operational and one in the process of being configured. All were found to have XY's confidential parts and features which were found to be "Confidential Information" in accordance with Kelleher J.'s Trial Order (paras. 42, 51);
2. documentation found included the XY protocols that had been specifically included as "Confidential Information" (para. 40); and
3. found to be "particularly disturbing" was that XY discovered certain parts at the lab that it had sought to earlier locate and secure from JingJing's bankruptcy trustee (i.e. the Missing Parts), notwithstanding that Zhu, in his testimony at the trial in the Original Action, had claimed to have no knowledge of these parts (paras. 43, 51).

**209**  The definition of the "Premises" that could be the object of the search and seizures authorized by the APO included the Byrne Road Lab, along with "every vehicle ... owned, leased or otherwise under the control of the Implicated Defendants that is at, appurtenant or adjacent to the Premises...". The definition of Implicated Defendants included Tang. In accordance with this provision, Mr. Jones searched and seized certain documentation found in Tang's BMW vehicle which was parked near the Byrne Road Lab at the time of execution of the APO.

**210**  Tang was asked directly by Mr. Jones if she had any knowledge of the whereabouts of the items listed in Schedule C to the APO. Tang responded "I don't think so, I don't know". When asked about a bag of documents stored in the trunk of her car parked at the Byrne Road Lab, Tang claimed that they were documents from other companies which might contain company secrets. She also asserted a potential claim of privilege relating to these documents.

**211**  Upon Mr. Jones' review of the documents found in Tang's vehicle, it was determined that there was absolutely no basis for any claim of privilege. In fact, the documents related to laboratory operations and some were in the name of IND. These documents also included an XY research bulletin which expressly stated that it contained trade secrets and confidential information.

**212**  These later events support my conclusion that by January 2012, as a result of Zhu's and his employees' activities both in the Lower Mainland and China, the IND Group had an unlimited ability to manufacture SX BSOs and SX tips. That is borne out, in part, by Mr. Evans finding a package of SPT SX tips at the Bryne Road Lab at the time of the seizure during execution of the APO.

1. ***The IND Group's Activities in China***

**213**  At the trial in the Original Action, the focus was on the activities of JingJing in Canada. However, XY certainly suggested, at the time, that JingJing and Zhu's activities went beyond Canada's borders and included sub-licencing and use of XY's technology in China. Even earlier, in July 2008, XY's submissions to this Court to that effect were not accepted toward expanding this Court's injunction: Trial Reasons at para. 137. In addition, even after the trial in the Original Action, Kelleher J. found that such suspicions were "inconclusive": Trial Reasons at para. 199.

**214**  It appears that, at best, the evidence available to XY up to the time of the Original Trial established that JingJing had attempted to establish sorting operations in China and that Zhu had lied in denying that he had such plans: Trial Reasons at paras. 227-228.

**215**  The defendants in this action were quick to argue that the execution of the APO in early 2012 put them "out of business". That may have been the case with respect to operations in British Columbia; however, it remains to be determined, in this action, the extent of the IND Group's efforts to use XY's Confidential Information in China and possibly elsewhere.

**216**  The evidence at this trial on the IND Group's activities in China went well beyond what was before the Court in the Original Action. That evidence included:

1. while retrofitting the cytometers at the Byrne Road Lab in the spring of 2011, Xu sent parts, measurements, and photographs to IND Group employees in China to arrange for copies to be made;
2. Xu testified that he was sent to China for the IND Group to make contact with companies in China and arrange for copying SX parts, in particular, the BSO, nozzle and nozzle tip. The IND Group did, eventually, contract with SPT to copy the SX nozzle tips in December 2011;
3. in March 2011, arrangements were made to ship two cytometers to Ai De in Qing Dao through Unique Way Technology, another of Zhu's companies. This was done with the assistance of Zhang;
4. on July 28, 2011, Tang wrote to a number of IND Group employees and asked them to "vote regarding the Qing Dao semen sorting centre domain name";
5. following the retrofitting of two cytometers in the Byrne Road Lab by Xu in 2011, Fu was tasked with going to China to assemble two cytometers and retrofit them into SX cytometers. One of the cytometers in China was the third XY cytometer which had been re-purchased by the IND Group from the Trustee after being stripped of its SX parts. The other cytometer in China was an ordinary cytometer that had been purchased from BioSurplus. Tang supplied the labels for these cytometers;
6. before going to China, Fu compared the BioSurplus cytometer, located in the Byrne Road Lab, with another cytometer which Xu had already retrofitted to an SX cytometer. Fu also took the parts from the SX cytometer and fit them into the ordinary cytometer to debug the machine and confirm that they were compatible. He obtained a copy of XY's software from the IND Group IT department and compared it to the software on the ordinary cytometer. Xu trained Fu how to retrofit the cytometers;
7. Fu testified that Tang gave him SX parts; in particular, two SX BSOs and two SX nozzles which he was to take with him to China. The IND Group IT department also put a copy of XY's Summit software on a removable hard disc for him to take to China. Fu confirmed that there were already SX nozzle tips in China;
8. Fu went to China in late 2011. He prepared part of a progress summary that confirmed that, by November 16, 2011, he had one of the machines in Qing Dao working as an SX machine. Tang reported on a number of other elements required to establish the semen-sorting lab in Qing Dao, including auxiliary components and training of personnel;
9. Fu went to China to work for the IND Group again in mid-2012. On that trip, he was instructed to install and debug the semen straw-filling machine in Qing Dao which is used in the production and packaging of semen. While in Qing Dao, Fu confirmed that there was an SX cytometer operating at the lab. The other machine had been taken to the IND Group's Beijing location. The lab and the semen production in China was under the supervision of Zhu Qian, Zhu's cousin. Further, while in Qing Dao in 2012, Fu was told, by Zhu Qian, that the semen being sorted was used for testing for the purpose of signing a contract with Guo Ming Dairy Company;
10. Xu testified that when he went to Qing Dao in March 2014, there were between 400 to 500 employees of the IND Group working there; and
11. Xu testified that, before October 2014, he understood from IND Group employees in China that they were not allowed to give him any information about developments in China, and that a fingerprint device had been installed to secure the IND Group's laboratory in Qing Dao.

**217**  None of the IND Employees who testified at the trial were able to give exact details as to the operations in China, including any embryo production. However, as early as August 2011, Zhu wrote to Tang and Fu confirming his intention to develop embryo-production facilities in China.

**218**  Zhu's complacency about the Trial Order, and any potential effect of these proceedings on his Chinese operations, is somewhat indicated by a later event. On December 29, 2014, Zhu's counsel "returned", to XY's counsel, an SX BSO (with a counterfeit label with the same serial number (#2196) as one XY had seized during the execution of the APO), and a SX nozzle and SX tip. There was no explanation as to why these parts were returned and how Zhu came to be in possession of such items.

**219**  I agree with XY that the natural presumption arising from this event is that Zhu already has either the originals or copies of these parts sufficient for his purposes in terms of carrying on his operations in China and possibly elsewhere.

**220**  I conclude, and find as a fact, that the misuse of XY's Confidential Information took place in the Lower Mainland and in China in equal measure. I find that by the end of 2011/early 2012, at least two cytometers were also in the hands of the IND Group in China, which the IND Group employees had similarly retrofitted into SX cytometers using XY's Confidential Information for the purpose of semen sorting.

1. **Summary re Breach of Confidence**

**221**  I conclude that the evidence overwhelming supports the following findings of fact:

1. Zhu, along with his key employees in the IND Group, used XY's Confidential Information to continue JingJing's operations past the date of termination of the Licence in late 2008 to create sexed semen. They did so until Zhu and the IND Group's key employees concocted a plan in 2010 that would place JingJing into bankruptcy with a view to disguising their ongoing operations and use of XY's Confidential Information;
2. concurrent with placing JingJing into bankruptcy, the IND Group companies (IND, IEI, IDI, CTS and FBI), its employees and Zhu expressly planned to use XY's Confidential Information for their own purposes in the future. They succeeded in doing so by January 2012, which saw a resurrection of their operations in the Lower Mainland (through CTS), and either a continuation or commencement of their operations in China. These activities arose, in part, from their use of both "real" SX parts withheld from XY and the Trustee, and also the copying of manufactured SX parts (the BSO and tips) based on further misuse of XY's Confidential Information; and
3. the plan was implemented by Zhu and his key IND Group employees, while knowing full well as to the confidential nature of XY's technology, and to exacerbate matters, while doing so in the face of litigation (i.e. the Original Action) commenced by XY to protect its interests in its technology.

**222**  I agree with XY that the fact that Zhu and the IND Group employees, both in Canada and China, took such pains to keep their plans secret, indicates that all these individuals were well-aware that their actions were breaches of confidence. In execution of this plan, Zhu and his employees made extensive efforts to hide their efforts. This included:

1. lying to the Trustee and XY in various respects and, in particular, misleading XY and the Court about who was the true purchaser of the cytometers;
2. making misrepresentations as to the Missing Parts and withholding the Missing Parts for their future (mis)use;
3. using false names, in terms of sourcing materials and parts for the retrofitting process of the cytometers, all in aid of hiding the IND Group's efforts from XY; and
4. attempting to remove the serial numbers from the SX parts and making counterfeit labels for the newly-copied parts and machines.

**223**  Zhu's plan was achieved, in part, by various misrepresentations to this Court, all as directed by Zhu and implemented by the IND Group employees at his direction.

**224**  I also accept XY's submissions that the IND Group employees have created what was defined in the Trial Order (as amended by the Court of Appeal) as "Improvements" as a result of their semen and embryo research, both in Canada and China. In terms of their activity relating to embryos, from the early negotiations in May 2003, the IND Group knew they needed an embryo licence from XY in order to produce sexed embryos from sexed semen: Trial Reasons at paras. 58, 62-63, 66-67.

**225**  I conclude, and find as a fact, that in addition to copying the SX cytometer parts, the defendants have used the newly-retrofitted SX cytometers to make substantial quantities of sexed semen and sexed embryos, all in breach of confidence relating to XY's Confidential Information.

**226**  All of the defendants involved in this trial received XY's Confidential Information knowing that it had been provided by XY to JingJing in confidence. Their surreptitious actions and misrepresentations taken in relation to this Court, the Trustee, and XY to avoid detection of their true activities are indicative of this knowledge. Equity will pursue the information into the hands of a third party who receives it knowing, or later learns, it was communicated in breach of confidence and impose its remedies: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [*[1999] 1 S.C.R. 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41H-00000-00&context=) at para. 19.

**227**  I find that Zhu, both personally and through his various companies, being IND, IDI, IEI, FBI, CTS and Ai De, all participated in this breach of confidence.

**228**  The further amended notice of civil claim sets out the following allegations against IND, IDI, IEI, FBI, CTS and Ai De:

Para. 4: [IND] has a number of related and subsidiary companies which it operates and regards as divisions of [IND] and not as independent legal entities.

Paras. 2/3/5/8/9: [CTS], [FBI], [Ai De], [IEI] and [IDI] are "not operated or regard by its senior management as a separate legal entity but is a division of [IND]."

Paras. 2/5: [CTS] and [Ai De] have been "for [IND] and its divisions, locating, purchasing, transporting, selling and otherwise trading in cytometers and cytometer parts, including cytometers and parts outfitting with or using XY's Confidential Information, and has obtained or is attempting to obtain, including by reverse engineering, specially adapted cytometer parts which contain and/or exploit XY's Confidential Information."

Para. 3: [FBI] obtained machinery, equipment and office space for use by other divisions of [IND] to create sex-selected inseminates using XY's Confidential Information and/or embryos made with such sex-selected inseminates for use and/or sale, directly or indirectly, by or on behalf of [IND] and its divisions.

Para. 8: [IEI] uses sex-selected inseminates created by the wrongful use of XY's Confidential Information to produce IVF embryos for sale by or on behalf of [IND].

Para. 9: [IDI] produces chemical solutions used by other divisions of [IND] to produce, store, and/or use sex-selected inseminates for sale by or on behalf of [IND] and its divisions.

Para. 39: [IDI] and its divisions, including affiliated and related companies, are and have been operating as a common enterprise with respect to the intentional, knowing and wrongful use of XY's Confidential Information as set out above. Among other things:

1. the profits of the divisions are treated as the profits of [IDI], including that funds flow from one division to another or to [IDI] without exchange for full or any value;
2. the affairs of the divisions are controlled by persons appointed by or on behalf of [IDI];
3. [IDI] directly or indirectly makes all decisions for the divisions;
4. [IDI] governs the business and aims of the divisions;
5. profits of the subsidiaries are derived from the skill and direction of [IDI]; and
6. [IDI] has effectual and constant control of the divisions.

Para. 40: In general, but also specifically with respect to the intentional, knowing and wrongful use of XY's Confidential Information as set out above, [IND] and its divisions are not operated or regard by the divisions' own nor by [IND]'s senior management as separate legal entities. The divisions and [IND] act jointly and in concert. They are also jointly liable, whether as a common enterprise or alternatively as joint venturers in a common purpose and project to wrongfully use XY's Confidential Information and as participants in the funds, directly or indirectly, necessary for and deriving from such wrongful use.

**229**  IND, IDI, IEI, FBI and CTS are essentially deemed to have admitted these allegations by reason of the striking of their responses to civil claim: *British Columbia (Director of Civil Forfeiture) v. Crowley*, [*2013 BCCA 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1WX-00000-00&context=) at para 76. I have already mentioned that Ai De was served but did not file any responses to civil claim. As such, the facts asserted by XY are also deemed as having been admitted by Ai De: *ICBC v. Wiese*, [*2011 BCSC 238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B18M-00000-00&context=) at para. 4.

**230**  Even so, the evidence at this trial overwhelmingly supports that Zhu, both personally and through his various companies by which he operates, received the Confidential Information and expressly and improperly misused it for his own purposes through the corporate actions of IND, IDI, IEI, FBI, CTS and Ai De. While the evidence is not sufficient to specify clearly the exact roles of some of the companies, I am more than satisfied that Zhu was acting in his capacity as owner of these corporations in directing their improper activities through the means of the various IND Group employees. All of these corporations took some action in aid of Zhu's goals, and while in possession of knowledge that it was acting for the purpose of improperly using XY's Confidential Information.

**231**  In addition, Zhu and Zhang were participating as "directors" or directing minds of various IND Group companies, and their actions amounted to a deliberate knowing pursuit or conduct to commit acts which cannot be said to be in the best interests of the companies through whom they acted. As such, they are personally liable for those acts: Trial Reasons at para. 259; *Prism Hospital Software Inc. v. Hospital Medical Records Institute* [*(1987), 18 C.P.R. (3d) 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3YF-00000-00&context=) (S.C.) at 399; *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co. Inc.* [*(1978), 89 D.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M3Y1-FG68-G2PS-00000-00&context=) (Fed. C.A.) at 204.

**232**  The available evidence is sufficiently clear, in terms of the role of FBI and CTS, which were involved (and in CTS' case, created) for the express purpose of acting to improperly use and exploit XY's Confidential Information. There is no evidence that IND, IDI, IEI and Ai De were expressly created for the purpose of using XY's Confidential Information, but corporate actions taken by them were used to further the improper activities relating to XY's technology, as directed by their owner, Zhu.

**233**  Accordingly, Zhu and the IND Group companies, being IND, IDI, IEI, FBI, CTS and Ai De, and Zhang, as a director of CTS, are all liable to XY for breach of confidence.

**234**  The principles from *Cadbury Schweppes* apply equally to Tang and Zhang, against whom XY seeks judgment.

**235**  Tang filed a response to amended civil claim on June 28, 2012 denying liability and asserting that, at all material times, she was an employee of IEI acting under the direction of Zhu. She asserted, at paragraph 5, that "[a]s lab manager, [her] job was to manage and support the laboratory technicians who conduct research at the laboratory facility located at the [Byrne Road Lab] and the [Foster's Way Lab]". She denied, in her pleading, that she uses, or has used, XY's Confidential Information.

**236**  As I stated above, Tang was aware of the dates of this trial, in addition to being served with a notice to call her as an adverse party witness pursuant to *Rule* 12-5(21). She emailed XY's counsel confirming that she would not participate relying, instead, on an indemnity agreement with Zhu which she attached. She did not ask for an adjournment of the trial, but noted that she had been suffering from depression for some time and could not afford a lawyer.

**237**  Again, the evidence, as to Tang's involvement in the plan to misuse XY's technology, is manifestly clear. She was:

1. the supervisor of the semen-sorting group in Canada and she was in charge of arranging the tasks for the various employees;
2. she was the most senior team member at the decisive August 20, 2010 meeting, at which time she instructed Xu to retrofit the two ordinary machines they anticipated receiving from BioSurplus by copying the three SX machines they currently had in their possession;
3. Xu, Fu and Cheng all testified that she was their supervisor;
4. when the IND Group learned that XY was to strip the SX parts from the machines in December 2010, she specifically instructed Xu to record the parts that were to be replaced by XY in aid of the retrofitting process;
5. in her discovery evidence, she stated that she understood, by September 2010, that the "intention is to turn these cytometers back into semen sorting SX cytometers";
6. she also admitted, in her discovery evidence, that she participated in the lie to the Trustee about who was actually purchasing the cytometers in order to avoid any suggestion that the IND Group was involved;
7. Xu testified that he received the SX parts from Tang when the time came to retrofit the machines. Tang admitted, on discovery, that she was "in charge of safekeeping" the parts and that she kept them in a cupboard. These parts consisted of "three or four complete sets of SX parts", namely, BSOs, nozzles and nozzle tips. She knew the SX parts were only available to XY's licensees, and knew they were being used to retrofit the ordinary cytometers back to SX cytometers both in Canada and China, confirming, "Yes, later when it was being done, of course I knew."; and
8. Tang was also directly and extensively involved throughout the course of events in the 2010-2012 timeframe as the various IND Group employees sought to copy the SX parts and retrofit the machines.

**238**  Accordingly, Tang is liable to XY for breach of confidence.

**239**  In its pleading, at paragraph 14, XY alleged that Zhang (i.e. the nominal director of CTS), was a current or former partner or joint venturer with Zhu, Ms. Wang and/or IND, to produce sex-selected inseminates and store sex-selected inseminates for sale and/or use by or on behalf of IND. Finally, XY alleged, at paragraph 33a, that Zhang intentionally, knowingly and wrongfully used and collaborated with the other defendants in the wrongful use of XY's Confidential Information. As was Ai De, Zhang was served with XY's pleading but did not file any response to civil claim. As such, the facts asserted by XY against him are deemed as having been admitted: *Wiese* at para. 4.

**240**  As with Tang, the involvement of Ai De and Zhang in the intentional misuse of XY's Confidential Information has, in any event, been clearly proven. The facts include:

1. Zhu signed as the "owner" of Ai De in its fraudulent proof of claim filed in JingJing's bankruptcy;
2. Zhang was an employee of the IND Group in China and participated in the breach of confidence. He agreed to be the nominee director of CTS knowing that this was done to avoid any suggestion as to Zhu's involvement; and
3. on February 21, 2011, Zhang emailed Ai De's delivery documentation and invoice to the Canadian IND Group employees, through which the two cytometers were shipped to China for the purpose of being retrofitted using XY's Confidential Information. On September 12, 2011, Zhang participated in the preparation of the Beijing Futonghua business plan.

**241**  It is not clear to me when Ai De was incorporated, but it certainly participated in Zhu's scheme, as I note above. Accordingly, Zhang and Ai De both played a direct role in receiving and misusing XY's Confidential Information.

**242**  In summary, Zhu, IND, IDI, IEI, FBI, CTS, Tang, Ai De and Zhang are all jointly liable for breach of confidence by reason of their conduct. As such, XY is entitled to certain remedies, both compensatory and injunctive, as are discussed below.

**X. CIVIL CONSPIRACY**

**243**  XY also alleges that Zhu, his companies, IND, IDI, IEI, FBI, CTS and Ai De, and the individuals, Tang and Zhang, have conspired to harm it through their actions.

**244**  The essential elements of the tort of conspiracy are:

1. an agreement between two or more persons;
2. concerted action pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff; and (ii) if the action is unlawful, there must be evidence the conspirators knew or ought to have known their action would harm the plaintiff; and
4. actual damage suffered by the plaintiff.

See *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, [*2008 BCSC 669*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2HV-00000-00&context=) at para. 75, aff'd [*2009 BCCA 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XB-00000-00&context=) at para. 20; *Le Soleil Hospitality Inc. v. Louie*, [*2010 BCSC 1183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2141-00000-00&context=) at paras. 341-345, aff'd [*2011 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22D3-00000-00&context=) at para. 111.

**245**  XY alleges that the conspiracy here is one of unlawful acts. It alleges that the defendants acted in concert, taking certain unlawful steps with the express intention of harming XY through the destruction or diminishment of its Confidential Information, and with the knowledge that their acts would cause injury to XY. XY further alleges that Zhu and Zhang's interest in so acting was separate and distinct and in addition to their role as officers and directors in the various corporate defendants and that, in certain respects, they used the corporate defendants for that purpose: *Tracy* (B.C.S.C.) at paras. 85-86; (B.C.C.A.) at paras. 25-28.

**246**  I am satisfied that the first element of the tort -- an agreement -- is made out.

**247**  As Kelleher J. stated in the Trial Reasons:

[268] Direct evidence is not required to demonstrate the existence of an agreement between co-conspirators, nor does the agreement have to be contractual. Rather, an agreement may be inferred from the facts, so long as they "cannot fairly admit of any other inference being drawn from them": *Golden Capital Securities Ltd. v. Holmes*, [*2004 BCCA 565*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0C0-00000-00&context=) at para. 46, citing *Sweeney v. Coote*, [1907] A.C. 221 at 222 (H.L.).

**248**  As I stated above, Zhu's intention, formed by at least early 2009 after the Licence was terminated, was to continue to use and exploit XY's technology for his own purposes. Various steps were taken in pursuit of that goal. In particular, the email exchanges in the summer of 2010 leading to the decision to bankrupt JingJing make clear that that option was discussed, debated and, ultimately, agreed to by the various IND Group employees who would see it through to implementation and execution. Although I appreciate that the actual course of events were not expressly planned ahead of time, at all times, the employees acted toward the agreed and never-wavering goal of using XY's Confidential Information to retrofit the SX cytometers for the IND Group's businesses in Canada and China.

**249**  In that respect, I agree with XY's submissions that Zhu and Zhang were acting in their personal and separate capacities beyond their positions within the corporations in entering into the agreement to so act and in acting to misuse XY's Confidential Information.

**250**  To that end, it was clear by all the defendants that they would have to create this sham bankruptcy and, in so doing, deceive the Trustee, act in violation of duties under the bankruptcy legislation, deceive XY and the Court, and withhold assets of JingJing from the Trustee.

**251**  The second element is met by the concerted action each of the defendants took, which included deceiving the Trustee, the Court and XY in various ways. All of these actions allowed the IND Group employees to work in relative obscurity in copying the SX parts and retrofitting the cytometers, all the while using XY's Confidential Information towards their mutual benefit in continuing operations.

**252**  The conduct of the defendants was all directed to the common goal of using XY's Confidential Information in breach of the confidence they knew to exist by rebuilding the SX cytometers and using them in Canada and China to create sexed products, including semen and embryos.

**253**  Similar to what was noted in the Appeal Reasons at para. 55, Zhu, Zhang and Tang were part of the "management team" of the various companies who not only acted in concert to carry out the unlawful acts, but also assisted in the planning as to how best to go about it. As the Court of Appeal commented in *Tracy*, acting through corporations does not shield corporate insiders:

[28] The fact the illegal activity was actually conducted by the Instaloans companies would, in the circumstances, appear to be of no consequence to the personal liability of Mr. Latimer and Mr. Arcand. While the primary reason individuals choose to incorporate is to protect themselves from personal liability through the separate legal personality of the corporation, as I have said, the law does not treat favourably individuals who either incorporate a company for the purpose of undertaking a wrongful act, or who, while acting as directors, cause the company to engage in a wrongful act.

**254**  Turning to the third element of the tort of conspiracy, XY contends that the defendants' various actions were unlawful. XY argues that the unlawful acts included a breach of confidence, as found above.

**255**  In the Appeal Reasons, the Court commented on the meaning of "unlawful act":

[49] There is not a great deal of case law in Canada on the meaning of "unlawful means" or "unlawful act" in the context of civil conspiracy. In 1961, in *Gagnon v. Foundation Maritime Ltd.* [*[1961] S.C.R. 435*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X30R-00000-00&context=), the Court referred in this context to "means ... [that] were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy ...". (At 446.) More recently, the Ontario Court of Appeal considered the issue in *Agribrands Purina Canada Inc. v. Kasamekas* [*2011 ONCA 460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4K7-00000-00&context=) in connection with a claim of intentional inference with economic relations. The Court referred to *Bank of Montreal v. Tortora*, [*[2010] B.C.J. No. 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X16N-00000-00&context=) supra, in which it was said at para. 47 that for conspiracy to lie, the plaintiff must show unlawful conduct by each conspirator. After considering the specific context of intentional interference cases, the Court in *Agribrands* continued:

[R]ather than automatically adopting the meaning of unlawful conduct given in the intentional interference tort cases, I think the better course is to use those cases as a guide, but also consider the kind of conduct that the jurisprudence has found to be unlawful conduct for the purposes of the conspiracy tort.

It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of *Canada Cement LaFarge* is an example. So too is conduct that is in breach of the *Criminal Code*. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* ..., the authors say this at p. 167-168:

... Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.

The second category of unlawful means is conduct comprising unlawful means not actionable in itself.

...

What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort. [At paras. 36-8; emphasis added.]

(See also *Rummery v. Matthews* [*2000 MBQB 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22RK-00000-00&context=), var'd on other grounds, [*2001 MBCA 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-F30T-B3MD-00000-00&context=); *Lerik v. Zaferis* [*[1930] 1 D.L.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0J7-00000-00&context=) (B.C.C.A.); and G.H.L. Fridman, *The Law of Torts*, *supra*, at 769-771.)

[50] In my view, the misconduct of the Personal Defendants in this case - essentially the preparation of false records and reports sent by JingJing to XY and the breach of confidence found by the trial judge -- satisfies in law the "unlawful act" requirement for these purposes.

**256**  Accordingly, similarly, the misconduct of all the defendants here stand as "unlawful acts" sufficient to satisfy this element of civil conspiracy. In that event, one must ask what is to be gained by XY pursuing this cause of action. The Court of Appeal asked a similar question in relation to liability of corporations for both conspiracy and unjust enrichment (where the corporate veil was pierced) in *Tracy* (B.C.C.A.) at para. 24.

**257**  XY argues that, while some of the unlawful acts established through the evidence relate to the breach of confidence, there are other unlawful acts that support a finding of the tort of civil conspiracy. These unlawful acts are said to be:

1. the filing of a false evidence (Zhu's affidavit, quoted above) in July 2008 which caused Slade J. to dismiss XY's application for an order extending the injunction granted earlier on October 30, 2007. At that time, XY was seeking an injunction to prevent Zhu and his companies from attempting to establish production of sexed semen and sexed embryos in China;
2. after November 2008 when XY terminated the Licence held by JingJing, Zhu and others, on behalf of JingJing, led everyone to believe it had ceased producing sexed semen. This was accomplished, in part, by the filing of a sham counterclaim in the Original Action in February 2009, by which damages for unlawful termination and relief from forfeiture were claimed;
3. Zhu and the IND Group employees decided to perpetuate the perception that JingJing was out of the semen-sorting business by having it file for bankruptcy in August 2010;
4. the IND Group employees, Zhu, and others organized the affairs of JingJing to transfer the business to a new company (CTS) so as to avoid liability to XY;
5. the IND Group employees, Zhu, and others deceived the Trustee into thinking that certain members of the IND Group who claimed to be creditors were not related to JingJing, allowing the IND Group to appoint Zhou and Chen ostensibly as independent inspectors representing these "creditors", so as to exert influence and control over the conduct of the bankruptcy;
6. the IND Group and Zhu created false, back-dated records to substantiate the IND Group companies' proofs of claim and, thus, participate as creditors in the bankruptcy proceedings;
7. Zhu kept up the pretence, to such an extent that he swore an affidavit on October 3, 2010, for the purposes of opposing the Trustee's application regarding JingJing's counterclaim against XY. He attested as to the IND Group's intention to pursue JingJing's counterclaim filed against XY pursuant to s. 38 of the *Bankruptcy and Insolvency Act*, [*R.S.C. 1985, c. B-3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB51-K054-G4Y8-00000-00&context=) (the "*BIA*"). This provision allows a creditor to take up causes of action in the place of a trustee in bankruptcy. Zhu falsely testified that he did not have notice of the Trustee's intention to settle the counterclaim. Kelleher J. ruled against Zhu and XY ultimately paid $100,000 to settle this counterclaim;
8. Zhu organized the making of false representations to the Court about FBI and Xu by asserting they were not connected to the IND Group at the beginning of trial in the Original Action. This was done for the express purpose of obtaining access to XY's confidential testimony in court so that it could be used in the future by the IND Group. This confidential testimony was used by Zhu and his various companies, although the extent of such use is not clear;
9. IND Group employees actively discussed, planned and then made false representations about the Missing Parts to the Trustee, and then to the Court and XY in October 2010;
10. IND Group employees actively discussed, planned, and then made false representations about the proposed purchaser of JingJing's cytometers to the Trustee, and then to the Court and XY in October 2010. A similar false representation was made regarding the purchaser of the semen inventory held by JingJing; and
11. IND Group employees did not disclose all of JingJing's assets to the Trustee, such as the Missing Parts and all of XY's protocols which were in their possession. Indeed, they actively lied about their continuing possession of the Missing Parts. These Missing Parts were simply transferred to various IND Group companies, including IEI, CTS and IND, for their own use.

**258**  As can be seen, many of the above unlawful acts, such as deceit of the Trustee, XY and the Court, are not technically breaches of confidence in respect of XY's Confidential Information. Rather, they are the means by which that breach was accomplished. Deceitful actions, in relation to the Trustee, were pleaded by XY in its further amended notice of civil claim at paras. 47(a)-(d), and, thus, has now been deemed to be admitted by Zhu, Zhang and the IND Group companies. There is also no doubt that Tang was equally complicit in deceiving the Trustee (and also XY and the Court in the Original Action and in the bankruptcy proceedings).

**259**  I find that the unlawful acts committed by the defendants also include being deceitful towards the Trustee, XY and this Court. In addition, many of the actions of the IND Group employees constitute breaches of the duties of a bankrupt and creditors or offences under the *BIA*: see ss. 158, 159, 198, 200, 201, 204. In particular, s. 201(1) of the *BIA* provides that where a creditor wilfully and with intent to defraud makes a false claim in a bankruptcy, such as the proofs of claim of IND and Ai De executed by Zhu, that person is guilty of an offence punishable on summary conviction. As an officer, director or agent of IND or Ai De, Zhu is equally liable: *BIA*, s. 204.

**260**  The fourth element is established by XY's loss of royalties, loss of control over sexed semen and embryo production in China and loss of the benefits of the Improvements. Mr. Evans, Mr. Gilligan and Mr. Holland all testified about the importance to XY of implementing quality control measures toward ensuring the quality of the product. In addition, XY ensures control over the technology by requiring that its licensees disclose any testing, development and distribution of Improvements and by requiring that such Improvements are assigned to XY. I agree with XY that, while this loss relating to Improvements may be more difficult to measure than lost royalties -- which is the more obvious form of actual damage -- it, nevertheless, also constitutes actual damage to XY.

**261**  Tang is liable for the tort of civil conspiracy as a joint tortfeasor by reason of her conduct. The findings of Kelleher J. in the Trial Reasons apply equally here:

[257] Furthermore, Selen Zhou, Tang Jin and Jesse Zhu are liable as joint tortfeasors by operation of the principle discussed in *Osborne v. Pavlick*, [*2000 BCCA 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X24S-00000-00&context=). In *Osborne* at para. 16, Southin J.A. adopted the description of joint tortfeasors from *The Koursk*, [*[1924] P. 140*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1924+P.+140) (U.K.C.A.), where Scrutton L.J. stated at 155:



The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.

[258] In this case, regardless of which defendant committed which aspect of the tort, the evidence supports a finding that Helen Zhou, Jesse Zhu, Tang Jin and Dr. Remillard each played a part and acted in concert to deceive XY about JingJing's use of its technology and information.

**262**  The evidence makes clear that all of these defendants each played a part in the overall plan to steal XY's Confidential Information for their own use by various means, including breaching the confidence in relation to XY's Confidential Information. They all worked together to achieve their goals based on their agreement as to the "common purpose"; namely, to use XY's Confidential Information to retrofit the cytometers so that they could be operated as SX cytometers in the future, and also to allow them to copy XY's Confidential Information for their future use. This was all done for the benefit of the IND Group so that the Group could collectively benefit from the use of that Confidential Information. It matters not that each of them completed only certain aspects of the plan.

**263**  Accordingly, I find Zhu, IND, IDI, IEI, FBI, CTS, Tang, Ai De and Zhang liable to XY in civil conspiracy.

**XI. UNJUST ENRICHMENT**

**264**  XY also advances a claim against Zhu, IND, IDI, IEI, FBI, CTS and Ai De on the basis of unjust enrichment (i.e. not against Tang or Zhang).

**265**  The test for unjust enrichment has three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and, (iii) the absence of juristic reason for the enrichment. See *Harraway v. Harraway*, [*2009 BCCA 561*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24PV-00000-00&context=) at paras. 14-21, citing *Garland v. Consumers' Gas Co.*, [*2004 SCC 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=); *Tracy* at para. 56, 59-60 (S.C.).

**266**  Given my discussion of the evidence and my findings as above, it has been proven that, by reason of the actions of Zhu, mainly through the corporate defendants, XY has suffered a deprivation and there has been enrichment through the breaches of confidence of XY's Confidential Information. I am also satisfied that there is no juristic reason for this enrichment.

**267**  The question that arises is who has been enriched?

**268**  XY made substantial submissions on the doctrine of piercing the corporate veil in terms of fastening liability on directors, officers and shareholders of a corporation, contrary to the well-known principle of separate corporate identity per *Salomon v. Salomon & Co.*, [*[1897] A.C. 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HDC-MS71-FFFC-B1D7-00000-00&context=) (H.L.).

**269**  This is not necessary in terms of the causes of action relating to breach of confidence and conspiracy, as discussed above, given the basis upon which liability has been found against the individual defendants.

**270**  On the unjust enrichment issue, however, XY argues that the corporate veil should be lifted so as to collapse Zhu's corporate holdings in order to hold Zhu personally liable in addition to all the corporations.

**271**  As I have already discussed, Lowry J.A. commented in *Tracy* (B.C.C.A.) at para. 24 that it was questionable whether a claim of conspiracy against a corporation could co-exist with a successful claim in unjust enrichment by which the corporate veil was pierced to fix liability on directors of a corporation. The reasoning of the Court was that if the corporate veil was to be disregarded, a shareholder could not conspire with himself.

**272**  Nevertheless, XY has confirmed that, similar to the representative plaintiff in *Tracy*, the conspiracy claim was advanced only as an alternate to the unjust enrichment claim: *Tracy* (B.C.C.A.) at para. 24.

**273**  I agree with XY that, supplementing the deemed admissions, it is manifestly clear that Zhu uses his companies, and nominee shareholders and directors, with little or no regard for the notional separate personality of his companies. Rather, he creates corporations and appoints nominees to create the false appearance that a company is not owned or controlled by him, or otherwise to carry out his intentions which, in this case, were unlawful. This is also done to shield himself from liability for such unlawful actions.

**274**  An example of this mindset is indicated in an audio recording of a group meeting Zhu emailed to Tang, Cheng and Yang on February 21, 2012. That recording included Zhu's comments that:

Uh, and then this company does not undertake stud bull, stud, sorting of sexed semen. Then we would do research and development, eh, and then, this sorting company, if \*\*XY\*\* wants to sue, go ahead and sue. This company would have nothing, no equipment, nothing whatsoever, it would all [belong to a parent] company, that's it, no land too, so the land is another company, eh, that would roughly be the model. Right now; the immediate issues involved are on veterinarian selection and site selection...

**275**  Again, I find as a fact that here, the IND Group of companies are all dominated and controlled by Zhu, and the defendant corporations were created and/or used by him for the improper and unlawful purpose of exploiting XY's Confidential Information.

**276**  This type of fixing of liability on corporate insiders was discussed in *Tracy* (B.C.S.C.) at paras. 90-93 and (B.C.C.A.) at paras. 18, 27-28. As the Court of Appeal commented in *Tracy*, acting through corporations does not shield corporate insiders in relation to unjust enrichment claims when a person forms and/or acts through the corporate entity to do a wrongful act:

[18] Mr. Latimer and Mr. Arcand contend the judge erred in finding they cannot take any advantage of the corporate structure to shield themselves from the liability borne by the Instaloans companies that actually made the loans through the storefront operations. But it has long been recognized that if a company is formed for the purpose of doing a wrongful act, or when formed is directed by those in control to do something that is wrong, the individuals as well as the company are responsible for the consequences: *Rainham Chemical Works, Ltd. (In Liquidation) v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 at 476 (H.L.). Mr. Latimer and Mr. Arcand accept that if the basis of there being an unjust enrichment is confined to the conflict with s. 347, as it is, their contention in this regard cannot succeed. This is a case in which the corporate veil is to be "pierced", rendering not only the Instaloans companies but the two principals, as shareholders, liable for the unjust enrichment, as found by the judge.

**277**  XY argues, in the alternative, that the leading case in British Columbia, *B.G. Preeco I (Pacific Coast) Limited v. Bon Street Holdings Ltd.* [*(1989), 37 B.C.L.R. (2d) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X241-00000-00&context=) (C.A.) at 268, sets out that the corporate veil may be pierced where there is "fraud or improper conduct" and where the corporation "is used to effect a purpose or commit an act which the shareholder could not effect or commit".

**278**  I confess to having some difficulty in seeing the need to apply *B.G. Preeco* here. In this case, neither Zhu nor any of his companies (including JingJing) were in a position to use and exploit XY's Confidential Information during the relevant timeframe. As such, none of the corporations were used to commit acts that only the shareholders were not able to commit.

**279**  While the IND Group did use various corporations in their efforts to gain control of the cytometers, and improperly use and exploit XY's Confidential Information (such as through FBI and CTS), this simply resulted in fixing joint and several liability on those corporations as joint actors with the persons controlling the actions of the corporations.

**280**  I am more than satisfied that Zhu created and/or used the various corporate defendants for the purpose of doing a wrongful act, and that as the directing mind of these corporations, he directed them to use and exploit XY's Confidential Information for the benefit of the IND Group and himself personally. As such, all are jointly and severally liable in unjust enrichment and liable for the consequences of such a finding: see *Tracy*. I would note that this finding is consistent with XY's allegations as found in its pleadings and, as such, are deemed admissions as against Zhu, IND, IDI, IEI, FBI, CTS and Ai De.

**281**  Relief for unjust enrichment may be not only a return of the property improperly received, but also damages in the form of disgorgement of any gains consequent on receipt of that property: *Alers-Hankey v. Teixeira*, [*2002 BCCA 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0N3-00000-00&context=) at para. 27; *Tracy* (B.C.S.C.) at para. 65. XY seeks monetary compensation in the form of disgorgement of the profits derived from the improper use of its Confidential Information.

**282**  Further, XY seeks a constructive trust over all those things, tangible or intangible, including, but not limited to, sexed semen, sexed embryos, cattle, goats, cytometers, equipment, parts, property, intellectual property (including, but not limited to, patents, patent applications, copyright, trademarks, trade secrets), which are derived, in any way, from XY's Confidential Information, whether held directly or indirectly, legally or beneficially, by any of the defendants or their agents, nominees, or assignees.

**283**  I will now turn to consider the remedies sought by XY against the various defendants.

**XII. THE REMEDIES**

1. **General Principles**

**284**  XY bears the onus of proving any damages it suffered arising from the defendants' actions.

**285**  The overall objective in assessing damages (or profits) in intellectual property cases is to find a broadly equitable result. It "must always be more or less a matter of estimate, because it is impossible to ascertain, with arithmetical precision, what, in the ordinary course of business, would have been the amount of the [plaintiffs'] sales and profits": see *Cadbury Schweppes Inc.* at para. 99, citing *United Horse-Shoe and Nail Co. v. Stewart* (1888), 13 App. Cas. 401 (H.L.). The tribunal must do "the best it can": *Cadbury Schweppes Inc.* at para. 99, citing *Wood v. Grand Valley Railway Co.* [*(1915), 51 S.C.R. 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F956-S16G-00000-00&context=) at 289.

**286**  If a plaintiff establishes that a loss has been suffered, the difficulty of determining the amount does not excuse the wrongdoer from paying damages or disgorging its profits. Damages are to be assessed by the court, not calculated, based on facts that were within the plaintiff's power to prove, and upon which the court may make a fair and reasonable estimate of damages: *Encorp Pacific (Canada) v. Rocky Mountain Return Center Ltd.*, [*2008 BCSC 779*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G30V-00000-00&context=) at paras. 129-130.

1. **Adverse Inference**

**287**  Earlier in these reasons, I noted Kelleher J.'s comment (Trial Reasons at para. 9), on the failure of the defendants in the Original Action to produce documents, and that such failure had negatively affected XY's ability to prove its case. In considering the calculation of damages, the Court stated that, in such circumstances, factual inferences may be drawn against the party who has failed to produce records that would be relevant to that calculation. Indeed, Kelleher J. applied this principle against the defendants in the Original Action: Trial Reasons at para. 348. He discussed the principle as follows:

[278] The plaintiff bears the burden of proving a compensable loss. Where a defendant's wrongful conduct prevents the plaintiff from establishing the loss, adverse facts will be presumed: *Le Soleil* (S.C.) at paras. 286-287, aff'd *Le Soleil* (CA).

[279] Where the defendants fail to keep a record that would establish the actual measure of damages, the court may apply the principle *omnia praesumuntur contra spoliatorem* (all things are presumed against a wrongdoer). The principle has been applied by this Court: *Encorp Pacific Canada v. Rocky Mountain Return Center Ltd.*, [*2008 BCSC 779*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G30V-00000-00&context=). The origin of this legal principle has been traced to *Armory v. Delamirie* (1722), 1 Strange 504, 93 E.R. 664 (K.B.). In that case, the plaintiff gave the defendant a jewel for the purpose of having it assessed. The defendant failed to return it, and the court presumed the jewel to be of the best quality.

**288**  Other cases cited by XY in support of this principle arising from *Armory* (cited above) are: *Lamb v. Kincaid* [*(1907), 38 S.C.R. 516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-K0BB-S0KD-00000-00&context=) at 541; *Brandon Electric Light Co. v. Brandon (City)* (1912), 1 D.L.R. 793 (Man. K.B.) at paras. 14-16; *Grenn v. Brampton Poultry Co.* [*(1958), 13 D.L.R. (2d) 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCC1-F2F4-G0GM-00000-00&context=) at para. 31 (Ont. H.C.J.); *Endean v. Canadian Red Cross Society* [*(1998), 48 B.C.L.R. (3d) 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29T-00000-00&context=) (C.A.) at para. 14; *Elsen v. Elsen*, [*2010 BCSC 1830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4SH-00000-00&context=) at paras. 325-330.

**289**  I have already commented on the concerted actions taken by the defendants to avoid document disclosure in this litigation. That evidence particularly arises from the testimony of Yang.

**290**  Yang testified that IEI's embryo production records were intentionally not disclosed to their lawyers. Yang personally shipped those lab records from Quebec to the Foster's Way Lab but, in his presence, Huang told the IND Group's lawyers that the documents were not there. As stated above, Huang was a lawyer hired by Zhu to manage and coordinate the IND Group's defence of this action which had been Yang's responsibility.

**291**  Yang also testified that, in addition to misleading the IND Group's external lawyers, the IND Group employees intentionally suppressed disclosure of the 2009 CTS semen-production record, as well as all their records from China. Yang confirmed that semen-production records, embryo-production records and embryos sales/use records, both in Canada and China, were not produced.

**292**  XY made reasonably persistent efforts to obtain records from the defendants that would reveal the actual scope of the Canadian and Chinese operations, both before and after the commencement of this litigation. Consistent with its earlier suspicions during the Original Action, XY continued to be of the view that operations by the IND Group were continuing in China even after the execution of the APO.

**293**  XY's demand for document disclosure and production dated August 27, 2013, provided:

***(b) We demand disclosure of all documents which show or lead to the use of cytometers to create sexed semen and the use of sexed semen to create embryos, using XYs Confidential Information.***

...

1. We demand disclosure of all documents which show or lead to the persons and process involved with using cytometers to sort semen (at the Burnaby Lab, in China (the "Chinese Labs") and elsewhere) including the source of semen, agreements to obtain semen, agreements to sort semen, payments to obtain semen, records related to sorting semen, the use and sale or distribution of sexed semen, inventories of sexed semen, payment for sexed semen, and agreements to provide and obtain sexed semen.
2. We demand all documents which show or lead to any of the defendants, anywhere, directly or indirectly, using cytometers or assisting others to use cytometers to create sexed semen. (See for example, Lawrence #1 at Exhibit E (paragraph 3) which shows Jesse Zhu and Jin Tang in July 2011 planning a semen sorting operation in China through CTS. See also Umbach #8 at Exhibit N which shows Jin Tang ordering supplies related to semen sorting through IND's purchasing department for delivery to China.)

...

1. We demand all documents which show or lead to the inventory of sexed semen and the use of sexed semen to produce embryos, including the inventory, distribution and shipping and/or use of such embryos.

[Emphasis Added]

**294**  As I outlined in my earlier reasons, (*XY, LLC v. Canadian Topsires Selection Inc.*, [*2015 BCSC 912*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21K5-00000-00&context=)), this demand was followed by two court orders (November 12, 2013 and May 30, 2014) requiring further document disclosure in relation to XY's demand letter. Yang testified that the defendants made no effort to comply with XY's demand and these court orders.

**295**  I agree with XY that the evidence establishes that the IND Group companies kept detailed and well-organized records of its semen and embryo production. Records exist up to 2008, which I presume were in evidence at the trial of the Original Action and supported the damages calculation of Kelleher J. As XY argues, such recordkeeping is consistent with the goal of recording the genetic resource to create the sexed product (whether semen or embryos), as certain bulls would have better pedigrees that would yield a higher value for their sexed products. The email traffic between the IND Group employees in this timeframe is replete with references to reports and statistics, consistent with such recordkeeping.

**296**  In my view, there is no reason to think that there has been any change in the manner and extent of the defendants' recordkeeping relating to semen and embryo production. A February 19, 2012 email refers to the defendants smuggling embryos into China by declaring them as "some kind of imported enzyme element". In a June 5, 2013 email, Zhu refers to "our standard daily report (including relating to the collection of fresh semen from bull studs), and that reports should be according to "our standard daily report format". This email alone supports the conclusion that the IND Group was sorting semen in China at that time and keeping detailed records of their production.

**297**  I conclude that Zhu, either personally or within the IND Group companies that he controls, has detailed records relating to the production and use of sexed semen and embryos in China, including the birth of live calves, within his control and/or possession. I also conclude that he has production records of the IND Group's operations in Canada up to the time of the APO in April 2012.

**298**  In that event, XY seeks a remedy based on an assessment of the highest reasonable number, and value, of sexed semen and embryos likely created and used by the defendants in Canada and China. I agree that, in these circumstances, the principle of *omnia praesumuntur contra spoliatorem* applies. Since the defendants have made it impossible to determine the extent of their operations in Canada and China, an inference should be drawn that the defendants used all the sexed semen and embryos they reasonably had the capacity to produce.

1. **Profit Analysis**

**299**  XY seeks a disgorgement of profits as against Zhu, IND, IDI, IEI, FBI, CTS and Ai De in respect of the Court's finding of unjust enrichment.

**300**  As mentioned above, Kelleher J.'s calculation of damages was only for the period ending in December 2008. That calculation was based on the royalties that XY would otherwise have received from JingJing's production of sexed semen and sexed embryos. I agree, however, with XY's contention that using the royalty rates in this analysis is not appropriate. It is clear enough that the misuse of XY's Confidential Information was done entirely outside any contractual relationship with XY.

**301**  Accordingly, the current analysis begins in early 2009.

1. ***Semen Production***

**302**  I accept XY's summary of the evidence on this issue, which I detail below.

**303**  Fu and Cheng testified regarding JingJing's semen-production records, confirming that the IND Group continued to sort semen throughout 2009 "at full capacity". According to the available records, their capacity to create sexed AI straws from 2005-2010 was as follows:

1. 2005: produced 40,937 sexed straws using 2 cytometers (1,700 straws per cytometer per month);
2. 2006: produced 70,508 sexed straws using 2 cytometers (2,900 straws per cytometer per month);
3. 2007: produced 60,122 sexed straws (acquired third cytometer July 12, 2007) (2,000 straws per cytometer per month);
4. 2008: produced 96,637 sexed straws using 3 cytometers (2,684 straws per cytometer per month);
5. 2009: records not produced but using 3 cytometers (kept on old CTS computer, per Fu); and
6. 2010 (January 29 to May 11; June 21 to August 12): produced 30,860 sexed straws (5 to 5 1/2 months using 3 cytometers) (1,870 - 2,050 straws per cytometer per month).

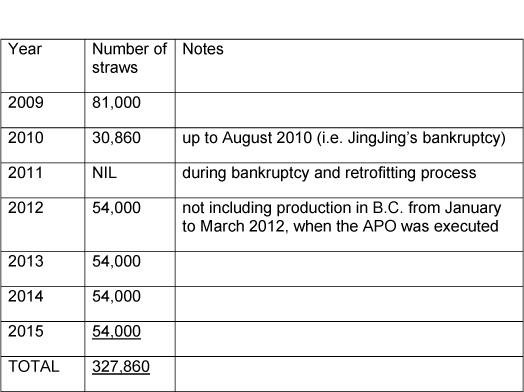
**304**  Therefore, the only year that the Court must estimate is 2009 as no records are available. Accordingly, XY suggests that it would be reasonable to extrapolate a range of 2,000 - 2,500 AI straws per month per cytometer. The three cytometers were acquired by JingJing in May 2004, October 2004 and July 2007: Trial Reasons at paras. 69, 71, 82. (Note: This is in addition to fresh semen produced by the defendants sufficient to produce over 100,000 IVF embryos per year, which is discussed below).

**305**  Focusing on AI straws, XY submits that it was likely that the IND Group created between 72,000 straws (2,000 straws per month per cytometer x 3 cytometers x 12 months) and 90,000 straws (2,500 straws per month per cytometer x 3 cytometers x 12 months) of sexed semen in 2009. Taking the mid-point leads to the calculation of approximately 81,000 AI straws produced in 2009.

**306**  By early 2012, the IND Group also had two functional SX cytometers in China arising from the use of XY's SX parts. Xu and Fu's testimony is to the effect that these retrofitted cytometers could produce similar numbers of straws per batch as they had previously done.

**307**  Extrapolating the capacity of the B.C. SX cytometers to those in China results in an estimate that the IND Group had the ability to produce between 48,000 straws (2,000 straws per month per cytometer x 2 cytometers x 12 months) and 60,000 straws annually (2,500 straws per month per cytometer x 2 cytometers x 12 months), or approximately 54,000 straws using the mid-point. (Note: This does not include what XY contends is the capacity of the IND Group to create additional cytometers, which is discussed further below).

**308**  In total, XY contends, and I agree, that a reasonable estimate of the number of AI straws produced by the IND Group from 2009 to 2015, in both China and B.C., using the cytometers for which there is direct evidence, can be calculated as follows:



**309**  XY also refers to various pieces of evidence in support of the value of the AI straws. Again, the defendants have not disclosed any direct evidence as to the value; rather, there are references in a variety of sources. These sources include magazine advertisements from 2006, and references in various IND Group documents and emails, including those found in various business plans for various Chinese companies in 2007 and 2011. In addition, Mr. Holland testified on this point and referred to various prices known to XY through its business operations.

**310**  The prices indicated in the IND Group documents range from a low of US$20 to a high of US$55. Mr. Holland's figures, in some cases, were higher but those well beyond US$55 were likely for more valuable semen. Despite the potential of applying the principle of *omnia praesumuntur contra spoliatorem* (which could result in the Court applying the highest value available), XY submits that a reasonable conclusion is to apply a value of US$40 per sexed AI straw produced from 2009 onwards. I agree that this value is reasonable.

**311**  Turning to the matter of the cost of producing the straws, the onus is ordinarily entirely on a defendant to prove its cost. I accept XY's submissions that overhead (including wages) is viewed as a fixed cost and is not deductible.

**312**  There is direct evidence of the IND Group's cost of producing sexed semen: $9.67 CDN (2005), $6.95 CDN (2006), $6.68 CDN (2007) and $5.37 CDN (2008) per straw. These numbers include wages. Excluding wages they are $8.32 CDN (2005), $5.97 CDN (2006), $5.73 CDN (2007), and $4.50 CDN (2008) per straw.

**313**  XY argues that since the IND Group's semen-production cost steadily declined from 2005 to 2008, it would be reasonable to assume that after 2012, the cost declined even further once production moved to China.

**314**  I agree that it would be fair to assume that the cost of semen production, at least, remained stable after 2008 and attribute a cost of CDN$4.00 per straw for production from 2009 to present. Taking an exchange rate near the mid-point between a high of 1.3173 (October 2015) and a low of 0.97 (June 2011), namely, 1.14, provides for an approximate cost of US$3.50.

**315**  I conclude that a reasonable assessment of the IND Group's profit on the fair-market value of each straw of sexed semen is US$36.50. Applying these calculations to 327,860 sexed AI straws results in a calculation of the IND Group's profit of $11,966,890.

1. ***IVF Embryo Production***

**316**  In addition to their production of AI straws, the IND Group also produced fresh semen for the purpose of creating IVF embryos.

**317**  At trial in the Original Action, Kelleher J. granted XY a reference as to the number of embryos produced by IEI after December 2008. XY submits that a line must be drawn between the embryos that were the subject of the Original Action (where the defendants concealed their ongoing semen production), and the new embryos produced from the ongoing semen production that is the subject of this action. I agree that the line can be drawn, by excluding from this action only, those embryos produced from the semen purchased from Semex Alliance, as that was the basis on which Kelleher J. granted the reference (Trial Reasons at para. 131).

**318**  With respect to the capacity to produce embryos, Kelleher J. pointed to evidence that the defendants had the capacity to produce between 100,000 and 300,000 IVF embryos per year. Justice Kelleher concluded that, between 2004 and 2008, they produced 650,000 embryos in total or an average of 130,000 IVF embryos annually: Trial Reasons at paras. 282-285. This finding is consistent with the 2006 Quebec embryo-production records in evidence at this trial (which may have been falsified to underreport), which generally indicate production of approximately 100,000 IVF embryos annually.

**319**  I agree with XY that the evidence establishes, on a balance of probabilities, that the IND Group was producing sexed embryos from 2009 to the present. By the time Yang packed up the Quebec lab in 2014, Zhu was advancing plans to open a location in Tulare County, California, and move the embryo lab there. Zhu's affidavit, filed in support of the adjournment application at the commencement of this trial, suggests that he has a continuing presence in Tulare County which, in turn, suggests that he is continuing his efforts to set up operations there (or perhaps has already).

**320**  I agree that for the period from January 2009 to the end of 2015, a period of seven years (and taking off half a year for what XY describes as an ovary shortage), a reasonable estimate of the number of IVF embryos produced by the IND Group in Canada and the United States is 650,000. XY notes that this is less per year than the 650,000 IVF embryos Kelleher J. found the IND Group produced over the five-year period from 2004 to 2008.

**321**  As with the value of the AI straws of sexed semen, XY refers to various pieces of evidence in support of the value of the IVF embryos. Again, the defendants have not disclosed any direct evidence as to the value; rather, there are references to such values in a variety of sources. These sources include a magazine advertisement from 2006, and references in various IND Group documents and emails, including those found in a business plans in 2003. In addition, Mr. Holland testified on this point and referred to various prices known to XY through its business operations.

**322**  The prices indicated in the IND Group documents range from a low of US$100 to a high of US$150. In some instances, Mr. Holland's figures were higher. XY submits that a reasonable conclusion is to apply a value of US$150 per IVF embryo produced from 2009 onwards. I agree that this value is reasonable. This is consistent with Kelleher J.'s finding that a fair value per embryo for slaughterhouse IVF embryos after January 2007 was US$150: Trial Reasons at para. 293.

**323**  On the matter of cost, XY refers to various references found in the IND Group's documents as to the cost of producing embryos. Those figures range from a low of US$14.50 (in 2012) to a high of U$24-26 (2007). I agree with XY that based on these figures, it is reasonable to attribute US$20 to the cost of producing each IVF embryo.

**324**  Accordingly, XY submits, and I agree, that a reasonable assessment of the IND Group's profit on the fair-market value of each IVF embryo is US$130. Applying these calculations to 650,000 IVF embryos results in a calculation of the IND Group's profit of $84,500,000.

1. ***OPU / In Vivo Embryo Production***

**325**  With respect to production in China, the calculation is somewhat different because the inference cannot be drawn that the defendants had a source of Holstein slaughterhouse ovaries.

**326**  Instead, and consistent with the industry trend Mr. Gilligan attested to, there is direct evidence that the IND Group in China had turned to producing and using far more valuable ovum pickup ("OPU") and *in vivo* embryos there.

**327**  Mr. Gilligan testified regarding the emerging market for sperm-sorting technology in China. He confirmed that the sex-selected semen, combined with multiple ovulation embryo transfer ("MOET"), or OPU embryo fertilization, is the optimal way to accelerate genetic advances and improve the genetics of the herd. In this way, the identity and pedigree of both sire and dame are known and the embryos can be carried by surrogate cows with inferior genetics without impacting the quality of the calf. OPU embryos are made from the oocytes of living donors. OPU embryos have significant advantages over both IVF and MOET embryos, as they are "full pedigree" (and thus valuable). Like *in vivo* MOET (or super-ovulated) embryos, the pedigree of both the dam and the sire are known, but OPU embryos can be mass-produced in lab conditions.

**328**  These newly-developing reproduction technologies are a particular advantage in China where the dairy herd has historically not been Holsteins, which is the dominant breed of dairy cows in North America and Europe, whose superior genetic traits increase milk production and provide a better source of embryos in the future. China is rapidly adopting Holsteins.

**329**  The March 2007 IND Lifetech (Qing Dao) Co. Ltd. business plan notes that under Mr. Remillard's leadership, "the company's technology as a whole in living body ovum and embryo pick-up for OPU embryo production represents first class standard in Canada."

**330**  The February 2008, IND Lifetech Group Ltd. ("ILG") business plan confirms that the company had identified a "reliable source of genetics ... *in vivo* embryos produced in China from the top 10% of dairy cattle from the Company's herd." On cross-examination in the Original Action, Zhu agreed that "the company's OPU embryo production technology represents Canada's finest" and that "in 2000, the company started the construction of a superovulated embryo collection centre."

**331**  This same ILG February 2008 business plan confirms that for *in vivo* embryo production, "each mature cow can undergo the process six to eight times a year, averaging over five embryos each time" (at page 19). ILG's June 2013 business plan confirms that it takes 12 months to breed a cow to maturity, it is usable for six to seven years total, and ILG had a herd of 10,000 cows at the end of 2012. XY suggests that this indicates an upper limit of 250,000 to 333,000 *in vivo* embryos per year, and that the capacity to produce OPU embryos would be higher.

**332**  Mr. Gilligan confirmed that the estimate for the cattle's annual value growth rate of 36% contained in the IND Group's June 2013 Aide PowerPoint presentation was not realistic without sexed embryos. His view was that this high growth estimate was only realistic through the use of sexed embryos created with sexed semen.

**333**  The data from Benson Zhang's June 5, 2013 email suggests that the IND Group's "OPU group" was using about 10 Wagyu OPU embryos each day (on the order of 2,000 - 3,000 annually). That amount does not take into account embryos they were stockpiling, as they did with slaughterhouse IVF embryos. In any event, Mr. Zhang's references to "thawed" embryos suggest they were freezing and stockpiling OPU embryos.

**334**  Fu testified that, based on his experience working at the IND Group IVF lab in Quebec, three to four straws of sexed semen, with two to three million semen/straw, could produce about ten embryos.

**335**  XY also argues that at the other end of the spectrum, if each cow were superovulated only once per year, that would entail producing on the order of 40,000 *in vivo* embryos across the herd each year. Mr. Gilligan suggested that superovulating a cow might take it out of milk production for a time, but he was not certain. It could be even less than that, if only a portion of the herd is used for the superovulation programme. On the other hand, with the higher efficiency of OPU production, that could make up for using only a portion of the herd.

**336**  The above discussion highlights the lack of document disclosure as to the actual production of embryos by the IND Group in China. Applying the principle of *omnia praesumuntur contra spoliatorem* in these circumstances, as I consider is appropriate, I find that it is reasonable to conclude that the IND Group produced 40,000 OPU embryos per year from 2009 to present. Therefore, for the seven-year period from 2009 to the end of 2015, I find that the IND Group produced 280,000 OPU or *in vivo* embryos in China.

**337**  XY also refers to various pieces of evidence in support of the value of these embryos. Again, there is no direct evidence from the defendants as to the value; rather, there are references to such values in various IND Group documents. In addition, Mr. Holland testified on this point and referred to various prices known to XY through its business operations.

**338**  The prices indicated in the IND Group documents range from a low of US$150 to a high of US$300 (likely from 2006). Mr. Holland's figures as to current values were much higher (US$750 to US$1,800). XY submits that a reasonable conclusion is to apply a value of US$350 per *in vivo* embryo produced from 2009 onwards. I agree that this value is reasonable. This is consistent with Kelleher J.'s finding that a fair value per *in vivo* embryo after January 2007 was US$350: Trial Reasons at paras. 295-296.

**339**  On the matter of cost, XY argues that this should be fixed at US$25, being the cost of producing IVF embryos (as above), plus a notional increase for additional labour cost in China of what appears to be a more complicated procedure. I agree that this is reasonable.

**340**  Accordingly, it is reasonable to assess the IND Group's profit arising from the use of OPU, or *in vivo* embryos, at US$325. Applying these calculations to 280,000 embryos results in a calculation of the IND Group's profit of $91,000,000.

1. ***Equipment Production***

**341**  By 2014, the IND Group also had the ability to recreate all of XY's parts. Everything but the nozzle had been copied by the time of the APO in April 2012, and the IND Group had found manufacturers to reproduce the SX tips (STP), and the BSOs (Wang Yun Qian). According to Xu's evidence, the nozzle was finally copied sometime in 2014.

**342**  The evidence suggests that part of the IND Group's business plan in China was to sell SX cytometers.

**343**  The IND Group's plans for producing additional cytometers are set out in the development outline of the Shengbang Biomedical Technology Ltd. ("Shengbang") business plan dated March 2014. Xu testified that Shengbang was another of Zhu's companies. Zhu is described in the document as the "chairman" of Shengbang. Section VI, entitled "Sales Outlook", estimates 2015 annual sales of 200 million Chinese renminbi ("RMB"), with a 40% profit and year-on-year increases of 50% for "Flow Cytometer-related preparations, spare parts and service".

**344**  In addition, Xu testified as to certain April 2014 promotional material for IND Bio-technology Development (China) Co. Ltd., advertising the use of flow cytometers for sexed semen in the beef cattle industry. The document refers to various IND Group companies and states:

After more than ten years of development, IND Group has now become the second sexed semen production enterprise in the world granted approval to proceed with commercialized sales of sexed semen, and also the first to obtain a license to sell in China, and the first enterprise in the world to possess [XY]'s sexed sorting patented technology, to carry out sexed semen production and commercialized sales. (p. 29)

...

**345**  Further, regarding "[r]ealization of using IND Biology's flow cytometer equipment to produce sex semen", the material states:

... due to the long-term monopoly by the owner on the ability possessed to produce sexed semen flow cytometer equipment .. [w]hile they are selling the equipment at a high price, there are additional mandatory patent royalties ... [c]ausing the purchaser's sexed frozen semen's production cost to be too high ...(p. 36)

...

Possesses 40000 square meters of constructed area of IND Biology's flow cytometer development and production base[/s] at the Hi-Tech Zone of Ying Kou City, to meet the Company's industrialization development based mainly on the production of flow cytometer and their related equipment (p. 43).

[Emphasis added]

**346**  XY concedes that, although more than 18 months have passed since the March and April 2014 business plans, it is difficult to estimate how far Zhu may have progressed in manufacturing and selling SX cytometers.

**347**  XY contends that I should find that Zhu and the IND Group companies are producing SX cytometers and selling them, as was referenced in Shengbang's March 2014 business plan. XY also contends that I should assess the profit at 40% of 200 million RMB, also in accordance with that business plan, which is equivalent to US$12.67 million.

**348**  In my view, there is substantial uncertainty as to whether Zhu has produced and sold equipment using XY's Confidential Information. It is entirely possible that any production of such equipment has been for the purpose of its own use in its business operations. This is in contrast to the evidence about semen and embryo production, as I have already described above. I am unable to conclude that Zhu and his companies have acted in this fashion or, if they have, what success was likely achieved. Accordingly, I consider this claim to be speculation and not supported by the evidence before me.

**349**  I am, therefore, unable to make any findings sufficient to ground any monetary compensation in favour of XY. However, I agree with XY that it is appropriate that injunctive relief and a constructive trust be granted to prevent any future misuse of all cytometers made by Mr. Zhu and those he controls which arise from or contain XY's Confidential Information.

1. ***Conclusions re Profit Analysis***

**350**  The profit calculations, as determined above, indicate the approximate amount of $187.4 million from 2009 to 2015. Details of the calculations leading to this figure are set out below.

**351**  XY argues that many of the documents substantiate that this figure is not entirely unreasonable in the circumstances.

**352**  One example is Mr. Zhu's June 2013 business plan for ILG, which states that the combined market value of assets is estimated at US$1.37 billion (8.3 billion RMB), with revenues of 299.7 million RMB in 2012 (49 million RMB profits); 266.8 million RMB in 2011 (46 million RMB profits); 125.9 million RMB in 2010 (20.6 million RMB profits); and 87 million RMB in 2009 (8.7 million RMB profits). The forecast for 2013-2015 reveals an expectation that the trend will continue moderately upwards for the Chinese calf-breeding operations.

**353**  Another example is a further document produced by the IND Group, which indicates just under 300 million RMB (CDN$48 million) in annual sales in 2012 arising from the production of Holstein cows.

**354**  It is also evident that Zhu saw his business as immensely valuable. One of his strategies was to acquire XY's business. He took the view that this plan would generate enough income (or cause XY sufficient loss), to allow him to "acquire \*\*xy\*\* using the best price", thinking that XY's annual revenue was on the order of US$100 million.

**355**  I agree with XY that the value that Zhu has added to his IND Group companies, through the use of XY's Confidential Information in the production of sexed semen and embryos, is substantial.

1. **Damages Calculation**

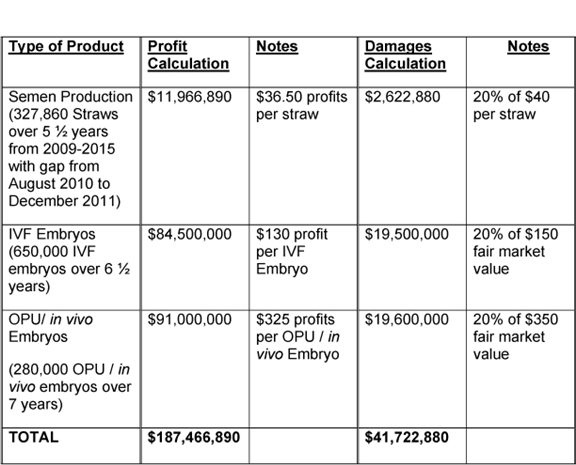
**356**  Damages would be calculated on the same basis as set out above, except that the defendants' costs would not be subtracted, and XY should be awarded 20% of the fair-market value of the products at issue.

**357**  The reasoning for the 20% figure is the same as that applied by Kelleher J. in assessing the quantum of damages for *in vivo* embryos made by the defendants in breach of confidence: Trial Reasons at para. 295. This was done on the basis of the Licence, section 3.1.1(c), which provided for double the 10% royalty on "Gross Receipts generated outside the Territory or outside the Field of Use".

1. **Summary re Profit / Damages Calculations**

**358**  All figures in the profit and damages assessments have been derived generally using conversion rates from U.S. dollars and RMB to Canadian dollars as published in the Wall Street Journal. I consider those conversion rates to be generally applicable given that section 3.1.4 of the Licence provided for the use of these rates in relation to royalties payable by JingJing to XY. However, as XY contends, use of these rates is not strictly required given that damages are to be assessed generally.

**359**  The following table summarizes the various calculations under both the profit and damages analysis (all figures in U.S. dollars)



**360**  I conclude that judgment in favour of XY is available in the amounts set out above.

**361**  To the profit analysis number of US$187,466,890 must be added pre-judgment interest of US$6,021,633.37 to January 15, 2016, for a total of US$193,488,523.37 (or CDN$269,856,121.68). A per diem rate of CDN$19,969.35 applies after that date.

**362**  To the damages analysis number of US$41,722,880 must be added pre-judgment interest of US$1,340,182.75 to January 15, 2016, for a total of US$43,063,062.75 (or CDN$60,059,536.86). A per diem rate of CDN$4,444.41 applies after that date.

1. **Damages or Profit Disgorgement?**

**363**  XY submits that its claim for unjust enrichment can stand alongside the claims for breach of confidence and conspiracy. It argues that the Court can fashion an appropriate remedy of damages for the breach of confidence and conspiracy, and disgorgement of profits for the unjust enrichment, while still being careful to ensure there is no overlap in remedy.

**364**  The leading English cases involving alternate or cumulative remedies are *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.) and *Tang Man Sit v. Capacious Investments Ltd.*, [1996] A.C. 514 (J.C.P.C.).

**365**  The principles from those cases and those that followed were summarized by Justice Gropper in *Bronson v. Tompkins Ranching Ltd.*, [*2012 BCSC 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3VK-00000-00&context=):

[71] A critical matter in this case is the distinction between "inconsistent rights", "alternative remedies", and "cumulative remedies". The leading case and starting point is *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.) [*United Australia*]. The facts and result in *United Australia* are concisely summarized in *Chevron Canada Resources v. Canada (Indian Oil and Gas Canada)*, [*2006 ABQB 945*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9391-JWR6-S47Y-00000-00&context=), at para. 15:

[15] ... [A] cheque payable to United Australia was converted by another company and collected for that company by its bankers, Barclays Bank. Initially, United Australia brought an action and obtained interlocutory judgment against the other company, but this was set aside. The action did not proceed to a final trial as the other company went into liquidation and the action was stayed. While United Australia made a claim in the liquidation, its claim was never admitted. Subsequently, United Australia brought an action for conversion against Barclays Bank. The House of Lords held that United Australia, merely by initiating an action against the other company for money loaned or had and received had not elected to 'waive the tort' so as to be precluded from bringing action against the Barclays Bank. The Court held that it would require judgment and satisfaction in the first action, and not just the bringing of the action, for the second action to be barred.

[Emphasis added.]

[72] All of the judges concurred in the result in *United Australia*. Lord Atkin said the following at p. 29-31 on the distinction between "inconsistent rights" and "alternative remedies":

It seems to me that ... it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other. Real actions have long disappeared: and, subject to the difficulty of including two causes of action in one writ which has also now disappeared, there has not been and there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ: or you may put one in first, and then amend and add or substitute another.

...

On the other hand, if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. ...

I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one.

...

In the present case, therefore, I find that the plaintiffs were at no stage in the proceedings they took against M.F.G. Trust called to make an election, and, if it were necessary so to hold, in fact made no election, to claim in contract and not to claim in tort: and the foundation of the defendant's defence disappears. But I think it necessary to add that even if the tort had been waived, or the plaintiff had made any final election against M.F.G. Trust, Ld., I fail to see why that should have any effect upon their claims against the bank. If a thief steals the plaintiff's goods worth 500*l*. and sells them to a receiver for 50*l*. who sells them to a fourth party for 400*l*., if I find the thief and he hands over to me the 50*l*. or I sue him for it and recover judgment I can no longer sue him for damages for the value of the goods, but why should that preclude me from suing the two receivers for damages. ... I can see no justice in the contention: and I know of no authority in support of it.

[Emphasis added.]

[73] Although Lord Atkin's judgment in *United Australia* is the one most often cited by Canadian courts, the judgment of Viscount Simon L.C. is also helpful for the purposes of the case at bar. He directly addressed the ability of the plaintiff to bring a second action on the same set of facts as in the first action, but against a different defendant and for a different remedy (i.e. in a situation that would be characterized in a later decision as featuring one of "cumulative remedies"). Simon L.C. held the following at p. 19-21:

So far, I have been discussing what is the true proposition of law when the second action is brought against the same defendant. In the present case, however, the action which is said to be barred by former proceedings against M.F.G. is not an action against M.F.G. at all, but an action against Barclays Bank. I am quite unable to see why this second action should be barred by the plaintiff's earlier proceedings against M.F.G. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by M.F.G. M.F.G.'s tort consisted in taking the cheque away from the appellants without the appellants' authority; that tort would have equally existed if M.F.G., instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. M.F.G. and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage.

But, apart from this, what ground is there for saying that proceedings in which M.F.G. were sued on the basis of waiving the tort, but which never resulted in satisfaction, should be regarded as a bar to suing the Bank for conversion? A case which comes near to the present is *Morris v. Robinson* [(1824) 3 B. & C. 196 ]. There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict, but they did not enter up judgment and there had been no actual satisfaction of their claim. Instead, they brought another action against different defendants - namely, an action for conversion against the purchasers who had bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second action were liable for their act in purchasing the plaintiff's goods. Bayley J., in giving judgment, observed: "If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If indeed the plaintiffs were to recover the full value of the goods in each action, a court of equity would interfere to prevent them from having a double satisfaction, but there is nothing in the former action which can, in a court of law, prevent the recovery in this." Similar reasoning, as it seems to me, would apply in the present case, and it follows that the earlier proceedings against M.F.G. could provide the present respondents with no defence, unless as a result of them the plaintiffs had received satisfaction for their loss.

...

To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment had been entered in the appellant company's earlier action against M.F.G. What would be necessary to constitute a bar, as Bayley J. pointed out in *Morris v. Robinson* , would be that, as the result of such judgment or otherwise, the appellants should have received satisfaction.

[Emphasis added.]

[74] *United Australia* has been cited and relied upon by courts in British Columbia. See *Morrison-Knudsen Co., Inc. et al. v. British Columbia Hydro and Power Authority*, [*[1978] B.C.J. No. 1218*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G298-00000-00&context=), [*85 D.L.R. (3d) 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G298-00000-00&context=) (C.A.) [*Morrison-Knudsen* cited to B.C.J.]; *Sandell Developments Ltd. v. Boivin*, [*[1986] B.C.J. No. 3191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1V6-00000-00&context=), [*2 B.C.L.R. (2d) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1V6-00000-00&context=) (S.C.) [*Sandell Developments*]; *Bratsch Inc. v. Lebrooy*, [*[1991] B.C.J. No. 3290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30N-00000-00&context=) (S.C.); *Vanmills Establishment v. Coles*, [*[1992] B.C.J. No. 881*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B17W-00000-00&context=) (S.C.) [*Vanmills*]; *Insurance Corporation of British Columbia v. Hosseini*, [*2003 BCSC 1482*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B04W-00000-00&context=); *Topgro Greenhouses Ltd. v. Houweling*, [*2009 BCCA 469*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B25N-00000-00&context=); and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, [*2010 BCCA 357*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20TC-00000-00&context=).

[75] In summarizing the principle from *United Australia*, Hinds J. (as he then was) held in *Sandell Developments* at 265 that "a party, who has elected to pursue one of two inconsistent rights, cannot later pursue the other; but a party may pursue two alternative remedies up to the time of judgment, at which time an election of remedy must be made."

[76] The distinction between inconsistent rights and alternative remedies is given further explanation by the Court in *Morrison-Knudsen* at para. 140:

It is necessary at the outset to distinguish between the two kinds of election that one must consider in a case such as this: an election between inconsistent rights and an election between alternative remedies. When faced with a fundamental breach the innocent party to a contract may elect to affirm the contract and hold the other party to the performance of its contractual obligations and sue as well for damages. On the other hand, he may elect to accept the breach as a repudiation of the contract. This is an election between inconsistent rights. It must generally be made with promptitude and communicated to the other party, and, once made, it is irrevocable. Where a plaintiff, having elected to accept the breach as a repudiation commences proceedings for his remedy, he may have, in a proper case, the right to *quantum meruit* as an alternative to the right of damages. His election between these alternatives is an election between alternative remedies and need not be made until judgment. The taking of judgment on one of the alternatives binds the plaintiff and he may not then have the other remedy.

[Emphasis added.]

[77] However, *United Australia* offers a further nuance to this statement of the law: where a party only pursues one of two cumulative remedies in the first action, but later pursues the second remedy against a different defendant in the second action, the party will not be barred from bringing the second action if the judgment it obtained in the first action has not yet been satisfied.

[78] This additional aspect of *United Australia* was addressed by Seaton J.A. in *Cuttell v. Bentz* [*(1985), 65 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-211T-00000-00&context=) (C.A.) [*Cuttell*]. That case focused on "whether payment of a judgment in favour of the plaintiffs against a third person for breach of contract bars an action in tort against the defendants for the same loss": *Cuttell*, at 274. Each of the three judges wrote separate reasons, all of which allowed the tort action to continue. Seaton J.A. was the only judge to make reference to *United Australia*, and particularly the comments of Viscount L.C. cited earlier in these reasons. Seaton J.A. held the following at 279:

I think that this part of *United Australia* was accurately summarized by Lord Diplock in *Mahesan S/O Thambiah v. Malaysia Govt. Officers' Co-op. Housing Soc.,* [1979] A.C. 374 at 382, [1978] 2 W.L.R. 444, [1978] 2 All E.R. 405 (P.C.):

The House of Lords also held that where the same facts gave rise in law to a cause of action against one defendant for money had and received and to a separate cause of action for damages in tort against another defendant, judgment recovered against the first defendant did not prevent the plaintiff from suing the other defendant in a separate action: but that to the extent that that judgment was actually satisfied this constituted satisfaction pro tanto of the claim for damages in the cause of action against the second defendant.

[79] A further qualification to the above principle, as alluded to earlier in these reasons, is that it has been said to apply where the two remedies in question can be characterized as cumulative, but not where the two remedies in question can be characterized as alternative. This reading of *United Australia* was confirmed in *Tang Man Sit v. Capacious Investments Ltd.*, [1996] A.C. 514 (J.C.P.C.) [*Tang Man Sit*]. The Court in *Tang Man Sit* briefly discussed the distinction between alternative and cumulative remedies at 521:

The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.

Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in ***negligence*** against two persons in respect of the same loss.

[80] In considering *United Australia*, the Court in *Tang Man Sit* held at 523 that "there is no inconsistency between the various speeches in that case if the different considerations applicable to alternative remedies and cumulative remedies are kept firmly in mind". The plaintiff in *United Australia* had a choice of two alternative remedies against M.F.G., namely damages in tort or in restitution, and the time at which the plaintiff had to elect between the remedies did not arise until judgment.

[81] The Court then went on to state at 523 that "the remedies of United Australia against M.F.G. on the one hand and the bank on the other hand were cumulative, not alternative", and thus "the earlier proceedings against M.F.G. could not bar the company subsequently bringing fresh proceedings against the bank unless the company had recouped the whole of its loss in the earlier proceedings" (emphasis added).

[82] At 522, the Court explained the concept of cumulative remedies in greater detail:

Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other.

[83] This statement in *Tang Man Sit* was cited by Belzil J. in *Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.*, [*2010 ABQB 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-F2MB-S0W3-00000-00&context=), at para. 19.

[84] Despite the above statement, the Court in *Tang Man Sit* noted the following limitations to the freedom of a plaintiff to pursue cumulative remedies at 522:

In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

**366**  Applying those principles to this case, I agree with XY that:

1. its claims against Zhu and the IND Group companies for damages (breach of confidence and conspiracy) and for disgorgement of profits (unjust enrichment) are alternative remedies: see *Pro-Sys Consultants Ltd., v. Microsoft Corp*., [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) at para. 93. As such, XY is required to elect as to which remedy it will seek judgment. XY seeks judgment based on a disgorgement of profits as against Zhu, IND, IDI, IEI, CTS, FBI and Ai De, jointly and severally;
2. its claims against Zhu and the IND Group companies on the one hand, and Tang and Zhang on the other, are cumulative remedies. XY may pursue Tang and Zhang on another basis (i.e. damages for breach of confidence and conspiracy), which is the basis upon which XY seeks judgment against them jointly and severally; and
3. any amounts collected from Tang and Zhang will constitute partial satisfaction of the amount of the judgment as against Zhu and the IND Group companies.

**367**  The relief as sought by XY is granted as against the various defendants.

1. **Injunctive Relief**

**368**  The accounting of profits remedy addresses Zhu and the IND Group company defendants' past misuse of XY's Confidential Information between 2009 and the end of 2015. However, it does not address their future conduct, or their continuing possession of the retrofitted SX cytometers, SX parts, protocols, and Improvements.

**369**  In the Trial Reasons, Kelleher J. granted both a mandatory and prohibitory injunction based on the following reasoning:

[326] As Robert J. Sharpe points out in *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 2010), in real property cases, conflicting property rights are in issue rather than outright appropriation of the plaintiff's property. He goes on to point out that in the intellectual property area, injunctions are a familiar remedy (para. 4.700).

[327] An injunction in cases like the present will ordinarily follow where (1) the plaintiff has a legal right in the property; (2) there is a real threat or an actual invasion of the legal right; and (3) there is no defence of laches, delay, acquiescence or estoppel: see Sharpe at para. 4.690.

[328] Injunctive relief is appropriate because the plaintiff is not seeking damages for future breach of confidence. If it were denied, the defendants would be permitted to sort semen using their intimate knowledge of XY's equipment and protocols without paying royalties to XY and in competition with other licensees in China, Canada or elsewhere who do pay royalties. The injunction is an appropriate remedy, both mandatory and prohibitory.

[329] The plaintiff's mandatory injunction is sought to deliver or destroy under oath confidential information of XY which is in the hands of the defendants. The defendants have no right to possess such information and indeed do not assert they do. The injunction does no more than hold JingJing and its employees and related companies who had access to the bargain struck under the CLA.

[330] Such a mandatory injunction is an ordinary ancillary remedy in intellectual property cases where an injunction is granted to restrain the use of the information. See Ronald E. Dimock, *Intellectual Property Disputes: Resolutions and Remedies*, Vol. 1, looseleaf (Toronto: Thomson Reuters Canada Limited, 2004), at 15.2.

**370**  The Trial Order, at para. 13, included a mandatory injunction requiring the return to XY of the Confidential Information (including the parts and their configuration, the protocols, and all Improvements). The Trial Order also included a prohibitory injunction at paras. 12 and 15, by which Zhu, Tang, Zhou and others were prevented from using XY's Confidential Information for any purpose or to any extent in the future. The definition of "Confidential Information" was varied in two minor respects, but largely upheld, by the Court of Appeal: Appeal Reasons at para. 128.

**371**  XY seeks the same form of injunction with certain additional terms. The relief sought is as follows:

1. In this Order, the term "**Confidential Information**" has the meaning set out in Appendix "A" attached hereto. [Note: substantially per the Trial Order, but now also referencing specific cytometers and related parts, photographs and records, intellectual property such as patents, cytometers held by Accurate Bailiffs, original and counterfeit parts and certain exhibits at trial. Also, "Confidential Information" in Appendix "A" includes "Improvements" which are in part as set out in Appendix "B"].
2. Zhu, Tang, Zhang and the IND Judgment Debtors [defined as CTS, FBI, IND, IEI, IDI and Ai De] and each of them (including by themselves, or by their directors, officers, agents, employees, servants, affiliates, joint venturers, successors, assigns, subsidiaries or related companies, and all those over whom they exercise control, directly or indirectly) (collectively, the "**Enjoined Parties**") are restrained from using the Confidential Information, for any purpose or to any extent, and are restrained from communicating, transferring, distributing, selling, publishing, leasing, licensing or in any other way or by any other means disclosing the Confidential Information to any person or for any purpose.
3. Within 14 days from the date of this Order After Trial, namely on or before **\_\_\_\_\_**, the Enjoined Parties, and each of them, shall deliver up to the plaintiff or its designate any and all Confidential Information in their possession, power or control, without keeping any copy, electronic or otherwise.
4. For clarity, the obligation to deliver up the Confidential Information applies notwithstanding any previous Order of this Court, including but not limited to the Anton Piller Order pronounced April 2, 2012 and the Consent Order pronounced May 11, 2012. Any and all previous Orders made in this action that might be deemed to interfere with compliance with this Order After Trial, are hereby varied to the extent necessary to permit compliance with this Order After Trial.

...

1. To the extent that any Confidential Information in the power, possession or control of the Enjoined Parties, or any of them, consists of copyright, trade-mark, patent or other intellectual property applications or registrations, the Enjoined Parties and each of them shall be deemed to have transferred all such Confidential Information to the plaintiff, and shall promptly take all steps necessary to formally transfer such Confidential Information to the plaintiff or its designate.
2. For clarity, the requirement in this Order After Trial to deliver up all Confidential Information includes but is not limited to all equipment, parts, notes, memoranda, photographs, records and documents, specifically including e-mails and other electronic documents, which contain Confidential Information.
3. The independent supervising solicitors designated pursuant to the Anton Piller Order pronounced April 2, 2012, and the bailiffs under their control, are directed to cooperate with the plaintiff and the Enjoined Parties and each of them, to the extent necessary to ensure compliance with the terms of this Order After Trial.
4. Within 30 days from the date of this Order After Trial, namely on or before **\_\_\_\_\_**, Zhu, Tang, Zhang and the IND Judgment Debtors shall each deliver to XY through its counsel an affidavit providing and verifying the accuracy and completeness of an itemized list with full particulars of all Confidential Information that has been delivered up in compliance with this Order, and an itemized list of all Confidential Information that has been in the power, possession or control the Enjoined Parties, or any of them, since July 2010 but is no longer, and all particulars of the last known location of all such Confidential Information.

**372**  In my view, the proposed relief is appropriate in the circumstances and is granted.

**373**  In addition, the Mareva orders, which I granted earlier in this action, by their terms, continue until further order of the Court. XY has requested that this judgment expressly confirm that there is no intention to discontinue or vacate the existing Mareva injunctions. I agree that this is appropriate to avoid any argument that this judgment has caused the Mareva orders to expire or be discharged.

1. **Constructive Trust**

**374**  XY also seeks the following order:

1. All of the Confidential Information in the possession, power or control of the Enjoined Parties, and each of them, is impressed with a constructive trust for the benefit of XY.

**375**  I agree that this relief is also appropriate in the circumstances. This relief recognizes the proprietary nature of XY's Confidential Information and is consistent with enforcing XY's rights until (and if) the defendants comply with the injunctive relief that I have granted and the injunctive relief that remains in place per the Trial Order: see *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, [*2010 BCCA 357*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20TC-00000-00&context=) at para. 21.

1. **Punitive Damages**

**376**  Similar to its position in the Original Action, XY seeks an award of punitive damages as against the defendants.

**377**  Justice Kelleher addressed this argument in the Trial Reasons at paras. 341-348. He rejected this claim, finding that although the fraudulent conduct of Zhu, Tang and Zhou was "reprehensible", such conduct did not fall into the category of "malicious" or "highly reprehensible". The Court cited *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. 94 in support: Trial Reasons at para. 347.

**378**  Justice Kelleher also referred to the rationale behind punitive damages, which are appropriate when compensatory damages do not meet the objectives of retribution, deterrence and denunciation. In the Trial Reasons at para. 348, Kelleher J. determined that this was essentially a fight between sophisticated business people, and that the application of the principle of *omnia praesumuntur contra spoliatorem* and the award of special costs was sufficient to achieve those objectives.

**379**  At this trial, XY seeks an award of punitive damages against Zhu, IND, CTS, FBI, IEI, IDI and Ai De in the amount of $1,100,000. XY also seeks an award of punitive damages against Tang and Zhang in the amount of $100,000 each.

**380**  In addition to Kelleher J.'s review of this issue, I have been greatly assisted by this Court's thorough review of the applicable law and principles as set out in *Le Soleil* (B.C.S.C.) at paras. 361-378. The Court, in *Le Soleil,* cites a number of authorities also before me, which include *Hill v. Church of Scientology of Toronto*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at paras. 196-199, *Performance Industries Ltd. v. Sylvan Lake Gold & Tennis Club Ltd.*, [*2002 SCC 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BT-00000-00&context=) at paras. 77-92 and *Whiten*.

**381**  The proper focus is not on the plaintiff's loss but on the defendants' misconduct. In general, the conduct justifying such an award must merit condemnation by the Court. As stated above, the general objectives are punishment, deterrence and denunciation, and any award should be rationally related to these objectives.

**382**  In August 2015, Kelleher J. found Zhu in contempt of the Trial Order in the Original Action in relation to: failing to deliver the Confidential Information in the Trial Order and Improvements made possible by or because of access to XY's technology; using the Confidential Information; failing to deliver to XY the Confidential Information in his possession, power or control (i.e. the Missing Parts); and failing to pay the judgment awarded against him: *XY, LLC v. International Newtech Development Incorporated*, [*2015 BCSC 1524*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GWF-M0T1-F8KH-X2FY-00000-00&context=) at paras. 128, 142. Justice Kelleher found that XY had not established that Zhu was in contempt of the sealing order which he granted during the trial (referred to earlier in these reasons) in respect of the use of the information imparted to Xu during the trial in the Original Action: para. 146.

**383**  XY expressly seeks not to have any award of punitive damages based on the actions of Zhu leading to this contempt finding. XY submits that the appropriate punishment in that respect should be left to the Court on the sentencing hearing for contempt. I agree.

**384**  XY submits that the focus here should be on the steps undertaken by Zhu and his employees to achieve the conspiracy and breach of confidence, including being deceitful towards the Trustee, XY and the Court, the violation of bankruptcy laws and the abuse of the court process throughout this action.

**385**  Here, I agree with XY that this is a case that invites an expression of condemnation by the Court. Unlike the facts before Kelleher J., where the deceit was largely within the context of a contractual relationship between XY and JingJing, Zhu's scheme, as now more fully revealed, went far beyond that scenario.

**386**  That scheme, in part, involved false representations and false evidence before this Court, consistent with the earlier deceit that was part of the Original Action. This includes Zhu's lies under oath as noted by Kelleher J. in the Trial Reasons, and the deceitful actions in relation to Xu's status when he was allowed to remain in the courtroom to hear XY's confidential testimony. Also relevant here is that the Court was deceived as a result of the sale to Technoterm within the bankruptcy proceedings as the sale required court approval. Thirdly, Zhu lied under oath at the trial of the Original Action regarding the Missing Parts. Clearly, Zhu's deceit in these last two matters was not limited to the Court, but also included the Trustee.

**387**  The scheme also involved a clear plan to avoid document disclosure of relevant documents in this action to disguise the true nature and extent of Zhu's operations.

**388**  Of course, the deceit also involved XY. I consider that Zhu's actions go beyond trying to "pull a fast one" on XY. XY describes this as a fraud of epic proportions, which cries out for punitive damages commensurate with the complexity, breadth, and long-standing efforts of Zhu to cheat XY and steal its Confidential Information.

**389**  There is considerable merit in XY's characterization of the matter. Years before this action was even started, Zhu conceived of a strategy to steal XY's intellectual property for his own gain. The course of his deception in achieving this goal never wavered. Zhu's tactics are more than deserving of punishment and denunciation. In addition, in my view, an award here would also serve the objective of deterrence. As can be seen from both the Trial Reasons and these reasons for judgment, Zhu often employs various people, including his family, friends and employees (such as Tang and Zhang), to do his dirty work. An award will send a clear message to those who have helped Zhu in his improper actions and those who might do so in the future, that assisting Zhu poses severe risks to them.

**390**  The authorities are clear that any award must be considered in the context of other relief granted by the Court (just as Kelleher J. did). This is the concept of proportionality. In *Le Soleil* (B.C.S.C.), the Court commented:

[377] The awards for compensatory damages and special costs are undeniably substantial. Standing alone, they will have a significant salutary effect. Nevertheless, such awards will not address fully all of Dr. Louie's and Mr. Nomani's wrongful conduct, including, for example, their repeated disruption of proper Strata Corporation functioning and reliance upon the Alleged June Agreements in other litigation such as the First 567 Action and the Telephone Action. In addition, they will not express fully the Court's condemnation of such a conscious, costly, fraudulent attempt to undermine a binding settlement.

**391**  These same considerations arise here. While the compensatory damages and special costs (that I am awarding, see below) are substantial, in my view, they do not adequately address the highly-reprehensible conduct of Zhu and the other defendants. In addition, it is more than apparent that XY has been severely hampered by the actions of Zhu in hiding his true activities. I have no doubt that XY has expended significant time, money, and effort in advancing the litigation that, to some extent, will not be recovered even by an award of special costs: *Le Soleil* (B.C.S.C.) at para. 375.

**392**  In *Whiten,* at para. 112, the Court stated that "[t]he more reprehensible the conduct, the higher the *rational* limits to the potential award" (emphasis in original). In *Le Soleil* (B.C.S.C.), the Court summarized many of the factors that may be considered in assessing the level of blameworthiness:

[365] The degree of blameworthiness at issue may involve several elements. These include, amongst others: whether the misconduct was planned and deliberate; the defendant's motive and awareness that the misconduct was wrong; the period over which the misconduct persisted; attempts at concealment; and whether the interest violated was deeply personal to the plaintiff or irreplaceable: *Whiten* at para. 113; *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, [*2008 BCSC 799*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G30S-00000-00&context=) at para. 85.

**393**  Here, there can be no doubt that the misconduct involves a high degree of blameworthiness. It was planned and deliberate. The defendants were driven by a profit motive and were keenly aware that their conduct was wrong. The misconduct took place over a long period of time, being from at least 2009 to the present. I consider it likely that the misconduct continues to this day. There is overwhelming evidence of the defendants' attempts at concealment in relation to XY, the Trustee, and, finally, this Court.

**394**  As did the Court in *Le Soleil* (B.C.S.C.) at para. 378, I conclude that this is an "exceptionally rare commercial case" where punitive damages are appropriate.

**395**  As to quantum, the Court in *Le Soleil* (B.C.S.C.) at para. 370 set out various court decisions. Needless to say, this is a very fact-driven assessment. I agree with XY that this is a very unique situation and the facts to be considered are extraordinary.

**396**  I award punitive damages against Zhu, IND, CTS, FBI, IEI, IDI and Ai De in the amount of $300,000 on a joint and several basis. In recognition of the lesser role played by Tang and Zhang, I award punitive damages against each of them in the amount of $100,000.

1. **Special Costs**

**397**  XY seeks special costs against Zhu, IND, CTS, FBI, IEI, IDI and Tang.

**398**  In *Le Soleil* (B.C.S.C.), the Court summarized the relevant law regarding special costs:

[383] Special costs may be awarded where a party has engaged in reprehensible misconduct. Such misconduct includes scandalous or outrageous acts, as well as milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, [*[1994] B.C.J. No. 2486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=) (C.A.) at para. 17.

[384] As a general rule, the type of misconduct that justifies an award of special costs will relate to the course of the litigation and not to pre-litigation misconduct. This is so because reprehensible pre-litigation misconduct giving rise to a cause of action is typically addressed by an award of punitive damages. In some cases, however, reprehensible misconduct may have originated prior to litigation but continued throughout the litigation process. In these circumstances, special costs may be ordered in addition to punitive damages without double punishment being imposed: *Golden Capital Sec. Ltd.* at para. 161-176.

[385] Perjury is reprehensible misconduct, as is fraud and conspiracy. Such misconduct cannot be condoned by the court. On the contrary, it should be denounced and deterred, both specifically and generally. For these reasons, acts of perjury, fraud and conspiracy often attract an award of special costs. Such awards may be made on the basis of full indemnity: *Fullerton v. Matsqui (District)*, [*[1992] B.C.J. No. 2969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B288-00000-00&context=) (C.A.) at para. 17; *Insurance Corporation of British Columbia v. Phung*, [*2003 BCSC 1619*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0D8-00000-00&context=) at para. 8 & 11.

**399**  Reprehensible misconduct will include conduct from which the court seeks to dissociate itself: *Heppner v. Schmand* [*(1998), 59 B.C.L.R. (3d) 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M1BV-00000-00&context=) (C.A.) at para. 17.

**400**  It is also open to the court to award special costs where there has been spoliation of evidence or a willful failure to produce documents: see *Endean* at para. 33. Justice Kelleher found this had occurred in the Original Action and awarded special costs on that basis: Trial Reasons at para. 355-362.

**401**  As I have already described in great detail above, that same criticism rings true at this time. I agree with XY that Zhu's and his companies' approach to document discovery was a transparent and deliberate attempt to frustrate XY and the Court's ability to find the truth. It manifestly interfered with XY's ability to pursue its case on liability and establish the proper value of its claim in damages. This deliberate failure of the defendants to disclose their documents equally supports an award of special costs.

**402**  Where a party deliberately provides dishonest testimony, this may also attract an award of special costs: Trial Reasons at para. 352-354. Here, Tang and Zhu did not testify at trial. However, Tang made false submissions to the Court as to the nature of documents. In addition, there are various instances of misleading the Court, as I have set out above.

**403**  I award special costs as against Zhu, IND, CTS, FBI, IEI and IDI and Tang, which shall be assessed. XY is also awarded party-and-party costs against Zhang and Ai De on Scale 3, in recognition of the more than ordinary difficulty involved in this litigation.

1. **Apportionment**

**404**  XY agrees that any monetary award it is ultimately granted -- to the extent it is joint and several and would permit any of the defendants to claim contribution and indemnity against Zhou and Ms. Wang/497 -- should be reduced by the amount paid by Zhou and Ms. Wang/497 pursuant to their settlement with XY: see *Ashcroft v. Dhaliwal*, [*2008 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M3DN-00000-00&context=) at paras. 7-8 and 19-21.

**405**  I agree that Zhou can be considered to have paid nothing under her settlement with XY by reason that the amount paid by her ($150,000 and a further contingent amount of $350,000), can be allocated to the existing approximately $8.5 million judgment that XY obtained against her in the Original Action.

**406**  As regards Ms. Wang and 497, the specific amount to be paid under her settlement with XY has not yet been ascertained. Therefore, it is appropriate to provide in the judgment that the award, if it is of a joint and several nature where a defendant might claim contribution and indemnity, is reduced by any amount that XY may collect from Ms. Wang and 497.

**XIII. CONCLUSION**

**407**  All calculations of either profit or damages done by XY, as above, have been in U.S. dollars, as this is the currency in which XY does business (see, for example, the Licence) and also the usual currency used by Zhu and his companies (in addition to Chinese RMB) in the substantial documentary evidence. Initially, XY sought judgment in U.S. dollars.

**408**  An issue that arises is the application of the *Foreign Money Claims Act*, *R.S.B.C. 1996, c. 155* (the "*Act*"). Section 1 of the *Act* provides:

1. If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.
2. The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

**409**  Accordingly, the usual order would be to grant judgment in U.S. dollars and the judgment debtors would be required to pay the amount of Canadian currency that is necessary to purchase the U.S. judgment amount just before payment is made (namely, the "conversion date" per s. 1(2) above).

**410**  As Justice Griffin stated in *Han v. Cho*, [*2009 BCSC 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S46N-00000-00&context=) at para. 96, in order to apply the *Act*, I must find two things: that XY will be "most truly and exactly compensated" if, firstly, all or a part of the judgment in measured in U.S. dollars; and, secondly, if the judgment amount is converted to Canadian dollars just prior to payment under the judgment.

**411**  XY does not suggest that the *Act* should be applied, as it was not in *Han*, arising from currency fluctuations. Rather, XY contends that converting a U.S. dollar judgment just before the date of payment may lead to difficulties in enforcing the judgment in foreign jurisdictions. This circumstance was also relevant in *Han*, where Griffin J. noted:

[104] There is an additional but lesser factor in this case weighing against application of the ***Foreign Money Claims Act***. The form of order under the ***Act*** leaves the determination of the total amount payable under the judgment to a future date, namely, one day before the date of payment, as this is the conversion date: s. 1(2) of the ***Act***. This form of order may work well when the judgment debtor is based in Canada and there is no evidence to suggest that the judgment debtor has assets elsewhere in the world that will need to be the subject of execution to satisfy the judgment. However, this form of order may cause too much uncertainty for a judgment creditor where the facts are similar to the facts in this case, where the evidence indicates that: Ms. Cho's home is in South Korea; she has carried on business in South Korea and possibly also in China; she may have no assets in Canada and the location of her assets is unknown; and it is unlikely that she will voluntarily pay the judgment of this court to the plaintiffs.

[105] This is a case where the plaintiffs may need to take steps to enforce this court's judgment on a piecemeal basis in other jurisdictions, where they ultimately find Ms. Cho to have assets. It is my view that in all the circumstances of this case, a form of order made under the ***Foreign Money Claims Act*** may create undue ongoing uncertainty as to the total amount payable to discharge the judgment. It would also motivate the wrongdoer, Ms. Cho, to choose to delay paying the judgment until the currency rates are most favourable to her.

**412**  Similar circumstances apply here. In March 2014, I granted a Mareva injunction as against Zhu, CTS, FBI, IND, IEI and IDI. Nevertheless, I have no doubt that the assets held by those defendants in this jurisdiction will not be sufficient to satisfy the judgments being awarded now.

**413**  I am aware that enforcement proceedings, as against Zhu, are already underway. This included the commencement of action S142293 in March 2014, which XY describes as the "Recovery Action". The defendants include various offshore companies in the IND Group owned or controlled by Zhu. In March 2014, I also granted a worldwide Mareva injunction as against Zhu and these offshore companies.

**414**  In addition, on the adjournment application, Zhu's counsel indicated to me that Zhu is afraid of setting foot in this jurisdiction for fear that he will be arrested (although I was not aware of any basis upon which that may have occurred then). In light of the various proceedings as against Zhu and his companies, I have little doubt that Zhu will have no appetite to bring or create any assets in this jurisdiction that might be seized by XY in execution of its judgment. In that vein, it appears that execution in other jurisdictions against the various defendants here is not only a possibility, but more likely a certainty.

**415**  I conclude that judgment in favour of XY in U.S. dollars is not appropriate in these circumstances as it would not "most truly and exactly" compensate XY. Accordingly, it is appropriate to express the judgment amount set out above, based on the Canadian equivalent of the U.S. dollar claims as of January 15, 2016.

**416**  Accordingly, the following relief is granted, in addition to the mandatory and prohibitory injunction provisions and declaration of constructive trust, as outlined above:

1. Zhu, CTS, FBI, IND, IEI IDI and Ai De Diagnostic (collectively, the "IND Judgment Debtors"), jointly and severally, shall pay the plaintiff $269,856,121.68, which includes pre-judgment interest to January 15, 2016, plus a per diem pre-judgment interest rate of $19,969.35 from January 16, 2016 to the date of this judgment (the "IND Award").
2. Jin Tang ("Tang") and Zhenyu Zhang ("Zhang"), jointly and severally, shall pay the plaintiff $60,059,536.86, which includes pre-judgment interest to January 15, 2016, plus a per diem pre-judgment interest rate of $4,444.41 from January 16, 2016 to the date of this judgment (the "Tang and Zhang Award").
3. The IND Judgment Debtors, jointly and severally, shall pay the plaintiff punitive damages of $300,000.
4. Tang shall pay the plaintiff punitive damages in the amount of $100,000.
5. Zhang shall pay the plaintiff punitive damages in the amount of $100,000.
6. The IND Award, the Tang and Zhang Award, and the awards of punitive damages against the IND Judgment Debtors, Tang and Zhang shall bear post-judgment interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, from the date of this judgment.

***Costs***

1. Zhu, Tang and the IND Judgment Debtors (other than Ai De Diagnostic), jointly and severally, shall pay the plaintiff special costs of this action to be assessed, plus post-judgment interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, from the date of assessment.
2. Zhang and Ai De Diagnostic, jointly and severally, shall pay the plaintiff party-and-party costs of this action on Scale 3.

***Mareva Orders***

1. Nothing in this Order is intended to affect the Mareva Orders pronounced in this action and not previously discharged, which shall remain in full force and effect until further Order of this Court.

**417**  Lastly, there will be an order that any person affected by this order may apply to me (as remaining seized of the matter), for such further and other directions as may be required, on two business days' notice.

S.C. FITZPATRICK J.

**End of Document**

[***Davies v. Elston, [2014] B.C.J. No. 3172***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S51X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.A. Griffin J.

Heard: September 2-5, 8-12, 2014.

Judgment: December 23, 2014.

Docket: M123029

Registry: Vancouver

**[2014] B.C.J. No. 3172** | 2014 BCSC 2435

Between James W. Davies, Plaintiff, and Kevin Elston and Pajo's (Garry Point) Restaurant Ltd., Defendants

(298 paras.)

**Case Summary**

**Damages — Types of damages — For personal injuries — Cost of future care — Special damages — Expenses and expenditures — Medical — Non-pecuniary loss — Pain and suffering — Action for personal injuries suffered as a result of a 2011 accident allowed — Plaintiff, 77, suffered serious injuries to his hip and pelvis when defendant caused him to fall off his bike — Accident resulted in nerve damage along right thigh and foot, permanent numbness and tingling, permanent leg length discrepancy and permanent anterior groin pain — Plaintiff had not proven entitlement to damages for past or future loss of earning capacity — Wife's in-trust claim assessed at $10,000 — Plaintiff awarded $85,000 as non-pecuniary damages, special damages of $5,162.69 for treatments and costs of future care.**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Contributory *negligence* — Duty of care — Motor vehicles — Cyclists — Action for personal injuries suffered in 2011 accident allowed — Defendant pulled up his truck beside plaintiff cyclist to confront plaintiff about a comment he made — When defendant pulled away, plaintiff fell off bike, seriously injuring himself — Defendant's conduct in pulling up and driving truck closely next to plaintiff while yelling at him angrily caused accident fell below standard of care of reasonable and prudent driver — Plaintiff was not contributorily negligent by riding abreast with his son in the bike lane or by putting his hand on the truck.**

|  |
| --- |
| Action for personal injuries suffered as a result of a 2011 accident. The plaintiff, a very experienced bicyclist, 77, was riding his bicycle with his son in a designated bike lane. They saw the defendant's truck parked beside the bike lane, the truck's mirror intruding into the bike lane. The son made a comment about the mirror. The defendant heard the comment and followed the plaintiff and his son with his truck to confront them. While briefly exchanging words with the defendant, the plaintiff put out his hand on the truck's passenger side window frame. When the truck drove away, the plaintiff fell off his bike, his hip smashing into the curb, causing serious injuries to his right hip and pelvis and leaving him with lasting injuries. The surgeries left him with some nerve damage along his right thigh and foot, leaving him with some permanent numbness and tingling. He was left with a permanent leg length discrepancy and permanent anterior groin pain on his right side. The plaintiff returned to cycling after recovering sufficiently from his injuries. He then fell off his bike again fracturing his left hip, several ribs and dislocated his left shoulder. The second fall did not exacerbate his injuries from the first accident.  HELD: Action allowed.  The plaintiff was awarded damages of $100,162 plus damages for cost of future care. The defendant's conduct in pulling up and driving a large truck next to the plaintiff within an arm's length, while yelling at him angrily upset the plaintiff's balance and led to his fall, regardless of whether or not the defendant pulled away while the plaintiff's hand was still on the truck. The defendant fell below the standard of care of a reasonable and prudent driver, in driving alongside the two cyclists and yelling at them, while so close to the bike lane that it made it intimidating, threatening and unsafe for the cyclists and in pulling away quickly, without warning. But for the defendant's aggressive and negligent conduct, the plaintiff would not have fallen from his bike. The plaintiff was not contributorily negligent by riding abreast with his son in the bike lane or by putting his hand on the truck to try to protect himself. The plaintiff was a co-owner of a bicycle store but had retired in 2004. Prior to the accident, he used to perform chores for the store. The evidence did not prove a real and substantial possibility that, but for the accident, the plaintiff would have earned an income that was now foreclosed to him due to his injuries. The plaintiff had not proven an entitlement to damages for past or future loss of earning capacity. The in-trust claim for necessary services provided by the plaintiff's wife around the house due to his injuries was $10,000. Based on the seriousness of the plaintiff's injuries, the numerous medical treatments he had undergone, the pain he had suffered and would continue to suffer, and the diminishment he was awarded $85,000 as non-pecuniary damages. He was entitled to special damages of $5,162.69 for treatments, medical expenses and mileage in getting to treatments. |

**Statutes, Regulations and Rules Cited:**

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. 119, s. 144, s. 183(1), s. 183(1)(d), s. 183(2)(c), s. 183(5), s. 183(14)(a)

**Counsel**

Counsel for the Plaintiff: Marc Kazimirski, Pauline V. Gardikiotis.

Counsel for the Defendants: Jeffrey W. Joudrey, J. Gill (Articling Student).

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**Reasons for Judgment**

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| **S.A. GRIFFIN J.** |

**I. Introduction**

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

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

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

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

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

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

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

**8**  When Mr. Elston caught up to the two cyclists they were still riding in the bike lane, but now on a stretch of Railway Avenue where the bike lane is on the far right of the road, with no parking lane next to it. This part of Railway Avenue is a long straight stretch with nothing obscuring the view ahead. The bike lane is bordered by a curb on the right and is six feet wide, with a painted continuous white border on the left bordering the lanes of vehicular traffic.

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

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

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

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

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

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

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

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

**II. Issues**

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

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

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

**20**  I will address the issues in this order:

1. Whether the defendant negligently caused the accident.
2. Whether the plaintiff was contributorily negligent.
3. Whether Gary Davies was partly negligent.
4. Whether the defendant is liable for a later fall that the plaintiff suffered.
5. If the defendant's liability is established, what damages ought to be awarded for the plaintiff's injuries:
6. nature of injuries;
7. special damages;
8. loss of past income and future earning capacity;
9. cost of future care;
10. in-trust claim; and
11. non-pecuniary damages.

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

**21**  The legal test for causation applicable here is whether the plaintiff can prove on a balance of probabilities that but for the defendant's negligent conduct, the plaintiff's fall from the bicycle and injuries would not have occurred: *Ediger v. Johnston*, [*2013 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X22V-00000-00&context=) at para. 28; *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, 13.

**A. Jim Davies' Evidence**

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

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

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

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

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

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

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

**28**  The plaintiff enjoyed racing in short road races.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**49**  The plaintiff said that when he and Gary Davies came upon the parked truck with its mirror extending into the bicycle lane, one of them commented to the effect "geez that guy's inconsiderate, why doesn't he push his mirrors in". They had to ride around the mirror with the plaintiff having to leave the bike lane and ride into the road and then back into the bike lane. The plaintiff said he could not remember if he or his son made the comment, but it was not directed at anybody and was just intended to be a comment shared between the two of them. He did not see anybody else around when the comment was made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**B. Gary Davies' Evidence**

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

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

**67**  Gary Davies denied knowing that there was someone around other than his father when he made the comment about the truck mirrors. He denied being offended and angry, rather he said he was surprised someone would do something that unsafe as leave the mirror extended into the bike lane because it was such a known bike route, and that was the gist of his comment intended for his father.

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

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

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

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

**72**  Gary Davies agreed that the reason he pulled forward with his bike was to make more room for his father so that his father could slow down and pull to the right behind him. He agreed that if his father was not hanging on to the vehicle, it was possible he could have done that. From the time his father put up his hand and Gary Davies moved forward with his bike he thought it was only 1.5 to 2 seconds before the crash.

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

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

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

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

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

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

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

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

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

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

**C. Constable Morgan's Evidence**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**D. Kevin Elston's Evidence**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**116**  Mr. Elston said he was very aware that the cyclist's hand was on his vehicle because if he stopped the cyclist would have hit his mirror. He said that when Jim Davies took his hand off the truck the second time he figured this was his "opportunity", as he then appreciated that the situation was "crazy" and he accelerated away. He admitted he did not give a warning that he was going to do so.

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

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

**E. Analysis of Evidence on Causation**

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

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

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

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

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

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

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

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

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

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

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

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

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

**132**  I found both Jim and Gary Davies to be soft spoken and sensitive in describing each other. It is clear they have a great bond between them and respect each other. Why is this relevant? It is because one of the themes of Mr. Elston in his evidence was to portray Gary Davies as the one to blame, using foul language initially when he saw the truck mirror and later when Mr. Elston caught up with them. I did not believe Mr. Elston's evidence in this regard.

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

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

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

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

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

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

1. "who had a problem with my mirrors";
2. "do you think you own the road";
3. "you cyclists are all the same"; and
4. something to make the point that cyclists are not allowed to ride side by side and if they had been riding single file they would not have a problem with his mirrors.

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

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

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

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

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

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

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

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

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

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

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

**150**  Mr. Elston used hand gestures in support of his testimony that he saw the handlebars of the bikes wobbling. He said he saw them "doing this", swooping his hands in large gestures back and forth several times, and it could have meant that they were colliding with each other and said they could have hit each other and bounced and could have hit "three times" and that's what he saw in his mirror. He said he did not know when he saw the bikes wobbling if they were colliding. However, he clearly wished to create the impression in his evidence that is what was happening.

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

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

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

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

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

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

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

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

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

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

**161**  Many cases recognize that a car driver can cause a cyclist to crash without actually hitting the cyclist, because the driver's actions cause the cyclist to react and lose balance. For example, in *Bern v. Jung*, [*2010 BCSC 730*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-220N-00000-00&context=) the driver's negligent choice of driving up the wrong side of a garage ramp caused the approaching cyclist to suddenly brake and lose control and fall.

**162**  I am persuaded that what Mr. Elston's conduct did was upset Jim Davies' equilibrium in every sense. I find that Jim Davies was a very experienced cyclist who would not have fallen off his bike riding in a bike lane along a flat and open road he had ridden hundreds of times before, unless his balance was disturbed by something or someone. I have no difficulty in concluding that what disturbed his balance and led to his fall was Mr. Elston's dangerous conduct in pulling up and driving a large truck next to him within an arm's length, while yelling at him angrily.

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

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

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

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

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

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

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

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

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

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

**2. Was the Plaintiff Contributorily Negligent?**

**173**  I turn to the duties of cyclists.

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

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

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

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

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

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

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

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

1. In addition to the duties imposed by this section, a person operating a cycle on a highway has the same rights and duties as a driver of a vehicle.
2. A person operating a cycle
3. must not ride on a sidewalk unless authorized by a bylaw made under section 124 or unless otherwise directed by a sign,
4. must not, for the purpose of crossing a highway, ride on a crosswalk unless authorized to do so by a bylaw made under section 124 or unless otherwise directed by a sign,
5. must, subject to paragraph (a), ride as near as practicable to the right side of the highway,
6. must not ride abreast of another person operating a cycle on the roadway,
7. must keep at least one hand on the handlebars,
8. must not ride other than on or astride a regular seat of the cycle,
9. must not use the cycle to carry more persons at one time than the number for which it is designed and equipped, and
10. must not ride a cycle on a highway where signs prohibit their use.
11. Nothing in subsection (2) (c) requires a person to ride a cycle on any part of a highway that is not paved.

...

1. A person must not ride a cycle, skate board, roller skates, in-line roller skates, sled, play vehicle or other similar means of conveyance when it is attached by the arm and hand of the rider or otherwise to a vehicle on a highway.

...

1. A person must not operate a cycle
2. on a highway without due care and attention or without reasonable consideration for other persons using the highway, or
3. on a sidewalk without due care and attention or without reasonable consideration for other persons using the sidewalk.

[Emphasis added.]

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

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

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

[Emphasis added.]

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

"highway" includes

1. every highway within the meaning of the *Transportation Act*,
2. every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and
3. every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,

but does not include an industrial road;

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

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

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

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

**186**  Under the *MVA* the definitions of a "motor vehicle" and a "vehicle" exclude cycles. This is supported by the Supreme Court of Canada decision in *R. v. Moore,* [*[1979] 1 S.C.R. 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-253T-00000-00&context=) at 199 [*Moore*].

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

**188**  In *Ormiston v. Insurance Corporation of British Columbia*, [*2014 BCCA 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B145-00000-00&context=) [*Ormiston*], both the majority and minority opinions agreed that there are differences between roadways and highways, and that a "shoulder" is part of the highway but since it is not designed for vehicular traffic, not part of a "roadway". As held by Lowry J.A., writing for the majority, at para. 23:

"Highway" is broadly defined to include any right of way designed to be used by the public for the passage of vehicles (s. 1). That, it is said, includes the shoulder such that sometimes cyclists must ride on it to be as near as practicable to the right side of the highway. Vehicles are required to travel on the right-hand half of the roadway (s. 150(1)). "Roadway" is defined as the improved portion of a highway designed for use by vehicular traffic but does not include any shoulder (s. 119). Vehicles cannot travel on the shoulder.

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

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

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

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

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

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

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

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

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

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

**199**  The common law duty of care in motor vehicle cases is informed by the *MVA*, as confirmed by the BC Court of Appeal in *Salaam v. Abramovic,* [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=) at paras. 18, 21:

[18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.

...

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

**200**  In *Nish v. McLaughlin,* [*2014 BCSC 1366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B19D-00000-00&context=) [*Nish*] at paras. 15-19, Gropper J. found that even though the plaintiff had breached the *MVA* by riding his bicycle in a crosswalk he did not demonstrate a lapse of care and found that the defendant was 100% at fault, citing *Deol v. Veach,* [*2011 BCSC 1437*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62JN-00000-00&context=) at para. 23.

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

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

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

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

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

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

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

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

**209**  As for whether Jim Davies should have taken some kind of evasive action once the truck pulled up beside him, such as braking and moving further to the right, I do not consider that this kind of second-guessing in a dangerous situation can rise to the level of a finding of contributory ***negligence***. Jim Davies was an experienced cyclist, he was travelling a good speed, he was at first thinking the person was approaching for directions, and once he learned the driver was angry he could not know if the driver would chase him further into the bike lane if he braked and tried to move towards the right. Braking could also put him in harm's way because it could cause him to fall and be run over by the back wheels of the moving truck. He instead made the split second judgment to try to defuse the situation by asking the driver to let it go. I find no ***negligence*** in this approach.

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

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

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

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

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

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

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

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

**217**  The "agony of collision" doctrine was summarized in *Gerbrandt v. Deleeuw* [*[1995] B.C.J. No. 1022*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X1CY-00000-00&context=) at paras. 10-11 where Hunter J. stated as follows:

[10] An often quoted summary of the law concerning the agony of collision is found in an old text, Huddy on Automobiles, 7th Ed., page 471 and page 335 (this passage is relied upon by the Saskatchewan Court of Appeal in *English v. North Star Oil Limited* [*[1941] 3 W.W.R. 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-JS0R-2459-00000-00&context=) (Sask. C.A.) and *Reineke v. Weisgerber* [*[1974] 3 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6S1-JJ6S-6161-00000-00&context=) (Sask. Q.B.)):

"Under circumstances of imminent danger an attempt to avoid a collision by turning one's course instead of stopping the vehicle is not necessarily ***negligence***. Or an attempt to stop when a turn would have been a more effective method of avoiding the collision is not necessarily ***negligence*** . . **.** one who suddenly finds himself in a place of danger and is required to consider the best means that may be adopted to evade the impending danger is not guilty of ***negligence*** if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own ***negligence***."

[11] In *Gill v. C.P.R.* [*[1973] 4 W.W.R. 593*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B04B-00000-00&context=) Mr. Justice Spence speaking for the court said the following:

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

[Emphasis added.]

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

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

**220**  I conclude that Jim Davies was not contributorily negligent.

**3. Was Gary Davies Partly Negligent?**

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

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

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

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

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

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

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

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

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

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

**230**  In assessing damages, I will not award the plaintiff any damages for his injuries from the second accident. For example, I will keep in mind that if he needed home care help or other care, or had pain and suffering or loss of enjoyment of life during that period of time due to the injuries from the second accident, he is not entitled to damages in this regard.

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

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

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

**A. Nature of Injuries**

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

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

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

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

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

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

**239**  The injuries have left the plaintiff significantly weaker in his right side leg, hip and foot and less nimble than he is on his left side. His walking has been negatively affected, as he now walks with a significantly uneven gait and he occasionally trips and falls. His falling appears related to the fact that his right leg and left leg are different lengths, and his right side foot, leg and hip do not respond with the same agility or strength as his left side, which is particularly problematic for him on uneven surfaces and in climbing stairs.

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

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

**242**  In assessing damages, the overarching legal principle is that the plaintiff is entitled to damages to restore him to the position he would have been in, absent the accident, so far as this can be done with money. He is not entitled to be placed in a position that is better than his original position would have been: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), at para. 32.

**B. Special Damages**

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

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

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

**245**  The legal principles were summarized by Warren J. in *Abbott v. Gerges*, [*2014 BCSC 1329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B17M-00000-00&context=) at paras. 163-165:

[163] Both past and future income loss is properly considered on the basis of loss of earning capacity: *Ibbitson v. Cooper*, [*2012 BCCA 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24M7-00000-00&context=), at para. 19.

[164] The burden of proof for actual past events is a balance of probabilities. However, the assessment of loss for both past and future earning capacity also involve the consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; rather, hypothetical events are given weight according to their relative likelihood. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey*, at para. 27; *Morlan v. Barrett*, [*2012 BCCA 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1TW-00000-00&context=), at para. 38.

[165] An award for loss of earning capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies. It is not a calculation according to a mathematical formula: *Schenker v. Scott*, [*2014 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2PW-00000-00&context=), at paras. 50, 53.

**246**  Here the issue very much turns on the question of whether there was ever a real and substantial possibility the plaintiff would have earned more income than he did, but for the accident, or whether this is mere speculation: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 30.

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

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

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

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

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

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

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

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

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

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

**D. Cost of Future Care**

**257**  A plaintiff who is injured due to the ***negligence*** of another is entitled to be compensated for the future costs of caring for the plaintiff which are reasonably and medically necessary due to the lasting effect of the injuries. There needs to be an evidentiary link between the medical evidence and the recommended future care item and consideration of whether or not the plaintiff is likely to use the recommended future care item: see *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 82-84 (S.C.); and *Gignac v. Insurance Corporation of British Columbia*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 40, 52-54.

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

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

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

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

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

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

1. The plaintiff is unsteady on his feet getting in and out of the shower and bathtub due to his injuries. A single wall mount grab bar at a cost of $135 is necessary to provide for stability and to keep him safe from falling. Based on a life expectancy of 11.7 years, the present value is $132.
2. The plaintiff needs supportive orthopaedic shoes, both athletic and casual shoes given his uneven gait due to his injuries. Ms. Tencha recommended that these be purchased on an annual basis, and factored in the cost difference between orthopaedic shoes and regular shoes, the latter of which the plaintiff would have purchased in any event regardless of the accident. The purchase cost differential for orthopaedic athletic and casual shoes is $67 and $56 respectively. The defendants challenge the recommended annual replacement rate of the shoes. I accept the defendants' point that the evidence does not support the need to replace these shoes every year. I find it more reasonable to assume that the plaintiff will buy two sets of these shoes in his lifetime, one set soon after trial when he receives judgment, and one set five years from now. The plaintiff is entitled to the present value of those costs based on the life expectancy of 11.7 years and Mr. Carson's evidence on multipliers.
3. The plaintiff needs lifts in his shoes because of the discrepancy in his leg length as a result of his injuries. Ms. Tencha estimated the cost would be in the range of $250 to $400 per year for two sets of shoe lifts. The defendants concede this cost is reasonable. The present value of this cost, assuming a mid-range annual cost of $320, is $3,229.
4. The plaintiff has sought out massage therapy since the accident to help him deal with the stiffness in his hip and leg and manage the pain. The defendants concede that some future massage therapy is warranted in relation to the accident, but correctly point out that even prior to the accident the plaintiff from time to time pursued this type of therapy, and may have sought it out more and more as he ages, and so not all future massage therapy can be attributed to the accident. Before trial he was incurring a cost of $58 per massage therapy session, with eight sessions in 2013 and ten sessions so far in 2014. I estimate that due to his injuries the plaintiff will need and seek out massage therapy six times per year in addition to whatever massage therapy he may have pursued but for the accident. He is entitled to the present value of this amount, applying the multipliers set out in Mr. Carson's evidence, based on a cost of $58 per session and a life expectancy of 11.7 years.
5. Ms. Tencha made recommendations that the plaintiff participate in a six month active rehabilitation program, using a kinesiologist. This was recommended by Dr. Russell O'Connor, a physiatrist who assessed the plaintiff on December 13, 2013. I note that such a program is not likely to greatly increase his functionality but it may help him to a small degree such that it is worth doing. I find that that this program is necessary as a result of the plaintiff's injuries, and the reason he has not pursued it until now is that he has been focussed on getting back to cycling. The plaintiff is likely to pursue such a program if he is awarded damages to pay for the cost of it. He is awarded damages for the estimated present value cost of this program, which is $1,500.
6. Ms. Tencha recommended that the plaintiff purchase an annual community gym pass to facilitate his active rehabilitation program with a kinesiologist, at an annual cost of $293. In addition, there will be the drop-in cost for the kinesiologist to attend the gym with him for 28 sessions, at a cost of $168. While the plaintiff has some exercise equipment at home, it is old and not likely to be as varied and helpful as what a kinesiologist might recommend he use. I accept that these costs are reasonably necessary and that the plaintiff will incur them after trial, but only once. I find little real possibility that the plaintiff will keep going to a gym on an annual basis as this has not been his pattern in the past. His history is that he much prefers being active outside. What I expect will happen is that he will learn exercises in a gym with a trained kinesiologist and then when the program is over, will be given suitable exercises to practice at home on his own. The plaintiff is awarded damages of the present value of the cost of a single annual gym pass and 28 sessions with a kinesiologist.
7. Ms. Tencha recommended that the plaintiff obtain psychological counselling. The evidence of friends and family was that the plaintiff has been sad and irritable since the accident. On its face this recommendation makes sense as from my limited observations the plaintiff does seem to be grieving the loss of his former self and having a difficult time finding pleasure in all that he still can do. However there is no medical evidence in support of this expense and the plaintiff has not shown any inclination to pursue this on his own. I conclude this is not supported on the evidence as an item of future care cost. I pause to note that general feelings of unhappiness are addressed somewhat in non-pecuniary damages, which if the plaintiff wishes can be spent on such things as psychological counselling to help him realize more enjoyment from life.
8. Ms. Tencha also recommended that the plaintiff engage the services of an occupational therapist to provide guidance to him in increasing his activity levels at home and in the community. I find no evidentiary support for this as a cost that is medically necessary or as something the plaintiff would possibly incur in the future.

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

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

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

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

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

**269**  The defendants correctly point out that this type of claim for the loss of the ability to perform home maintenance is better characterized as loss of homemaking capacity: *Westbroek v Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=) at paras. 72-79 [*Westbroek*]. Such damages are not dependent on whether replacement costs are actually incurred.

**270**  In *Westbroek,* the Court of Appeal emphasizes that such an award should be approached conservatively, expressing concern that in that case there was limited evidence as to the allocation of household tasks between husband and wife pre-accident.

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

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

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

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

**E. In-Trust Claim**

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

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

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

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

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

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

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

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

**F. Non-pecuniary Damages**

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

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

**285**  In an attempt to ensure consistency and give guidance to trial courts, and apparently influenced by concerns about runaway awards in the United States, the Supreme Court of Canada held in 1978 that the rough upper limit for non-pecuniary damages should be $100,000: *Andrews v. Grand & toy Alberta Ltd.,* [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 260-265 [*Andrews*].

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

**287**  In order to decide what award of non-pecuniary damages is fair, the courts must consider non-pecuniary damages in a way that is relative to what other people in other accidents might suffer, keeping in mind the rough upper limit of damages for the very worst cases. For example, a young child who is brain damaged, or rendered a quadriplegic, and who has a long life of suffering ahead of her, will be awarded far greater non-pecuniary damages than an older person who already had a full career, still has all bodily functions and has no brain injury. It is important to understand this thinking is not about valuing a young person as worth more than an elderly person, it is about recognizing the relative differences between the impact of injuries on the lives of two people given the severity of the injuries and where they are in their lives.

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

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

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

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

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

**293**  Based on the seriousness of Mr. Davies' injuries, the numerous medical treatments he has undergone, the pain he has suffered and will continue to suffer, and the diminishment in enjoyment of the activities he used to love to do, but keeping in mind the relative nature of non-pecuniary damages and the rough upper limit for the most catastrophic of injuries, I find that $85,000 is an appropriate award of non-pecuniary damages on the facts of this case.

**III. Conclusion**

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

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

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

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

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

S.A. GRIFFIN J.

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[***0731989 B.C. Ltd. v. Hope (District), [2013] B.C.J. No. 2774***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S4CJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.B.T. Goepel J.

Heard: September 16-19, 2013; by written submissions,

September 26, 2013 (Defendant) and October 7, 2013

(Plaintiff).

Judgment: December 17, 2013.

Docket: S108115

Registry: Vancouver

**[2013] B.C.J. No. 2774** | 2013 BCSC 2315

Between 0731989 B.C. Ltd., Plaintiff, and District of Hope, Defendant

(46 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Flood — Value of realty — Repair or replacement — Action by plaintiff for damages against District of Hope for *negligence* and negligent misrepresentation allowed in part — District liable for telling plaintiff water leak from spring when knew it was from municipal water line and for failing to investigate further — Evidence did not support claim for general damages — Plaintiff could not recover costs of repairs not carried out — Entitled to recover amounts actually expended as result of District's *negligence* including water overcharges, repairs actually performed and monies spent attempting to locate leak and repair water lines — Total damages were assessed at $26,164.**

**Municipal law — Liabilities of municipality — *Negligence* — Duty of care — Inspection of public property — Types — Flooding — Water system — Breaks in water line — Negligent misrepresentation — Action by plaintiff for damages against District of Hope for *negligence* and negligent misrepresentation allowed in part — Water leak continued after repair of municipal water line — District told plaintiff leak was from natural spring — Plaintiff relied on representations to its detriment — District had obligation, given knowledge leak's source was within municipal water system and difficulties plaintiff was facing, to investigate further — District was liable in *negligence* and negligent misrepresentation.**

**Tort law — Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Nature and extent of duty of care — Duty of public servant or authority — Action by plaintiff for damages against District of Hope for *negligence* and negligent misrepresentation allowed in part — Water leak continued after repair of municipal water line — District told plaintiff leak was from natural spring — Plaintiff relied on representations to detriment — District had obligation, given knowledge leak's source was within municipal water system and difficulties plaintiff was facing, to investigate further — District was liable in *negligence* and negligent misrepresentation.**

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| Action by the plaintiff for damages against the defendant District of Hope for ***negligence*** and negligent misrepresentation. In 2008, the District repaired a pipe without determining it was the cause of a reported leak. When the line was activated, the leak continued. No further steps were taken to determine the source of the leak. The plaintiff was told the leak was due to a natural spring and not to the water system. As the leak increased, the plaintiff's water bills began to dramatically increase and the water pressure in its mobile home units decreased. The plaintiff was told the problem was with its private water lines. It paid to inspect all plumbing connections on its property and replaced all of its water lines. In 2010, the leak was determined to be from the municipal water line. The District credited the plaintiff's water account for water consumption but denied all other compensation. The plaintiff's damage claim included $30,000 for general damages and $19,600 for estimated costs to repair a house on the property.  HELD: Action allowed in part.  The District knew the leak came from water in the municipal system and not from a natural spring. Its representation to the plaintiff that the leak was from a spring was false. The plaintiff relied on the representations to his detriment. The District had an obligation, given its knowledge that the leak's source was within the municipal water system and the difficulties the plaintiff was facing, to investigate further. The District was liable in ***negligence*** and negligent misrepresentation for the damages the plaintiff incurred as a result of the leak. The evidence did not support a claim for general damages. The plaintiff could not recover costs of repairs that were not carried out. The plaintiff was entitled to recover the amounts it actually expended as a result of the District's ***negligence*** including water overcharges, repairs actually performed and monies spent attempting to locate the leak and repair water lines. The plaintiff's total damages were assessed at $26,164. |

**Counsel**

Counsel for the Plaintiff: D.C. Creighton.

Counsel for the Defendant: K. Ameyaw, D. Twining.

**Reasons for Judgment**

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| **R.B.T. GOEPEL J.** |

**INTRODUCTION**

**1**  The plaintiff, 0731989 B.C. Ltd., claims damages against the defendant, District of Hope (the "District"), for ***negligence*** and negligent misrepresentation. The claim arises in the context of a water leak that was ultimately traced back to the municipal water system.

**BACKGROUND**

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| **A.** | **The Municipal Water System** |  |

**2**  The District maintains the municipal water system. Property owners pay for the water they use. The water is transported from a reservoir to the city water mains. Individual property owners connect to the water system at their property lines by way of private service lines.

**3**  Individual property owners must pay for all water used and consumed on their properties. Their usage is measured by water meters that are connected to the private service lines. The District is responsible for the maintenance and repairs of the water meters.

**4**  Over the years the District has grown in size. The water system, which is the subject of this proceeding, was initially installed and maintained by the local Regional District. There was no charge for water usage under the Regional District. The area was incorporated into the District in 1994. It was only then that water meters were installed.

**5**  The District maintains service maps which are supposed to show the location of the municipal water lines. The service maps for the subject area were inherited from the Regional District in 1994. The District acknowledged at the trial that the service maps have at times been found to be inadequate and incomplete. The policy of the District is to update their service maps from time to time as work is done in the area.

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| **B.** | **The Plaintiff** |  |

**6**  At the material times the plaintiff owned and operated the Silverhope Mobile Home Park ("Silverhope"). Mr. Neil Fourchalk was the plaintiff's sole director, shareholder and operating mind.

**7**  Silverhope rents out mobile homes, cabins, an old house and R.V. pads. It has some 40 units. It is located on Frontage Road, sometimes referred to as Flood Hope Road.

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| **C.** | **The Leak** |  |

**8**  On May 9, 2008 a resident of the District brought to the District's attention that water was flowing in the area of a culvert under Frontage Road (the "leak"). The leak was located immediately across the road from Silverhope. The water system in that location was constructed at a time when that area formed part of the Regional District.

**9**  Mr. Al Trick, the District's utilities foreman, investigated the leak. He reviewed the water service maps that identified the location of known water lines in the region, including in the area immediately surrounding the location of the culvert. The service map showed a water line running below Frontage Road in the direction of the culvert. Mr. Trick believed that this line had developed a leak and was the source of the water running through the culvert.

**10**  To test his theory, Mr. Trick attempted to close the valve of the water line running below the culvert. When this did not stop the flow of water, he concluded that the valve was dysfunctional. When, however, he shut off the municipal water line at the water valve connection at the pedestrian overpass, which is located to the east of the Silverhope property, water stopped flowing through the culvert. Mr. Trick then knew that the leak was in some manner connected to the municipal water system, albeit he did not know the exact location or source of the leak.

**11**  Mr. Trick suspected that the source of the leak was the water line immediately adjacent to the culvert. Rather than excavating and removing that line, the District crew pushed a new smaller pipe through the larger existing pipe to tie into the main water supply line. Having followed this procedure, there was no actual evidence that the old larger pipe was broken.

**12**  When the new line was activated, the leak continued. Mr. Trick took no further steps to determine the source of the leak. Having replaced the only line in close proximity to the underground water source according to their service map/cards, and observing that the water continued to run in the area of the culvert, Mr. Trick testified that he concluded that the source of the leak was an underground natural fissure spring.

**13**  I have considerable trouble with this evidence. Mr. Trick knew in May 2008 that the leak would not have been caused by a spring because it had dried up when the municipal water system had been shut down at the overpass. While Mr. Trick may not have known in May 2008 the exact cause of the leak he did know that the water that was escaping from around the culvert had its origin in and was in some way connected to the municipal system. Mr. Trick agreed that if he had again shut off the water value at the overpass after the water line adjacent to the culvert had been replaced he would have known in May 2008 that the leak was somehow connected to the municipal system.

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| **D.** | **Impact on Silverhope** |  |

**14**  In June 2008, Mr. Fourchalk was advised that the District was going to replace the head of the water meter that serviced the Silverhope property. He was told that the existing meter was not properly calibrating the consumption of water.

**15**  While the modification to the water meter was taking place Mr. Fourchalk noticed the leak for the first time. He brought the matter to the attention of the District and spoke to Mr. Trick. Mr. Trick advised him that the water accumulating near the culvert was spring water and it was nothing to do with Silverhope's water system.

**16**  When Mr. Fourchalk first observed the leak it was no bigger than a saucer of water. Over the next several months he observed it increase in size. As the leak increased in size Silverhope's water bills began to increase and the water pressure in the units decreased.

**17**  Over time the ground near the property described as "the old house" became saturated. The drains in the old house stopped working. In the basement of the old house water was found seeping through the concrete slab foundation. To remedy this problem Mr. Fourchalk jack hammered the slab out and installed a sump pump in the basement of the old house to dispose of the excess water. Mr. Fourchalk also discovered that the septic tank was flooded and had to be pumped.

**18**  Throughout 2009, Silverhope's water bills continued to increase while its water pressure continued to fall. The increase in water bills was quite dramatic. Mr. Fourchalk indicated that prior to the problems developing his average water bill was $125 a month or $375 quarterly. The four quarterly billings in 2009 were $1,370.49; $2,808.77; $2,990.21; and $4,049.69.

**19**  Mr. Fourchalk continued to raise these matters with the District. He was continually advised that Silverhope's problems were not related to the increasing water observed by the culvert. He was told that the leak was from a natural spring and the fact it was increasing in size was just coincidental. Mr. Trick told Mr. Fourchalk that Silverhope's increased water bills and decreased water pressure were likely caused by a leak in Silverhope's own water system.

**20**  Based on Mr. Trick's representations Mr. Fourchalk attempted to locate the water leak. He checked the water connection in all of Silverhope's units without success. Mr. Trick then advised him that he should retain the services of a company that specialized in water leak detection. The company that he retained could not observe any leaks. It suggested, however, it was possible that there were pinprick leaks in the Silverhope system that were causing the problem.

**21**  Based on this advice and the information that he had received from the District that there was a leak in the Silverhope system, Mr. Fourchalk then undertook the replacement of all of the water lines at Silverhope. Once the new lines were laid they had to be connected to the District water system.

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| **E.** | **Fixing the Leak** |  |

**22**  The source of the leak was discovered at the end of January 2010 when it came time to connect the new Silverhope water lines to the water meter. In order to connect the municipal system to the new Silverhope water lines it was first necessary to turn off the water to the existing private service line. When this was done, the leak by the culvert immediately dried up.

**23**  Examination of the existing private service line indicated that it did not go directly into the Silverhope property. Rather, the line looped back under Frontage Road. Because the line looped under the road and the road was not dug up, the location of the leak in the line was not uncovered. In his evidence, Mr. Trick suggested that there was likely a second line connected to the private service line and that this additional line, which is not shown on the District's service maps, was the source of the leak.

**24**  Following the determination of the cause of the leak Mr. Fourchalk sought to be reimbursed for various amounts that he says Silverhope expended because of the leak. The District agreed to credit Silverhope's water account for water consumption by $3,231. 66. It denied all other compensation.

**25**  In November 2011, the plaintiff sold Silverhope to a third party.

**POSITION OF THE PARTIES**

**26**  The plaintiff submits that the District is liable in ***negligence*** and for negligent misrepresentation. It says that Mr. Trick knew as of May 2008, when the water leak continued after repair of the water line, that the leak was not caused by a natural spring. It says his representations to Mr. Fourchalk that the leak at the culvert was caused by a spring were negligent. It says Mr. Trick should have realized when the water problems at Silverhope were brought to his attention, that those problems could be traced back to the leak at the culvert which he knew was sourced from the municipal system. It submits the damages that it incurred in the 20 months subsequent to June 2008 are recoverable against the District.

**27**  The District submits that it acted in a proper fashion throughout. It says its belief that the water by the culvert was caused by a spring was, given the information available to it, reasonable. It further submits that the leak was ultimately discovered to exist in the private service line and, accordingly, the District has no responsibilities for any of the ensuing damage.

**DISCUSSION**

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| **A.** | **Liability** |  |

**28**  Mr. Trick knew in May 2008 that the municipal water system was the source of the leak at the culvert. This was conclusively established when the leak dried up after the municipal system was turned off at the overpass. Mr. Trick at that time thought the source of the leak was the line under Frontage Road. Given the location of the leak, that was a reasonable conclusion. When that line was repaired, however, the leak continued. I find that in May 2008 Mr. Trick knew the leak was coming from water in the municipal system and could not be from a natural spring.

**29**  Mr. Trick further knew that the leak was somewhere between the culvert and the overpass. The evidence indicates that there were approximately 12 properties that connected to the main water system between the culvert and the overpass. Of those 12 properties, Silverhope was the closest to the culvert.

**30**  When Mr. Fourchalk first raised the question of the leak in June 2008, Mr. Trick told him it was from a spring. That representation was false and Mr. Trick knew from his prior investigation that the representation was false.

**31**  When the leak continued to increase in size, at a time when the water pressure at Silverhope was falling and Silverhope's water bills were increasing, it should have been obvious to Mr. Trick that there was a connection between the leak and the problems at Silverhope. Rather than drawing that conclusion, however, Mr. Trick told Mr. Fourchalk that the increase in the size of the leak by the culvert had nothing to do with the problems with the Silverhope system and that the problems at Silverhope were related to a leak somewhere in the Silverhope system.

**32**  Mr. Fourchalk relied on that advice to his detriment. He expended time and money checking all the plumbing connections on the Silverhope property and ultimately replaced all of the water lines at Silverhope. It was only when it came time to connect the newly laid lines to the water meter that the source of the leak was discovered.

**33**  In these circumstances, I find that the District had an obligation, given its knowledge that the leak's source was the municipal water system, when faced with the difficulties that Silverhope was occurring, to further investigate the matter. It chose not to. Rather, the District advised Mr. Fourchalk that it was his responsibility to find the leak and charged Mr. Fourchalk ever increasing amounts for water use. If the District had conducted further investigations, it would have quickly determined the source of the leak. In the circumstances, I find that the District is liable both in ***negligence*** and negligent misrepresentation for the damages that Silverhope incurred as a result of the leak.

**DAMAGES**

**34**  The plaintiff seeks a wide range of damages totalling some $88,151. Included in the damage claim is $30,000 for general damages as a result of the inconvenience for its business both in dealing with residents and District staff over a period of 30 months. The plaintiff also seeks to recover some $19,600 representing the estimated cost of repairs to the old house, even though the proposed repairs were not carried out.

**35**  I find that neither of those sums is recoverable. The evidence does not support a claim for general damages. The plaintiff cannot recover for the costs of repairs that were not carried out. There is no evidence that Silverhope's value was reduced by the damage to the old house or that the amount the plaintiff received when it sold Silverhope was reduced on account of the state of the old home.

**36**  The plaintiff is entitled to recover the amounts it actually expended as a result of the District's ***negligence***. This includes the excess water charges which would not have been incurred absent early detection of the leak, amounts spent attempting to discover the source of the leak, amounts spent fixing the problems in the old house basement and the costs incurred in replacing the existing water lines.

**37**  In regard to the later item, the District submits that it should not have to pay for the costs of the new water line because the new water line conferred a benefit on the plaintiff. The difficulty with that submission is that there is no evidence that the plaintiff benefitted from the new line. The line was replaced because of the information provided to Mr. Fourchalk that the leak must be in the existing line. There is no evidence that the value of Silverhope was increased by the new lines or that the sale price of Silverhope was increased because of the new water lines.

**38**  Both parties provided calculations in relation to the excess water charge. It is not possible, however, on the evidence to calculate the amount with precision because the Silverhope water meter was not working accurately for several months prior to its replacement in June 2008. The only water bill produced subsequent to the repairs to the system was for the three month billing period July 7, 2010 to October 10, 2010. That showed a billing of $292.18. Whether that mid-summer billing is representative of annual billings cannot be determined on the evidence. Mr. Fourchalk, in his evidence, indicated that prior to the difficulties arising, his monthly water bills averaged $125.00. I find that that is the most accurate figure to base the overages.

**39**  I accept the calculations set out in Table 2 of Exhibit B of the plaintiff's written submissions, save and except I would change the referenced amount to $375 from $292.18. This reduces the claim by $579.74 ($375-$292.18 x 7). Using that number and giving the credit to which the District is entitled, would lead to an overage of $8,196.35 which I would round off to $8,200.00,

**40**  In regard to the work performed in relation to the old house, the plaintiff is entitled to recover $1,406 (ex. 1-37). The plaintiff is, however, as noted above, not entitled to recover the estimated costs for reframing and repairing the old house.

**41**  The plaintiff is entitled to recover the monies it spent attempting to isolate and locate the leaks in the fixtures and valves on its property including the hiring of an underground leak detection company and the replacing of its water lines which ultimately were determined not to be the cause of the leak. The work is detailed on the invoice set out at Ex. 1-8. It was reasonable for the plaintiff to carry out that work given the advice it had received from the District. The amounts total $16,558.30 and are recoverable.

**42**  The plaintiff has not proven its claim for loss of rental income. While the plaintiff suggests that certain tenants moved out or refused to pay rent because of the water problems in the units, there is no evidence in relation to historical movement of tenants or other evidence by which one could compare the rental income during this 20-month period with other time periods. Absent such evidence, the plaintiff has not proven a loss of rental income.

**43**  The plaintiff also seeks to recover certain monies which it says were incurred in relation to maintaining and correcting the initial settling of the new water lines laid. The evidence is not sufficient to support those claims.

**44**  In summary, therefore, the plaintiff is entitled to recover the following amounts:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Water overages | $8,200.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Work performed in |  |  |
|  | relation to the old house | 1,406.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Monies spent attempting |  |  |
|  | to locate and isolate |  |  |
|  | leaks and repairing water lines | 16,558.30 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL**: | **$26,164.30** |  |

**45**  The plaintiff is entitled to judgment in the sum of $26,164.30.

**46**  Unless there are matters of which I am not aware, the plaintiff is entitled to costs. If either party seeks a different cost result, they should make written submissions within 21 days of the date of these reasons. Any submissions in response should be delivered within 15 days thereafter.

R.B.T. GOEPEL J.

**End of Document**

[***Basil Estate v. Interior Health Authority, [2012] B.C.J. No. 1624***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S282-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nelson, British Columbia

T.M. McEwan J.

Heard: April 10 and 11, 2012.

Judgment: August 2, 2012.

Docket: 15683

Registry: Nelson

**[2012] B.C.J. No. 1624** | 2012 BCSC 1158 | 95 C.C.L.T. (3d) 289 | 2012 CarswellBC 2351

Between The Estate of Zachery C. Basil Jr., Mary Basil, John Rogers Sarah Loftus, Riley Evanseline Loftus by her guardian ad litem Sarah Lofteus, Ayla Randelle Basil-Loftus by her guardian ad litem Sarah Lofteus, Warren Loftus by his guardian ad litem Sarah Lofteus, Ashly Basil, Zachery Clifford Basil Jr. by his guardian ad litem Mary Basil, and Zack Basil the 4th by his guardian ad litem Mary Basil, Plaintiffs, and Interior Health Authority (C.O.B. East Kootenay Regional Hospital and Creston Valley Hospital), Defendant

(65 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Dismissal of action — Application by defendant to dismiss plaintiffs' action, allowed — Basil died in 2008 after contracting flesh-eating disease — Plaintiffs alleged defendant failed to take steps to properly diagnose and treat Basil — Treating physician was a contractor and plaintiffs failed to prove she was an employee or agent of defendant — No evidence tendered to support plaintiffs' contention that other tests could have and should have been ordered by defendant's nursing staff — Similarly, no evidence tendered on appropriate standard of care or causation — Claims were statute-barred and no evidence submitted to justify postponing limitation period, which had expired.**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Failure to diagnose — Failure to provide care — Particular professions — Nurses — Application by defendant to dismiss plaintiffs' action, allowed — Basil died in 2008 after contracting flesh-eating disease — Plaintiffs alleged defendant failed to take steps to properly diagnose and treat Basil — Treating physician was a contractor and plaintiffs failed to prove she was an employee or agent of defendant — No evidence tendered to support plaintiffs' contention that other tests could have and should have been ordered by defendant's nursing staff — Similarly, no evidence tendered on appropriate standard of care or causation — Claims were statute-barred and no evidence submitted to justify postponing limitation period, which had expired.**

**Tort law — Practice and procedure — Trials — Nonsuit or dismissal of action — Application by defendant to dismiss plaintiffs' action, allowed — Basil died in 2008 after contracting flesh-eating disease — Plaintiffs alleged defendant failed to take steps to properly diagnose and treat Basil — Treating physician was a contractor and plaintiffs failed to prove she was an employee or agent of defendant — No evidence tendered to support plaintiffs' contention that other tests could have and should have been ordered by defendant's nursing staff — Similarly, no evidence tendered on appropriate standard of care or causation — Claims were statute-barred and no evidence submitted to justify postponing limitation period, which had expired.**

|  |
| --- |
| Application by the defendant for dismissal of the plaintiffs' action. Zachary Basil Jr. died in 2008 as a result of an infection that led to necrotizing fasciitis, or "flesh-eating disease". The plaintiffs alleged the defendant were negligent in failing to conduct carry out a sufficient diagnostic investigation, in their ultimate diagnosis and treatment of Basil, and in discouraging Basil from attending the Creston Valley Hospital when his symptoms worsened. The plaintiffs also alleged that Basil had been treated the way he was because he was aboriginal and that the defendant hospitals were in breach of the Human Rights Code. The defendant argued that the treating physician who first saw Basil was not an employee of the defendant but was an independent contractor and no claims had been made against the physician. To the extent that the plaintiffs' claims were founded on issues of medical diagnosis and treatment, liability could not attach to the hospital. With respect to the claims against the nursing staff who were employees of the defendant, the defendant argued that the plaintiffs had failed to lead any evidence regarding the standard of care or causation. The defendant argued that the plaintiffs' claims were, in any event, barred by the Limitation Act. Finally, the defendant' submitted that the plaintiffs' claims under the Human Rights Code could not be maintained because any lis had died with Basil.  HELD: Application allowed.  In a summary trial for dismissal of a plaintiff's claims, the plaintiff was responsible for laying out an arguable evidentiary case that, if accepted, would support a judgment in his or her favour. In this case, while discoveries had not yet taken place, the plaintiffs did not suggest that there were circumstances that prevented them from presenting a case that met the defendant' application. The plaintiffs offered no proof in support of their contention that there were tests that should have been performed to more accurately diagnosis Basil's condition and that those tests could have or should have been ordered by the defendant' nursing staff. Nor was there any evidence that the delay in bringing Basil in when his condition worsen had any causative effect. Moreover, there was no evidence before the Court addressing the reason behind the delay in pursuing the claim and thus no basis upon which to postpone the limitation period, which had expired. No evidence at all was tendered in response to the defendant's arguments regarding the Human Rights Code allegations. In all the circumstances, the evidence established that no claim in ***negligence*** could have been maintained against the defendant. Even if that were not the case, the claim was statute barred. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *RSBC 1996, CHAPTER 126*,

Human Rights Code, *RSBC 1996, CHAPTER 210*,

Limitation Act, RSBC 1996, CHAPTER 266, s. 3(2), s. 6(4)

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

Rules of Civil Procedure, Rule 3-6(3), Rule 9-7

**Counsel**

Counsel for the Plaintiffs: D. Aaron.

Counsel for the Defendant: A. Howden-Duke.

**Reasons for Judgment**

|  |
| --- |
| **T.M. McEWAN J.** |

**I**

**1**  This is the defendant's application for dismissal of this action on a summary trial basis and for costs.

**2**  The plaintiffs' claim was issued on June 28, 2010. It concerns the death, on June 25, 2008, of Zachary C. Basil, Jr., as a result of a streptococcus A infection leading to necrotizing fasciitis, or "flesh eating disease".

**II**

**The Pleadings**

**3**  The allegations against the defendant are that, on June 22, 2008, during an attendance at the East Kootenay Regional Hospital (the "EKRH"), one of the hospitals administered by the defendant:

1. the EKRH conducted a diagnostic investigation on Mr. Basil;
2. the EKRH failed to conduct laboratory tests of Mr. Basil's blood, urine or other bodily samples, which a reasonable physician would have conducted;
3. the tests would have revealed streptococcus infection, and Mr. Basil would then have been treated, probably successfully;
4. the EKRH failed to carry out the diagnostic investigation in a manner that was reasonably thorough, diligent and effective, thereby breaching the standard of care owed to Mr. Basil;
5. the EKRH prescribed an air cast and medication but failed or refused to provide them, because Mr. Basis lacked the money to pay for them;
6. the EKRH breached the standard of care it owed Mr. Basil in "acquiescing" to Mr. Basil leaving the EKRH without an air cast, crutches or medication;
7. these failures caused Mr. Basil to lose faith in the EKRH.

**4**  The allegations against the defendant also include a claim that on June 23, 2008, Mr. Basil's niece called the Creston Valley Hospital (the "CVH"), another of the hospitals administered by the defendant, because his condition had worsened, but that the CVH:

1. refused to see Mr. Basil, and/or
2. discouraged Mr. Basil from attending CVH;
3. informed Mr. Basil's niece that they were not willing to call a doctor and he would have to wait until the next morning.

**5**  The plaintiffs allege that the CVH breached the standard of care owed to Mr. Basil in behaving as it did.

**6**  The plaintiffs further allege:

1. that the behaviour of the CVH along that of the EKRH compounded Mr. Basil's loss of faith in the hospital system;
2. that the defendant's hospitals treated Mr. Basil as they did because he was aboriginal;
3. that the defendant's hospitals were in breach of the *Human Rights Code of B.C.* and caused Mr. Basil humiliation.

**7**  The defendant responded by admitting that Mr. Basil attended EKRH on June 22, 2008, and "received investigations and medical attention."

**8**  The defendant denies that it was responsible for "ordering medical diagnostic tests, including laboratory tests, making medical decisions or diagnosing the deceased with any medical condition." It says that any medical decision or diagnosis was made by a physician who is an independent contractor and not a person for whose actions the defendant is vicariously liable.

**9**  The defendant denies all ***negligence*** and says that any prescription would have been ordered by a doctor not by the defendant.

**10**  The defendant pleads the ***Negligence*** *Act* and the *Limitation Act*.

**III**

**The Evidence**

**11**  The defendant produced an affidavit from Yvonne Federko, a Registered Nurse, who was on duty at the EKRH as a triage nurse in the Emergency Department. She had no personal recollection of seeing Mr. Basil on that occasion but had reviewed the Hospital charts and recognized her handwriting documenting his attendance. She summarized what occurred from a review of her notes:

1. I have no personal recollection of Mr. Basil's attendance at the Hospital in June 2008. However, I have reviewed his hospital chart for a June 22, 2008 attendance at the Hospital. I recognize my writing that establishes that I triaged him that day. It is my practice to make accurate notes in the charting of my assessments of a patient and I have no reason to believe that did not occur in this case. What follows is my summary of what I believe took place at the June 22, 2008 based on my review of the charting, upon my knowledge of the usual and standard practices at the Hospital in June 2008 and upon my usual and invariable practices.
2. At approximately 1015 hours on June 22, 2008, Mr. Basil attended the Hospital complaining of an injury to his left big toe. At no time during my triage assessment of Mr. Basil did he inform me of any complaints to his ankle. I would have otherwise made a record of such a complaint. Attached and referred to this Affidavit as Exhibit "A" is a true copy of triage emergency assessment and treatment record, dated June 22, 2008.
3. I carried out a preliminary assessment of Mr. Basil. Mr. Basil reported significant pain to his left big toe and I accordingly charted that his pain level was 9/10 as reported by him. Typically, injuries of this nature are triaged at CTAS Levels 4 or 5. I triaged Mr. Basil at a more acute level, CTAS Level 3. I believe I did so due to his level of reported pain. As an RN, I do not have the authority to provide a medical diagnosis. I do not have the training or the experience to make a medical diagnosis and such decisions are made by the emergency physician in the Emergency department.
4. Shortly after I triaged Mr. Basil, Mr. Basil was taken to Nurse Janet Zielinski, for secondary assessment. Based on the charting, Nurse Zielinski completed her assessment of Mr. Basil at approximately 1027 hours.

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1. Based on the charting, at approximately 1030 hours, Mr. Basil was assessed by the ER physician, Dr. Anneline Du Preez. Dr. Du Preez diagnosed Mr. Basil and ordered x-rays to his left foot, an air cast brace, buddy tape around his big toe and his second toe and his discharge.

**12**  The records Ms. Federko referred to were attached to her affidavit.

**13**  Ms. Federko then commented on her role in the hospital:

1. The decision to admit to a hospital or to discharge a patient from a hospital is a decision made by a physician and not the nursing staff. As a RN, I do not have the authority to discharge a patient. The decision to discharge a patient is a medical decision made by the emergency physician in the Emergency Department.
2. As a RN, I do not have the authority to make a referral to a specialist, to request a consult or to order further exams, including x-rays or laboratory tests of a patient's blood, urine or other body samples. A specialist cannot accept a referral from a nurse. Any request for a referral to a specialist or a consult or exams must be made by the patient's emergency physician in the Emergency department. It is the responsibility of the attending physician to make a referral to a specialist.

**14**  She had no further dealings with Mr. Basil.

**15**  The defendant produced an affidavit from Janet Zielinski, a Licensed Practical Nurse setting out her involvement with Mr. Basil:

1. I have reviewed Mr. Basil's hospital chart for a June 22, 2008 attendance at the Hospital. I recognize my writing that establishes that I assessed him that day. It is my practice to make accurate notes in the charting of my assessments of a patient and I have no reason to believe that did not occur in this case.
2. What follows is my summary of what I believe took place at the June 22, 2008 based on my personal recollection of the events on that date, my review of the charting, upon the usual and standard practices at the Hospital in June 2008 and upon my usual and invariable practices.

June 22, 2008 Hospital Attendance

1. From 0700 to 1900 hours on June 22, 2008, I was working in the emergency department at the Hospital. On that day, Zachery Basil attended the Hospital's emergency department presenting with an injury to his left great toe.
2. Based on the hospital charting, I understand that, at approximately 1015 hours, Mr. Basil was triaged by Nurse Yvonne Federko. Nurse Federko charted that Mr. Basil had a left great toe injury as a result of him kicking a door the previous night. His Glasgow coma scale was recorded at 15/15 and he reported pain at 9/10. Mr. Basil was triaged at CTAS (Canadian Triage and Acuity Scale) Level 3.

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1. At approximately 1027 hours, I conducted a secondary assessment of Mr. Basil. During my assessment of Mr. Basil, I observed that Mr. Basil presented with a red, swollen toe with a small abrasion, but it was not actively bleeding and it was not draining. I asked Mr. Basil about the injury to his great toe and he told me he had kicked a door the previous night. He did not mention any problems with his ankle. His only complaint was pain and that his toe was swollen, red and he had an abrasion.

**16**  Ms. Zielinski then described what happened next:

1. Based on the charting, at approximately 1030 hours, Mr. Basil was assessed by the emergency physician, Dr. Anneline Du Preez. Dr. Du Preez reported that Mr. Basil had "kicked door last night" and had "++pain" in his big toe.
2. Dr. Du Preez ordered x-rays to his left foot.

**17**  She commented:

1. Mr. Basil was seen as an outpatient and was not admitted to the hospital. The decision to admit a patient to hospital is a decision made by a physician and not the nursing staff. It is solely a medical decision made by a physician.
2. Mr. Basil was subsequently taken to the radiology department to have the x-ray of his left foot taken. When the x-ray results came in, I recall that Dr. Du Preez met with Mr. Basil to discuss the results, her diagnosis and her treatment recommendations.
3. Dr. Du Preez ordered an air cast brace, buddy tape around his big toe and his second toe together and to subsequently discharge Mr. Basil. Dr. Du Preez did not order or prescribe any medication to Mr. Basil. Based on the charting, her final diagnosis was a possible fracture.

**18**  Ms. Zielinski had further dealings with Mr. Basil:

1. After Dr. Du Preez examined Mr. Basil, I saw Mr. Basil to implement the treatment ordered by Dr. Du Preez. Pursuant to the Physician Orders, I cleaned Mr. Basil's left big toe with normal saline, applied polysporin on the abrasion applied gauze between the big toe and applied tape around the toes to hold the toes together (buddy taped).
2. I further advised Mr. Basil that Dr. Du Preez had ordered an air cast and that he could get an air cast from the pharmacy, People's Pharmacy. People's Pharmacy is an independently owned and operated pharmacy that is located onsite in the Hospital. I directed Mr. Basil to the location of People's Pharmacy.
3. At approximately 1035 hours, I signed off that the Physician Orders were entered.

**19**  She commented further on her role:

1. As an LPN, I do not have the authority to provide a medical diagnosis. I do not have the training or the experience to make a medical diagnosis and such decisions are made by the emergency physician in the emergency department.
2. As an LPN, I do not have the authority to make a referral to a specialist, to request a consult or to order further exams, including x-rays or laboratory tests of a patient's blood, urine or other body samples. Any request for a referral to a specialist must be made by a physician.
3. Mr. Basil did not ask me the cost of the cast, but if he had asked me, I would have looked up the price for him.
4. At approximately 1120 hours, Mr. Basil was discharged from the Hospital.
5. As an LPN, I do not have the authority to discharge a patient. The decision to discharge a patient is made by the attending physician.

**20**  The records Ms. Zielinski referred to were attached to her affidavit.

**21**  She did not see Mr. Basil again.

**22**  Ms. Zielinski made the following comments about the air cast:

1. In my experience, if a patient attends to the pharmacy and indicates that he or she has financial difficulties with respect to filling a prescription, the pharmacy staff will direct the patient back to the emergency department to seek assistance. Further, if the pharmacy is closed, the emergency department has extra air casts braces on hand to distribute to patients and the patient can be billed at a later date.
2. At no time did Mr. Basil advise me that he could not afford an air cast brace or that he required assistance with transport to his home.
3. If Mr. Basil had informed me he required assistance, either with respect to his ability to afford the air cast brace or with respect to transport, I would have fitted Mr. Basil with an air cast and had him billed or contacted a social worker to provide him with further assistance.

**23**  The defendant produced an affidavit from David Elliott, a Licensed Practical Nurse employed at the Creston Valley Hospital on June 23, 2008. He outlined his involvement as follows:

1. From 1900 hours on June 22, 2008 to 0800 hours on June 23, 2008, I was working in the medical/surgical department at CVH.
2. There is normally no physician on site in the Emergency Department ("ER") during the evenings between 2000 to 0700 hours ("after hours"). However, there is at physician on call 24 hours a day, 7 days a week.
3. When a patient arrives to the ER after hours, when a physician is not on site, a nurse will triage the patient. Triaging involves assessing the acuity of a patient's medical problem and prioritizing the patient relative to other patients. Patients are triaged on a scale of 1 (most serious) to 5 (least severe). At CVH, if a patient is triaged at CTAS Level 1, 2, or 3, the on call physician will be asked to attend. If a patient is triaged at CTAS Level 4 or 5, the Emergency nurse may call the physician and get a phone order, or the physician will attend, depending upon the severity of the patient's complaints and the assessment by the triage nurse. If a patient's presenting complaints are deemed sufficiently serious (despite being triaged at CTAS Level 4 or 5), the on call physician will be called to attend.
4. The policy with respect to telephone calls received during after hours when a physician is not on site is to inform the caller that we cannot conduct a proper medical assessment of the caller's injuries or complaints over the telephone, but if the caller wishes to attend to the hospital, they are welcome to do so and a nurse can properly assess the caller on site.
5. During the early morning on June 23, 2008, I received a telephone call in the medical surgical department from a woman who told me her uncle had a swollen leg. At the time I received the telephone call, I was sitting at the main nursing station.
6. Pursuant to my general practice, I asked the caller a few questions regarding her uncle's leg. The questions asked are part of my general practice and include how long has it been swollen; was it warm to the touch; was there any pain; if so, where; and out of a scale of 0 to 10, what would he rate the pain at if 10 was the worst pain he had ever experienced.
7. The caller informed me that her uncle's leg was of normal warmth and that it had been swollen for a couple of days. I do not recall whether the caller informed me of the reported pain level of her uncle's leg.
8. I informed the caller to elevate her uncle's legs and to monitor his condition.
9. The caller asked whether there was a physician present and if her uncle could attend to the CVH to see a physician.
10. I advised the caller there were no physicians on site in the ER during the evenings. I informed her that a physician would be in at 0800 hours. I further informed her that it was not possible to conduct a proper assessment of her uncle's injury over the telephone and if she felt that he should come in for treatment, a nurse would assess him and an on call physician could be called if necessary as a physician is on call 24 hours 7 days a week.
11. At no time did the caller advise me that her uncle was of aboriginal descent. Even if she had, the information I provided to her would have been the same.
12. To my knowledge, no one with symptoms of swollen legs came into the Emergency Department during the remainder of my shift.

**24**  The defendant produced an affidavit from Patricia Diane Glaim, its Director of Risk Management. She set out the relative roles of the defendant and members of the medical profession:

1. The IHA is responsible for the operation of hospitals in the interior of British Columbia, including the Hospital. The IHA is governed by a Board of Directors ("IHA Board") appointed by the Minister of Health Services in accordance with the *Health Authorities Act.* The individual hospitals operated by the IHA do not have individual boards of directors.
2. The IHA Board of Directors overseeing the conduct of the IHA's business and supervises management, which is responsible for day-to-day operations. The current IHA Board of Directors consists of individuals with a variety of expertise in legal, business and management. None of the current members of the Board have medical degrees.
3. The IHA Board has no role in the individual care provided to patients who attend in emergency or are admitted into the hospitals operated by the IHA.
4. The IHA Board is not directly involved in:
5. the admission of patients into any hospitals;
6. the transfer of patients between hospitals;
7. the diagnosis of patients' medical conditions;
8. referrals to specialists for patients in hospitals; and
9. making beds available for patients to be transferred between hospitals.
10. All of the activities referred to in paragraph 5 are the responsibility of the particular patient's attending physician.

**25**  She made the following specific observations respecting Dr. Anneline Du Preez:

1. I am further informed by Ms. Low that the treatment in issue was provided by Dr. Anneline Du Preez.
2. Dr. Du Preez is not an employee of the IHA and was not an employee of the IHA in June 2008.
3. In 2008, Dr. Du Preez had privileges to practice at the East Kootenay Regional Hospital, a hospital operated by the IHA. She was not paid by IHA for treating and caring for patients at East Kootenay Regional Hospital. Rather, in 2008, Dr. Du Preez, like most physicians, worked as an independent practitioner and billed the Medical Services Plan for the medical treatment she provided to patients at the East Kootenay Regional Hospital.

**26**  The defendant provided an opinion from Craig MacKenzie, an experienced emergency room nurse. He stated his qualifications as follows:

Statement of qualifications

As the attached resume indicates I graduated from Douglas College with a Diploma of Nursing in 1992. I obtained certification in Emergency Nursing Specialty in BCIT in 1996 and went on to complete my Bachelor of Science in Nursing in 2000. I commenced my work in emergency nursing in the spring of 1993 and have continued to do so to this date.

The majority of my emergency practice has been with the Trauma Center at the Royal Columbian Hospital as well a period of employment in the emergency department at the Eagle Ridge Hospital in Coquitlam. In 2009, I transferred to the Saanich Peninsula Hospital emergency department on Vancouver Island.

As an emergency room nurse it has been my role to provide nursing care to a wide range of patients of all ages and presenting with a variety of conditions. Triaging, assessing, monitoring and treating patients with simple to complex fractures. minor to major trauma, burns, acute medical illnesses, drug overdose, acute psychiatric disorders and a variety of infectious diseases are examples of some of these conditions. It has also been part of my experience to assist with health related teaching and information sharing with patients and families as part of their treatment while in the emergency department.

Having a variety of technical skills is also part of the role that I have assumed in my emergency nursing practice. Aseptic procedural care techniques such as complex wound care and irritations, bladder catheterizations as well as intravenous initiation and management are examples of these. Applying a variety of immobilization splints and casts has also been part of my practice.

Further to my emergency nursing practice the sum of my employment, as a registered nurse, also includes employment in various critical care capacities, teaching nursing, doing some research, nursing management and consultation. It is the combination of the above mentioned that I bring in providing expertise for this report.

**27**  After setting out the facts and assumptions and documents relied upon, Mr. MacKenzie provided an overview of facts consonant with those set out in the affidavits he reviewed. He then made the following observations:

Mr. Basil walked into the emergency department, was determined to have a Glasgow coma scale of 15/15 (fully alert and orientated with no obvious neurological deficits). He reported a history of kicking a door the previous evening that injured his left big toe. Mr. Basil reported a 9/10 pain. Therefore, based on the triage CTAS guidelines this would cause a nurse to assign a CTAS level 3. Whereas, the nature of the injury with a lower rated pain scale would rate the CTAS at a level 4. Considering this information, assigning a CTAS level 3 would be appropriate.

As part of the triage process and at any time that nurses attend to their patients in the emergency department, pain assessments and management is always a priority. Evaluation of pain relies on both the subjective information that a patient reports and any objective assessment of pain behaviour as assessed by the nurse. It does not rely exclusively on the subjective rating number that a patient may report when asked. Consideration of the source of pain, its location, time of onset and duration, is also important information when considering the treatment or management of pain. This may or may not include administering medications.

It is my experience that once immobilization of fractures or possible fractures of this nature have occurred, medications may not be required for pain control. Dr. Du Preez did not order any medications, suggesting none were required. It should be noted that nurses do not prescribe medications in the emergency department.

Nursing assessment of this type of injury includes evaluation of the injury for sensation, blood flow and possible evidence of infection. An examination by the LPN recorded that there was evidence of swelling and redness, point tenderness, with a small abrasion on the left great toe that was not actively bleeding or draining fluids. It is my opinion that infection is unlikely to have developed so soon after such an injury and that the redness and swelling was readily explained by the trauma of kicking a door.

The LPN is noted to have applied her wound management skills when she cleansed the abrasion on the left great toe with normal saline, applied polysporin (topical antibiotic cream) to the wound. Taking precaution when applying the tape to Mr. Basil's toes, she did not cover the abrasion with tape. This would promote wound healing of the abrasion and demonstrates appropriate wound care management.

One of the primary reasons for immobilizing a fracture by means of buddy taping, splinting or casting is to promote bone healing while maintaining bone alignment. Dr. Du Preez ordered the buddy taping to be done. It is within scope of practice of the LPN to carry out this order and would support ongoing management of Mr. Basil's injury.

As noted above, nurses are responsible for implementing or carrying out physician orders as part of a team approach to provision of care. Orders are implemented based on scope of practice and training and/or hospital policy. The LPN carried out those orders when she assisted Mr. Basil with the buddy taping and by providing him with direction on how to acquire the aircast brace from the local pharmacy in the hospital.

The responsibilities that a nurse has when discharging a patient from the emergency room include completing all discharge orders, providing their patients with any relevant follow-up with appointments and when to return to the hospital if further assistance is required. Dr. Du Preez had ordered the buddy taping, aircast and follow-up x-ray in one week. The LPN carried out those orders and instructed Mr. Basil where he could get the aircast brace. Mr. Basil left walking, with no evidence of objections or concerns.

**28**  Mr. MacKenzie based his ultimate conclusion as to the appropriateness of the care Mr. Basil received on the assumption that the assertions contained in the records were reliable. On that basis he gave the following opinion:

Mr. Basil was triaged appropriately by the RN and according to the CTAS guidelines, established a correct CTAS score. Mr. Basil was assessed by Dr. Du Preez within 15 minutes of the triage time. This also meets the standard under the CTAS guidelines for a CTAS level 3 of a recommended 30 minutes.

The care that Mr. Basil received concerning his toe and the interventions that were carried out by the LPN were also appropriate. The LPN's nursing assessments and interventions met the standard of nursing practice and were in compliance with Dr. Du Preez's orders for care.

It is therefore my opinion that both the LPN and the RN provided appropriate and reasonable care of Mr. Basil. In my experience the treatment of Mr. Basil, during his emergency department visit at the East Kootenay Regional Hospital, was both appropriate and consistent with my observation of similar emergency cases that I have cared for. It is therefore my opinion that the nurses met both the Standard for Nursing practice and the level of care that I would expect of a nurse working in an Emergency Department in British Columbia.

**29**  The plaintiffs' provided an affidavit from Jolene Basil, a niece of Zachary Basil, who was her mother's half-brother.

**30**  She deposed that she is the niece referred to in the pleadings and that she was the person who called the Creston Valley Hospital on June 23, 2008.

**31**  She described her uncle's pain that evening and what happened next:

1. ... on the night of June 23, 2008, at approximately 9:30 pm to 10:00 pm, I telephoned the Creston Valley Hospital on behalf of my Uncle ("the Telephone Call)".
2. I strongly believe that the person who answered the Telephone Call was a woman ("the woman").
3. The entire Telephone Call consisted of a conversation, of approximately five minutes, between myself and the Woman.
4. The following are particulars of the communications that occurred by way of the Telephone Call:
5. The Woman answered the phone: "Creston Valley Hospital";
6. I told the Woman that my Uncle was in severe pain, his leg was hurting and that his left foot was black, purple and about three times its normal size;
7. I told the Woman that my Uncle wanted to come to the hospital.
8. I tried to explain to the Woman how bad his foot was (that it was swollen, coloured and hurting) and that he needed to go to the hospital but, every time that I tried speaking, the Woman interrupted me and told me that I couldn't bring him in. The Woman kept telling me that there is no doctor there and that my Uncle's case was not considered an emergency. She said that they would not be willing to call a doctor for that condition.
9. Because of the way my Uncle's foot was (swollen and coloured), I thought that it was an emergency but the Woman told me not to bring my Uncle into the hospital because it was "after hours" and there was no doctor there and that they only take patients after 8:00 am;
10. I thought that the hospital would take a look at my Uncle and, if a doctor needed to look at him, they'd call one in, but the Woman told me not to bring him in; that I should wait until the next morning;
11. At no time did I ask if there was a doctor there. Rather, I said that I wanted to take my Uncle into the hospital and the Woman responded by saying that there was no doctor there.
12. At no time did the Woman ask me anything about the warmth of my Uncle's leg or how long it had been swollen or how the pain ranked on a scale of 1 to 10;
13. At no time did the Woman advise me to elevate my Uncle's leg;
14. At no time did the Woman say anything to the effect that my Uncle could come to the hospital for an assessment and that a doctor could be called in if necessary.
15. My Uncle died two to three days later, on June 26, 2012. I am told that he died of a Streptococcus A infection arising in the left foot leading to necrotizing fasciitis, commonly known as flesh-eating disease or flesh-eating bacteria syndrome.
16. My Uncle has many nieces but, as far as I know, I am the only person who ever phoned the Creston Valley Hospital on my Uncle's behalf.

**IV**

**Submissions of the Defendant**

**32**  The defendant seeks dismissal of the plaintiffs' claims under Rule 9-7, the summary trial rule. It reads, insofar as it is applicable:

1. A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
2. an action in which a response to civil claim has been filed ...
3. On the hearing of a summary trial application, the court may
4. grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application.

**33**  The test to be applied is found in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [*1990, 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=):

The test for Rule 18A, in my view, is the same as on a trial. Upon the facts being found the chamber judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

In deciding whether the case is an appropriate one for judgment under Rule 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, if the process is adversarial, the judge may be able fairly and justly to find the fact necessary to decide the issue.

**34**  In *Dahl et al. v. Royal Bank of Canada et al.*, [*2005 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1DT-00000-00&context=) at para. 12 (aff'd [*2006 BCCA 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3D8-00000-00&context=)) this court, per Gerow J. made the following observation at para. 20:

**20** On a Rule 18A application, the Court must be able, on the whole of the evidence, to find the facts necessary to decide the issues of fact and law and must be of the opinion that it would be just to decide the issues on the application. Where this is so, the Court should determine the matter, particularly where the plaintiff has adduced no evidence to dispute the evidence presented by the defendant or shown any substantial basis for concluding that the plaintiff could succeed in challenging the defendant's evidence. Rule 18A(11); *Finan*, [*[1985] B.C.J. No. 2516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-2152-00000-00&context=), at pp. 3, 4, 7, 11; *Inspiration Management Ltd.* at pp. 213 to 216.

**35**  The defendant submits that this case is suitable for disposition under Rule 9-7 particularly because the plaintiffs have failed to lead evidence respecting the standard of care or causation and have failed to meet their evidentiary burden in the circumstances. It submits that this legal burden is described in *Crnkovic v. Stockdill* (unreported) New Westminster No. S026054, Jan. 1, 1998, per Cohen J. at paras. 67 - 69:

**67** The onus is on the plaintiff to prove his allegations against the defendants, even on a summary trial pursuant to Rule 18A. See American Pyramid Resources Inc. v. Royal Bank of Canada [*(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=) at 105 (S.C.); Muira v. Muira [*(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.); 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=) (8 January 1996), Vancouver C931493 (S.C.) Zeledon v. Kelowna General Hospital et al., [*[1996] B.C.J. No. 2868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1XM-00000-00&context=), (4 September 1996), Kelowna 26347 (S.C.) and Hampton v. Marshall, [*[1996] B.C.J. No. 1948*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61VX-00000-00&context=), (11 September 1996), Vancouver B923834 (B.C.S.C.).

**68** The plaintiff has the burden of showing that the defendant doctors failed to meet the standard of care expected in the circumstances and that this failure caused or contributed to his injuries. The plaintiff in these circumstances must present evidence from experts in the field of medicine corresponding with each of the two defendant doctors to support his allegations against them. See Zeldon, supra at p. 20.

**69** As Sopinka J. stated in ter Neuzen, supra, at p. 591, quoting from Professor J.G. Flemming's text The Law of Torts 7th ed. (Sydney: Law Book Co., 1987), at p. 110:

Common practice plays a conspicuous role in medical ***negligence*** actions. Conscious at once of the layman's ignorance of medical science and apprehensive of the impact of jury bias on a peculiarly vulnerable profession, courts have resorted to the safeguard of insisting that ***negligence*** in diagnosis and treatment (including treatment of risks) cannot ordinarily be established without the aid of expert testimony or in the teeth of conformity with accepted medical practice.

**36**  The defendant also relies on *Shields v. Shortt,* [*[1999] B.C.J. No. 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21X7-00000-00&context=), Victoria Nos. 92-4396 and 93-4204, Feb. 15, 1999, (aff'd [*2001 BCCA 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G157-00000-00&context=), at para. 80) paras. 23 - 26 per Edwards J.:

**23** The onus is on the plaintiff, on a Rule 18A summary judgment application as it is at a full trial, to provide evidence to support the allegations of ***negligence*** made in the pleadings. In virtually all cases of alleged medical malpractice, expert evidence will be required to meet that onus. [See: ter Neuzen v. Korn [*(1995), 11 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) (S.C.C.)]. The plaintiff has failed to meet that onus here.

**24** This case bears a remarkable similarity to Crnkovic v. Stockdill, [*[1998] B.C.J. No. 3187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1PG-00000-00&context=), (January 9, 1998, No. S026054, New Westminster Registry) in which Cohen J. dismissed a malpractice action against doctors and a hospital brought by an unrepresented plaintiff. The plaintiff there as here failed to provide expert evidence to support the claims of ***negligence***.

**25** The plaintiff says she needs a lawyer to get expert evidence. That presumes expert evidence could be obtained to support her claims of ***negligence***.

**26** Special care must be taken to ensure that unrepresented litigants are not disadvantaged. Defendants must be fairly treated as well. Neither side should incur unnecessary expense or exposure to legal costs by having a case go to trial which has no prospect of success.

**37**  The defendant submit that the burden is on the plaintiffs to prove that it fell below the required standard of care and that that breach of duty caused a loss. This includes the filing of expert opinion evidence in cases of medical ***negligence***, including claims against nurses. In *Heidebrecht v. The Fraser-Burrard Hospital Society* (unreported) Vancouver No. C933456, October 10, 1996, at paras. 120-121 this court per Henderson J. observed:

**120** In the absence of expert evidence, I am not satisfied that the failure to warn Dr. Chan of these new symptoms was a breach of the standard of care expected of a registered nurse. The complaints of soreness and stiffness were subjective complaints that could have been a lingering result of the use of 4 point leather restraints. The nurses were aware that Dr. Chan, whose sole responsibility it was to provide a diagnosis, considered Decadron psychosis to be the most likely problem.

**121** Nursing is an independent profession with its own practices, procedures, and standards of competence. The fact that Dr. Griesdale 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 Dr. Chan's attention.

**38**  In *Crnovic*, Cohen J. at para. 85 also noted the need for expert evidence in claims against nurses:

**85** Finally, as counsel for the defendant Hospital submitted, the plaintiff has led no expert medical evidence to indicate that the nursing staff fell below the standard approved practice in any area of the treatment they rendered to the plaintiff. She cited Heidebrecht v. Chan, (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=)), (10 October 1996), Vancouver C933456 (B.C.S.C.), for the proposition that the nursing profession is its own independent profession with its own independent duties and standards of care and, therefore, that expert evidence with regard to a breach of that standard of care is required in order to succeed in a claim in ***negligence***.

**39**  The defendant submits that the plaintiffs cannot succeed without expert evidence because the case does not involve a kind of ***negligence*** on which an ordinary person could pass judgment sensibly, as set out in *Zeledon v. Kelowna General Hospital et al.*, [*[1996] B.C.J. No. 2868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1XM-00000-00&context=) (S.C.) per Mackenzie J. at paras. 45 - 46:

**45** On the case before me, I find that expert evidence supporting the plaintiff's case was required because this case does not involve alleged ***negligence*** on which an ordinary person could pass judgment sensibly. There is not an obviously patent error or breach of standard of care.

**46** The plaintiff must establish the defendant doctors failed to meet the standard of care expected in the circumstances and that failure to meet the standard of care caused or contributed to her injuries. She must present evidence from experts in the fields of medicine corresponding with each of the two defendant doctors to support her allegations against them. See Belknap et al v. Meakes [*(1989) 1 C.C.L.T. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=) (B.C.C.A.) at 220-221 and ter Neuzen v. Korn, supra.

**40**  The defendant further submits that, in any event, the evidence demonstrates that the nursing staff followed the orders of the treating emergency physician and acted within the scope of their practise. The defendant submits that none of the particulars of ***negligence*** alleged, including "a diagnostic examination", the failure to conduct tests of blood, urine or other bodily samples "which a reasonable physician exercising reasonable diligence in the circumstances would have conducted", or to prescribe medication, or to admit or discharge the plaintiff from hospital are duties within the scope of responsibility of the hospital employees for whom the defendant is responsible.

**41**  The defendant submits that the duties its employees are alleged to have breached are duties which, if anything, are owed to the plaintiff by the treating physician. That doctor is not named as a party and no claim is made against the defendant suggesting that it is vicariously liable for the doctor's actions.

**42**  The defendant submits that, to the extent the claims are founded on issues of medical diagnosis and treatment, liability cannot attach to the hospital. Diagnosis and treatment are not the responsibility of the defendant's nursing staff. In *Tekano v. Lions Gate Hospital et al.*, [*[1999] B.C.J. No. 1763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0WP-00000-00&context=) this court, per Macaulay J. observed at paras. 109-110:

**109** Nurses will be held to the standard of care expected of a registered nurse of average competence. As with physicians, nurses will not generally incur liability in ***negligence*** for errors in judgment: 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=), (October 10, 1996) Vancouver C933456 (B.C.S.C.) at 46. Generally, expert evidence is required to establish the standard of care expected of a registered nurse of average competence. As Henderson J. stated in Heidebrecht, supra, at para. 121:

Nursing is an independent profession with its own practices, procedures, and standards of competence.

**110** It is clear, however, that nurses are not responsible for diagnosis, nor are nurses free to depart from a physician's instructions absent "clear and obvious" neglect or incompetence. In Serre v. de Tilly [*(1975), 58 D.L.R. (3d) 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M42B-00000-00&context=) (Ont. H.C.), the court considered the liability of nurses who, in accordance with a physician's instructions, discharged a patient. The patient later died. In dismissing the action against the nurses, the court stated, at 367:

I cannot accept the argument that if any of the nurses or hospital servants disagreed with the findings or direction of the family doctor, that they should have acted independently or called in other medical advice. Diagnosis is surely not a function of the nurse; and less there were clear and obvious evidences of neglect or incompetence on the part of the family doctor, it would be unthinkable that the hospital or its agents should interfere with or depart from his instructions.

**43**  It has long been established that hospitals are not responsible for the ***negligence*** of non-employed medical staff. In *Yepremian et al. v. Scarborough General Hospital et al.*, [*(1980) 110 D.L.R. (3d) 513*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JG59-22SW-00000-00&context=) at pages 531-532 the Ontario Court of Appeal, per Arnup J.A. observed:

... Implicit in conclusion 3 is the determination that the principle of respondent superior has nothing to do with this case and the liability of the hospital cannot be founded upon the application of the principle. With this conclusion, I agree.

The trial Judge has founded liability upon a breach of the hospital's own duty - not that of an employed doctor, or of a doctor chosen by it to be on its staff, but an independent duty of its own, which is breached if there is a failure by a specialist on its staff to use reasonable skill and competence in the treatment of a patient in the hospital under his care. I agree that unless there exists in law a "non-delegable duty of care" owned by the hospital to the patient, the hospital is not liable in this case.

No Court in Canada has ever found before that such a duty exists, and with great respect to the trial Judge, I am not persuaded by his reasons that there is such a duty.

**44**  This has been followed in a number of cases in British Columbia, including *Crnovic*. In *Stewart v. Noone*, [*[1992] B.C.J. No. 1017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0TD-00000-00&context=), our Court of Appeal, per Saunders J.A. quoted the above passage at para. 74.

**45**  The defendant submits that Dr. Du Preez is not an employee of the IHA and that, in any event, there is no competent opinion evidence to suggest the Dr. Du Preez was negligent.

**46**  The defendant submits that the plaintiffs have failed to show that the death of the deceased was caused to or contributed to by any act or omission of the defendant or its employees.

**47**  The defendant further pleads that the claims of the plaintiffs are, in any event, barred by the two year limitation set out in s. 3(2) 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=). The defendant pleaded the limitation. The plaintiffs have not replied to assert any positive reason, or circumstances which might bring the postponement provision s. 6(4) consideration. By virtue of Rule 3-6(3) they are deemed to have joined issue with the allegation, but there is no evidence before the court addressing the delay. In the absence of such circumstances the applicability of a statutory bar is not a matter of discretion. In *Ince v. Sanders*, [*2010 BCSC 872*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22B4-00000-00&context=), this court per Ehrcke J. noted at paras. 30 - 32:

**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;

**48**  The defendant submits that the plaintiff Zack Basil, the 4th, is not, in any event, a proper party. Zack Basil the 4th was born after Zachary Basil died, and was never a "child", that is, "a person to whom the deceased stood in the role of a parent", as the statute defines the term.

**49**  The defendant submits that the plaintiffs' claim for damages for discrimination and humiliation under the *Human Rights Code* *R.S.B.C. 1996, c. 210* cannot be maintained by the representative plaintiff because such rights are personal. In *HMTQ v. Gregoire* [*2005 BCSC 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S148-00000-00&context=) (aff'd [*2005 BCCA 585*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2NH-00000-00&context=)), this court per Cohen J. observed at paras. 32 - 38:

**32** First, I agree with the Province's position that human rights established by the Code are "personal" and abate on the death of the person whose human rights have been breached. Under s. 21(1) of the Code, "Any person or group of persons that alleges that a person has contravened this Code may file a complaint with the tribunal ...". Under s. 21(4) of the Code, a complaint under ss. (1) may be filed on behalf of:

1. another person, or
2. a group or class of persons whether or not the person filing the complaint is a member of that group or class.

[emphasis mine]

**33** In my opinion, it is clear that the Code establishes "personal" rights. In order for a representative complaint to be filed, there must be an individual "person" or a group or class of "persons".

**34** Further, the human rights protected under the Code and the remedies to be granted are available to a "person": See Code ss. 7-10, 13 and 37. In the instant case, the alleged contravention arises from s. 8 of the Code, the relevant portions of which provide, as follows:

1. A person must not, without a bona fide and reasonable justification,
2. deny to a person or a class of persons any accommodation, service or facility customarily available to the public, or
3. discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the ... physical or mental disability ... of that person or class of persons.

**35** Section 8 makes it clear that the Code creates "personal" rights. If there is no person, then there is no one on whose behalf a complaint has been filed, and there is no one who is being discriminated against. In short, there is no basis for a complaint.

**36** Furthermore, s. 37 of the Code allows for the Tribunal to make orders to "compensate the *person* discriminated against", make available to the "*person* discriminated against the right opportunity or privilege that ... was denied", and "pay to the person discriminated against an amount ... to compensate that *person* for injury to dignity, feelings, and self respect ..." [emphasis mine].

**37** Moreover, I agree with counsel for the Province that the fact that the Code protects "personal" rights is supported by the case law considering the effect of the death of a litigant in constitutional cases: See Stinson Estate, [*[1999] B.C.J. No. 2903*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-233G-00000-00&context=), supra; Wilson Estate, [*[1996] B.C.J. No. 1264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1PG-00000-00&context=), supra; Re Caddedu, [1983] B.C.J. No. 3005, supra; and Collins v. Abrams, [*[2002] B.C.J. No. 2917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3T3-00000-00&context=), [*2002 BCSC 1774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3T3-00000-00&context=), Aff'd [*[2004] B.C.J. No. 376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3MY-00000-00&context=), [*2004 BCCA 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3MY-00000-00&context=).

**38** In the case at bar, the Complaint was filed on behalf of Mr. Goodwin against the Province. Like the circumstances in the constitutional cases where the lis between the parties died with the claimant, by analogy, the lis between Mr. Goodwin and the Province died with Mr. Goodwin.

**50**  The defendant also submits that damages under the *Family Compensation Act* are restricted to pecuniary loss and loss of benefits sustained by the spouse, parent or child of the deceased but do not extend to aggravated damages. In *Campbell v. Read*, [*[1987] B.C.J. No. 2726*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22F8-00000-00&context=), [*1987 CanLII 2402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22F8-00000-00&context=) (C.A) at para. 16 the Court of Appeal per Hutcheon J.A. observed:

[16] Claims under this Act have been restricted to pecuniary loss and benefits sustained by the spouse, parent or child of the deceased victim, which they would have enjoyed had the person not died as a result of the conduct of the tortfeasor: see *Ponyicki v. Sawayama,* [*[1943] S.C.R. 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B01D-00000-00&context=) at 206-207, [*[1943] 2 D.L.R. 545*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B01D-00000-00&context=) [B.C.]

[17] Circumstances which may aggravate the loss or damage sustained by an injured party are personal to that individual in the same sense as is the pain, suffering and loss of amenities experienced by the injury party. Such loss is not an injury of the kind dependents sustain as a "result of the death of the deceased".

**V**

**Submissions of the Plaintiffs**

**51**  The plaintiffs rely solely on the affidavit of Jolene Basil. The strongest possible reading of her affidavit is that an employee of the CVH did not take her description of Zachery Basil's pain seriously and deterred her from attending the hospital. Her description of Zachery Basil's circumstances, and of her own suggest that a lack of means has been a factor in the pace of the litigation.

**52**  The plaintiffs' legal position is dependent on an inference of causation being drawn from the *fact* of Zachery Basil Sr.'s death back to the fact that no laboratory tests were ordered when he attended EKRH on June 22, 2008. The plaintiffs assert that the defendant does not deny that no tests were ordered, as if the inference that this caused Mr. Basil's death is self-evident.

**53**  The plaintiffs assert that "the defendant has not provided sufficient evidence" to enable the court to determine the legal characterization of the relationship between the defendant and Dr. Du Preez.

**54**  They also assert that there is a dispute about the evidence provided by David Elliott that should be resolved by trial.

**55**  The plaintiffs flatly assert that the defendant has not provided sufficient evidence to the court to enable it to find the facts necessary to decide the material issues of fact and law, and submits that the case is inappropriate for disposition under Rule 9-7.

**VI**

**56**  The difficulty for the plaintiffs is that, as the cases show, the burden of proof remains with them. It is not uncommon for defendants to bring on applications for summary dismissal at a point where it would be unfair to the plaintiffs to decide, because the proof of the case is not fully developed. This can be particularly true in cases like those involving medical ***negligence*** where the proof may lie largely in the hands of the defendant. It is often inappropriate to accede to summary judgment before the plaintiffs have had an opportunity to conduct discoveries or to obtain access to the relevant documents and records through discovery. These difficulties can sometimes be compounded by lack of resources, and courts must be careful to take account of such circumstances where they may have a bearing on the state of the plaintiffs' preparation.

**57**  In the present case the court has been advised that no discoveries have been held. It is not clear whether documents have been fully exchanged but, in any event, no explanation is offered to suggest that there are circumstances which have prevented the plaintiffs from moving the action along, such that now, some four years after the event, they are unable to present a case that meets the defendant's application.

**58**  Instead, the plaintiffs offer no proof in support of their contention that responsibilities normally performed by Doctors should, in this case, have been performed by nurses, and that their failure to do so caused the harm alleged. The plaintiff has developed no evidence that the court could weigh or consider to support the central proposition of the case: that there were tests that, if performed, would have led to a different, more aggressive treatment regime, or would have made a difference. Even assuming, for the sake of argument, that the nurses should have ordered the tests, or in the alternative, that the doctor should have (and that the doctor's ***negligence*** in failing to do so was a matter for which the defendant should be liable), there is no evidence that any specific test or tests would have revealed the problem or led to a different treatment regime. That is a matter that could obviously have been addressed by expert opinion evidence, which could have been developed by now. The plaintiffs make no excuse for not having done so, but simply submits that the onus on this application is on the defendant. That is not the law as the defendant has pointed out (see paras. 35-36 herein).

**59**  The plaintiffs are presently unable to show:

1. That anything anyone failed to do caused the death of the plaintiff. That is, leaving aside the question of whether the doctor or the nurses are responsible for ordering tests, there is no evidence of what the tests might have shown or whether anything could have been done as a result.
2. That, in the face of the defendant's denial of responsibility for the specific items of ***negligence*** identified in the pleadings, on the basis that all of those allegations relate to matters for which the Doctor was responsible, there is any case to be made for the proposition that:
3. the Doctor was in this case an agent or employee of the defendant, or;
4. the Nurses had the responsibility in the context, of this case for activities normally undertaken by Doctors;
5. there is any basis on which to postpone the limitation period which has expired;
6. that with respect to the allegations made about the CVH, assuming they were true, the delay in bringing Mr. Basil in to the Creston Hospital had any causative effect.

**60**  It is not sufficient for the plaintiffs to make generalized allegations, and to take no steps following the issue of process to establish whether its suspicions are borne out in the evidence. The defence is entitled to lead its evidence and to put the plaintiffs to the proof of their case. A case based on evidence, including expert evidence negating the plaintiffs' claims, must be met by more than an assertion that the claim is just generally not suitable for disposition under Rule 9-7.

**61**  The plaintiffs' responsibility in the circumstances was to lay out an arguable evidentiary case that, if accepted, would support a judgment in their favour. The alternative would be to persuade the court that the plaintiffs had made their best efforts to assemble a case but that the hearing was premature. The court has a wide discretion in such matters in the interests of justice.

**62**  It is not in the interests of justice for the plaintiffs to commence a proceeding outside of the limitation period; to neither plead nor provide evidence that suggests that the running time should be postponed; to fail to address substantive evidence that meets each element of their case, or to fail show that their inability to meet the case arises as a result of difficulties the court ought to accommodate.

**63**  It may be superfluous in the circumstances but I note that the plaintiffs do not answer any of the defendant's submissions respecting the *Human Rights* claims, the joinder of Zachary Basil the 4th by his grandson ad litem Mary Basil, or the claim for aggravated damages.

**VII**

**64**  In view of the Plaintiffs' failure to meet any aspects of the case advanced by the defendant my ruling is that:

1. The evidence, which the court is in a position to accept, establishes that no claim in ***negligence*** can be maintained against the defendant or its employees;
2. Even if that were not the case, the claim is struck on the basis that it is out of time contrary to the *Limitation Act*,and no circumstances have been advanced justifying a postponement;
3. For further clarity, in any event paragraphs 48 - 56 and 64(6) would have been struck from the Notice of Civil Claim and the name of Zachary Basil the 4th struck from the style of cause.

**65**  Accordingly the application is allowed and the plaintiffs' claims are dismissed.

T.M. McEWAN J.

**End of Document**

[***Cragg v. Tone, [2006] B.C.J. No. 1555***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G34N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.M. Davies J.

Heard: February 27, and March 2 - 3, 6 - 10 and 13

- 15, 2006.

Judgment: June 30, 2006.

Vancouver Registry No. S020246

**[2006] B.C.J. No. 1555** | 2006 BCSC 1020 | 151 A.C.W.S. (3d) 953

Between George Philip Cragg, plaintiff, and David Allan Tone and The District of West Vancouver, defendants

(181 paras.)

**Case Summary**

**Municipal law — Liabilities of municipality — Tortious liability — *Negligence* — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault.**

**Municipal law — Actions by or against municipalities — Types of actions against municipalities — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault.**

**Professional responsibility — Professional duties — Duties of care and *negligence* — Standard of care — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault — The loss suffered by the plaintiff was a consequence of the minimization of his concerns in face of the very real danger posed by Tone's threats materially contributed to by the actions of the WVPD and was foreseeable.**

**Professional responsibility — Professions — Other — Police — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault — The loss suffered by the plaintiff was a consequence of the minimization of his concerns in face of the very real danger posed by Tone's threats materially contributed to by the actions of the WVPD and was foreseeable.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Standard of care — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault — Tone was held to be 85 per cent liable for the damages, while the district was liable for the remaining 15 per cent.**

**Tort law — Trespass — To person — Assault — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault.**

**Tort law — Defences — Provocation — The defendant District of West Vancouver was jointly and severally liable with the aggressor defendant Tone for the damages suffered by the plaintiff due to police *negligence* in failing to properly respond to a 911 call, and thereby failing to prevent the damages sustained by the plaintiff in an assault — The evidence did not support the defence of provocation as the defendant Tone was the aggressor in all dealings with the plaintiff.**

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| Both parties were jointly and severally liable for the assault, in an 85/15 per cent split -- The plaintiff was having a relationship with the defendant Tone's ex-wife -- After several incidents of alleged harassment by Tone, which included several challenges to fight, when both the plaintiff's vehicle and the ex-wife's vehicle were vandalized, the plaintiff called Tone to ask him to leave them alone -- Then he called the police to report the vandalism, the harassment, and that Tone had challenged him to a fight -- After telling the plaintiff that police assistance was imminent, the police filed the report as a "damage to auto" report which could acceptably be responded to the next day -- Meanwhile, the defendant had phoned the ex-wife, had discovered that a complaint had been lodged with the police, had phoned the police to make his own complaint, wherein he disclosed that he had driven over to the plaintiff's house -- Next Tone burst through the front door and assaulted the plaintiff, who suffered serious injuries -- The question to be determined was the liability of the both the defendant Tone and the defendant District of West Vancouver -- Both defendants presently alleged that the plaintiff's conduct in telephoning Tone that evening to confront him over alleged damages to his and Buchanan's cars that day amounted to provocation -- HELD: Both defendants were jointly and severally liable to the plaintiff/plaintiff; with Tone being responsible for 85 per cent of the damages, and the district for the other 15 per cent -- The defendant Tone, who had been found guilty of criminal assault charges with respect to the incident, was liable for the assault, and the evidence was incapable of supporting a defence of provocation -- The defendant was found to have always been the aggressor in his dealings with the plaintiff -- Based on the transcript of the call to the police, where the plaintiff responded to the question: "You are not afraid that he is going to be showing up there anytime soon are you?" by saying: "Oh, I'll just lock the door" was a reactive rather than a considered response, and the plaintiff was not fearful of an imminent confrontation at his home with the defendant when he called the police -- However, the plaintiff had met the burden of proving that in all the circumstances, including the prior reported threats and the particulars of the events of the day in question, the WVPD owed him a duty of care to protect him and that the risk of harm to him was reasonably foreseeable if Tone's actions were not constrained by appropriate police intervention -- Policy reasons did not prevent the imposition of this duty as no issues of remoteness or resource allocation arose -- The call taker had fallen significantly below the standard of care expected from her by prejudging its seriousness, failing to explore obvious concerns, and by transmitting the call for dispatch as a routine low priority mischief call with no hint or threat of violence -- She compounded the effect by assuring the plaintiff of imminent police assistance -- The loss suffered by the plaintiff was a consequence of the minimization of his concerns in face of the very real danger posed by Tone's threats materially contributed to by the actions of the WVPD and was foreseeable. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B067-00000-00&context=), s. 4

Police Act, R.S.B.C. 1966, c. 367, s. 20, s. 26(2), s. 34(2)

**Counsel**

Counsel for the Plaintiff: J.E. Murphy, Q.C.

The Defendant, acting on his own behalf: D.A. Tone

Counsel for the Defendant, The District of West Vancouver: D.G. Butcher, K. Bastow

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| **B.M. DAVIES J.** |

**INTRODUCTION**

**1**  On August 19, 2001, the defendant, David Tone, broke down the door to the home of the plaintiff, George Cragg, in West Vancouver. He then assaulted Mr. Cragg causing him serious personal injury.

**2**  Although the West Vancouver Police were alerted to the potential for serious trouble between the two men that night, they failed to respond to that alert in a way that would have allowed them to prevent the assault.

**3**  This judgment addresses only the alleged liability of the defendants for the injuries suffered by Mr. Cragg. Damages issues will be considered later.

**ISSUES**

**4**  On May 22, 2003, Mr. Tone was convicted of assault causing bodily harm for his role in the beating of Mr. Cragg. That conviction, together with the evidence adduced at trial, conclusively establish that Mr. Tone is civilly liable for assaulting and causing bodily injury to Mr. Cragg.

**5**  Also, at the conclusion of argument, I ruled that the evidence adduced at trial was incapable of supporting a defence of provocation arising from Mr. Tone's anger concerning Mr. Cragg's romantic relationship with Mr. Tone's ex-wife, Joan Buchanan. Accordingly, no issues of contributory ***negligence*** alleged by either defendant as stemming from Mr. Cragg's conduct regarding that relationship remain for determination.

**6**  One discrete issue of contributory ***negligence*** does, however, remain. It concerns Mr. Cragg's conduct in telephoning Mr. Tone on the evening of August 19, 2001 to confront him over alleged damages caused to Mr. Cragg's and to Ms. Buchanan's automobiles that day. Both defendants allege that this conduct was sufficiently provocative and blameworthy that any liability which they may have for the injuries suffered by Mr. Cragg must be apportioned amongst all parties.

**7**  In summary, therefore, the remaining issues to be determined are:

1. Is the defendant, The District of West Vancouver ("The District"), liable to the plaintiff by reason of the alleged ***negligence*** of the West Vancouver Police Department (the "WVPD") in failing to prevent the assault of Mr. Cragg by Mr. Tone?
2. Do Mr. Cragg's actions in confronting Mr. Tone alleging his responsibility for damage to the two vehicles require the apportionment of liability amongst all of the parties?

**BACKGROUND**

**8**  The plaintiff, George Cragg, is an architect and businessman who is now 54 years old. At all material times he resided on Gleneagles Drive in West Vancouver, British Columbia.

**9**  The defendant, David Tone, is now 49 years of age. At the time of his assault on Mr. Cragg he lived with his two sons on Gisby Street in West Vancouver, British Columbia, approximately 13 kilometres or 15 minutes by car away from Mr. Cragg's home. Mr. Tone was still married to Ms. Buchanan at the time of the assault but they had separated in the fall of 2000 after 20 years of marriage.

**10**  When the assault occurred Ms. Buchanan was residing with her parents in West Vancouver but also occasionally stayed with Mr. Cragg. Mr. Tone and Ms. Buchanan were divorced after the assault.

**11**  After her separation from Mr. Tone, Ms. Buchanan began to see Mr. Cragg and they eventually became romantically involved.

**12**  Mr. Tone did not react well to the separation nor to Ms. Buchanan's involvement with Mr. Cragg. Over time his negative reaction evolved from disappointment to anger and obsession. While I regret that it is necessary to review the history of the relationship amongst Mr. Tone, Mr. Cragg and Ms. Buchanan, I must address some of the important events that became the subject of dispute at trial because they are relevant to my determinations of credibility and to my consideration of the contributory ***negligence*** issues that must still be decided.

**13**  Because of the conflicting evidence of Mr. Cragg, Mr. Tone and Ms. Buchanan concerning those events, it is also necessary for me to record my assessment of the credibility of each witness and the extent to which I have determined that I may rely upon their testimony. Although I will deal with specific testimonial conflict as necessary in relation to particular events, my general assessment of those principle witnesses is that:

1. Mr. Cragg's evidence was largely internally consistent and also consistent with the available documentary evidence and the evidence of the police witnesses. He was generally responsive to questioning on cross-examination and there were no material differences between his evidence at trial and at examination for discovery. I am, however, satisfied that Mr. Cragg tended to downplay his own anger and willingness to engage in verbal insults during the various encounters with Mr. Tone that led up to Mr. Tone's assault on him on August 19, 2001.
2. Mr. Tone's evidence was internally consistent but largely inconsistent with the evidence of Mr. Cragg and Ms. Buchanan. While Mr. Tone was prepared to admit those facts that could not be disputed because of hard evidence such as telephone records or contemporaneous police reports, he, at all times, cast himself as a victim or attempted to minimize his behaviour by reference to being under emotional duress due to Mr. Cragg's involvement with Ms. Buchanan. I reject those characterizations, both of his behaviour and of the emotional state which gave rise to that behaviour. I have concluded that Mr. Tone's evidence must be treated as being self-serving and unreliable.
3. Ms. Buchanan was in a very difficult position as a witness just as she was as a participant in the events that led to Mr. Tone's assault on Mr. Cragg. I am satisfied that she generally attempted to be a truthful witness. I have also, however, concluded that the reliability of her testimony is seriously compromised by:
4. her history with Mr. Tone;
5. her significant continued interaction with Mr. Tone during the period after her separation and the time prior to the assault;
6. Mr. Tone's obvious emotional influence upon her and attempted control of her actions during that period, including his inundation of her with his self-serving and manipulative versions of confrontations between he and Mr. Cragg;
7. what I consider to be her disingenuous testimony related to the extent of her own participation in Mr. Tone's video-taping of her and Mr. Cragg in Mr. Cragg's home in January of 2001;
8. the inexplicable contradiction between her evidence and that of Constable Del Bianco relating to her denial that she was present in Mr. Cragg's home during Constable Del Bianco's investigation of certain telephone calls from Hawaii;
9. the impossibility of reconciling her version of the content and timing of the telephone discussions between Mr. Tone and Mr. Cragg immediately prior to the assault on August 19, 2001 with Mr. Tone's telephone cellular records which establish that she had more and longer calls with him that evening than she is now able to recall; and
10. her present antipathy toward Mr. Cragg arising from their own disputes that culminated in litigation after their relationship came to an end which, I am satisfied, caused her either deliberately or otherwise to minimize or excuse Mr. Tone's actions against Mr. Cragg both prior to and on August 19, 2001 and attribute blame to Mr. Cragg.

**14**  As a consequence of my assessment of the credibility of these important witnesses, I have determined that, unless I reach a different conclusion with respect to any specific evidentiary point or issue, where the evidence of Mr. Tone is in conflict with that of either Mr. Cragg or Ms. Buchanan, I prefer their evidence. Similarly, unless I reach a different conclusion concerning any particular evidence or issue, where the evidence of Ms. Buchanan is in direct conflict with that of Mr. Cragg, I accept Mr. Cragg's evidence.

**15**  With those findings in mind, I now turn to the important background circumstances that preceded Mr. Tone's assault upon Mr. Cragg on August 19, 2001.

**16**  There is little controversy that the first significant encounter between Mr. Tone and Mr. Cragg after Ms. Buchanan's separation from Mr. Tone occurred in October 2000 at a Starbuck's restaurant.

**17**  Mr. Tone testified that during that encounter Mr. Cragg agreed that he would "back off" from the relationship with Ms. Buchanan. Mr. Cragg testified that he only told Mr. Tone that Mr. Tone would "get over her". Both men testified that the meeting was amiable.

**18**  In December 2000, Ms. Buchanan returned to live with Mr. Tone for a short period of time. She then left again after the Christmas season but one evening in January 2001 returned to the matrimonial home to cook dinner. Sometime after that she left, telling Mr. Tone that she intended to go to Mr. Cragg's home.

**19**  Later that evening, in a bizarre series of events, Mr. Tone attended Mr. Cragg's home with a video camera and from a position on the deck surreptitiously taped some intimate moments between Mr. Cragg and Ms. Buchanan.

**20**  Following that episode Mr. Tone and Mr. Cragg had another encounter at a Starbuck's coffee house. This occurred on March 7, 2001, and again the testimony of Mr. Tone and Mr. Cragg as to what occurred is widely divergent.

**21**  Mr. Cragg testified that he called Mr. Tone to ask for a meeting to obtain the videotape taken by Mr. Tone from Mr. Cragg's deck in January. He testified that Mr. Tone refused to give over the tape, swore at him, insulted him and said that he would "split [Mr. Cragg's] spine, break his neck and get the people he loved".

**22**  Mr. Tone testified that Mr. Cragg confronted him with a list of wrongs committed upon Ms. Buchanan and their children during their marriage. He also stated that Mr. Cragg said that he would "cut off [Mr. Tone's] balls and stuff them down his throat" and challenged him to a fight requiring an attendant at the coffee shop to tell them to "take it outside". Mr. Tone testified that he walked away but that it was all he could do not to escalate matters.

**23**  Ms. Buchanan testified that after the Starbuck's encounter she discussed it with both protagonists and was told by Mr. Tone about the list and Mr. Cragg's alleged threats. She said she then confronted Mr. Cragg about the using of the contents of the list and that he said he used it because he did not want to forget what he had been told by her when he met with Mr. Tone. She also testified that Mr. Cragg had stated that he could not fight with Mr. Tone because he [Mr. Cragg] was dressed for a meeting.

**24**  I accept Ms. Buchanan's evidence that Mr. Cragg admitted to confronting Mr. Tone with a list because of the personal importance to her of the items discussed. I also find that Mr. Cragg demanded the return of the videotape from Mr. Tone. I do not consider Ms. Buchanan's hearsay evidence concerning threats allegedly made by Mr. Cragg against Mr. Tone to be reliable. That evidence was compromised by what Mr. Tone told her had occurred and I reject his evidence.

**25**  I also find that that Mr. Tone threatened Mr. Cragg and those he loved with violence. I reach those conclusions because of:

1. the relative stature of the two men;
2. Mr. Tone's history of physical aggression towards men who showed interest in Ms. Buchanan;
3. the events that next transpired which lead to the conclusion that Mr. Tone was at all times the threatening aggressor in the continuing confrontations between he and Mr. Cragg; and
4. the later reports made by Mr. Cragg to the police about these events in the presence of Ms. Buchanan.

**26**  I further find that it is likely that Mr. Cragg told Ms. Buchanan that he could not fight Mr. Tone that day. However, any such statement was made out of a sense of bravado, not because he was the aggressor as alleged by Mr. Tone.

**27**  Concerning my determination that Mr. Tone was at all times the threatening aggressor in the continuing confrontations between he and Mr. Cragg, I refer to events that occurred later in March 2001 while Mr. Tone was vacationing in Hawaii.

**28**  In Hawaii, on the evening of March 13, 2001, Mr. Tone had been drinking and became angry. Mr. Cragg then received a series of four "hang up" calls at his home between 1:00 a.m. and 2:20 a.m. on March 14, 2001 and managed to trace the last call to Mr. Tone. He then contacted the West Vancouver Police.

**29**  Constable Del Bianco of the WVPD attended at Mr. Cragg's home shortly after Mr. Cragg traced the call to Mr. Tone. I find that notwithstanding Ms. Buchanan's evidence that she was not there at the time, Mr. Cragg advised Constable Del Bianco, in the presence of Ms. Buchanan, of the prior threat made by Mr. Tone against him at Starbucks the week earlier and stated that he was afraid for his safety.

**30**  I also find that Constable Del Bianco advised Mr. Cragg that he could proceed with a peace bond application or instigate charges of threats and harassment against Mr. Tone and that Mr. Cragg responded that he just wanted the police to call Mr. Tone and tell him to stop calling.

**31**  Constable Del Bianco then returned to the police detachment and called Mr. Tone who told the officer he had called the Cragg residence because he was looking for Ms. Buchanan. After being told by the police not to contact Mr. Cragg anymore, Mr. Tone agreed he would not call again.

**32**  The incident concluded with Constable Del Bianco advising Mr. Cragg of his discussion with Mr. Tone and advising Mr. Cragg to monitor his calls.

**33**  The next day, however, Ms. Buchanan retrieved a message from her cellular telephone left by Mr. Tone the prior evening referring to Mr. Cragg and saying, amongst other things, that "I'm going to slice him and dice him". When he learned of that telephone message from Ms. Buchanan, Mr. Cragg determined to once more involve the police and that afternoon he and Ms. Buchanan met with Constable Derouin at the West Vancouver Police station.

**34**  Constable Derouin told them that the police could have Mr. Tone picked up by the Maui police or at the airport on his return to Vancouver. Ms. Buchanan opposed either process because Mr. Tone was travelling with two of their sons. It was also her view that she knew Mr. Tone best and that she believed that he could best be handled by giving him time to adjust to life without her. She also asked the police not to advise Mr. Tone that she had been to the police station with Mr. Cragg.

**35**  In the result, Mr. Cragg agreed that the police should do nothing except again talk to Mr. Tone and tell him to desist and that Mr. Cragg would continue to monitor his telephone calls. That report ended with Constable Derouin giving Mr. Cragg a card with the telephone number of the WVPD to be called if the situation escalated.

**36**  The following day, after again being contacted by the police, Mr. Tone sent flowers to Ms. Buchanan and her parents who had also heard the threatening message left on her cellular phone.

**37**  Over the next months it appeared to Mr. Cragg and Ms. Buchanan that her strategy of not having the police do more than warn Mr. Tone had worked because they had no more significant encounters with Mr. Tone until August 19, 2001 when he attacked Mr. Cragg in his home.

**38**  In that intervening period there were, however, a number of encounters that in retrospect lead to the conclusion that Mr. Tone's obsession and anger were not wholly curtailed by the police warnings and that he may have been stalking Mr. Cragg, Ms. Buchanan or both.

**39**  One day in July, Mr. Cragg saw Mr. Tone at the entrance to his driveway although Ms. Buchanan said he was about two houses away where a family friend resided. Mr. Cragg and Ms. Buchanan next encountered Mr. Tone on two separate occasions in a restaurant in Vancouver in the three weeks before the assault. On one of those occasions Mr. Tone walked by their table making contact with Mr. Cragg's shoulder with some force.

**40**  Mr. Cragg was concerned about these encounters but did not report them to the police because they were all potentially explicable as innocuous or as happenstance.

**41**  On the other hand, the events of August 19, 2001, immediately preceding Mr. Tone's assault on Mr. Cragg, chillingly evidence the extent and depth of Mr. Tone's obsession with the relationship between Mr. Cragg and Ms. Buchanan and the extent of his hatred of Mr. Cragg.

**42**  In the morning of August 19, 2001, Mr. Cragg and Ms. Buchanan went to her mother's house. They noticed that the back window of Ms. Buchanan's vehicle had been broken although nothing was stolen. Ms. Buchanan and Mr. Cragg each wondered whether Mr. Tone was responsible.

**43**  Mr. Cragg and Ms. Buchanan then drove to Thunderbird Marina in Mr. Cragg's vehicle where they parked and travelled to Wreck Beach in the Tone family boat. Wreck Beach was chosen because of clouds in Howe Sound. They arrived at the beach at approximately 3:00 p.m..

**44**  About 45 minutes after they arrived, Mr. Cragg saw Mr. Tone walking on the beach, apparently looking for someone. He eventually came towards Ms. Buchanan and Mr. Cragg and then sat staring at them from a log a short distance away. He did not say anything and left shortly after.

**45**  Mr. Cragg testified that he was surprised and shocked to see Mr. Tone and was very relieved when he left the beach.

**46**  After Mr. Tone left the beach, he went to Bridges Pub and consumed three or four pints of beer. On the way home he got into a car accident.

**47**  Mr. Tone testified that he had not known that Ms. Buchanan and Mr. Cragg were going to be at Wreck Beach. He also denied sitting on a log near them and staring at them. I do not accept that evidence because shortly after departing the beach, Mr. Tone called Ms. Buchanan on her cell phone asking where she had been that day. Mr. Tone's telephone records disclose that the call was made at 4:44 p.m. I accept Ms. Buchanan's testimony that she told Mr. Tone that he knew where she had been because he had seen her at the beach and that Mr. Tone replied that he just wanted to see if she would tell him.

**48**  Mr. Cragg and Ms. Buchanan left Wreck Beach at around 7:00 p.m. arriving back at Thunderbird Marina at about 8:00 p.m. Mr. Cragg then drove Ms. Buchanan to her parent's home.

**49**  Ms. Buchanan testified that when she arrived home, Mr. Tone again telephoned her. He told her that he had a "ton of kids" at his home and was trying to feed them dinner. He also told her he missed her cooking and having her there and informed her he had been in a car accident. He then asked her where she was sleeping that night.

**50**  Ms. Buchanan testified that she did not like the "flavour" of Mr. Tone's call asking where she was staying and decided to go to Mr. Cragg's home.

**51**  Mr. Cragg testified that after dropping off Ms. Buchanan, he stopped off at his brother's home to pick up a 30 or 40 page affidavit that he had to read and critique for a court application the following morning. He testified that he arrived home at about 8:30 p.m. and that when he unlocked the front door, he felt a breeze and discovered that the door leading to the deck from the master bedroom was open upstairs. He said he was sure that he did not leave it open and it could not have blown open.

**52**  Ms. Buchanan arrived at Mr. Cragg's house at about 9:00 p.m. Mr. Cragg testified that she looked shocked. She told him that she had noticed a scratch on the tailgate of his Jeep. She also told him about the disturbing telephone call from Mr. Tone and asked Mr. Cragg to come outside to the driveway where she pointed out a deep scratch along the tailgate of his vehicle.

**53**  Mr. Cragg testified that both he and Ms. Buchanan believed that Mr. Tone was responsible for the vandalism to their vehicles that day and that they discussed the "extraordinary events which had occurred today". He testified that he and Ms. Buchanan had agreed earlier that if there were any further "weird" occurrences with Mr. Tone, they would call the police.

**54**  Mr. Cragg also stated, both in examination in chief and in cross-examination, that notwithstanding that agreement and the events of August 19, 2001, Ms. Buchanan asked him to give Mr. Tone one more chance before calling the police and that he agreed to do so. To the extent that Ms. Buchanan's evidence contradicts Mr. Cragg's evidence about her request that Mr. Cragg not immediately contact the police, I do not accept it.

**55**  Mr. Cragg testified that when he called Mr. Tone to confront him about the vehicle damage he was very respectful. He denied he was angry when he made the call but did admit that he was upset. He testified that he told Mr. Tone that he thought Mr. Tone had scratched his car but denied telling him that he had a witness who had seen him vandalize the car. He also testified that he told Mr. Tone that he was not asking that Mr. Tone pay for the damage and that he only asked Mr. Tone to leave them alone. He further testified that Mr. Tone responded by asking him to meet him in a nearby parking lot to fight. Mr. Cragg said his response to that was "no, I have better things to do" and that he then hung up.

**56**  Mr. Tone testified that when he received Mr. Cragg's telephone call about the damage to his vehicle, he was making dinner for his sons and their friends. He also testified that by that time he had consumed a bottle of wine in addition to the four pints of beer at Bridges Pub earlier that evening. Mr. Tone further testified that Mr. Cragg was immediately accusatory, and told him that someone had seen him vandalize Mr. Cragg's car. Mr. Tone said that he said that was an untrue accusation and stated that Mr. Cragg swore at him in a "rapid fire" manner and also said "I have had enough of you. I'm going to ruin you" and "I'm going to waste you." He testified that Mr. Cragg invited him to fight him and then hung up on him.

**57**  Ms. Buchanan's version of the events of that first telephone call confirms some of the evidence of Mr. Cragg and some of that of Mr. Tone.

**58**  She testified that when Mr. Cragg called Mr. Tone, he said "I've got a big scratch on my car and I know you did it. We have proof, somebody saw you do it." She testified that Mr. Cragg then started swearing and yelling at Mr. Tone. She did not, however, confirm the same words or threats attributed to Mr. Cragg by Mr. Tone. She also did not agree that the challenge to a fight emanated from Mr. Cragg. She further testified that Mr. Cragg ended the conversation by saying "if you are not going to let me speak then I will hang up".

**59**  After having considered the totality of the evidence, I accept Mr. Cragg's testimony that he called with intent to ask Mr. Tone to leave them alone and did not seek recompense for the damage. While he did swear at Mr. Tone in response to Mr. Tone's aggressiveness towards him, he did not use the words attributed to him by Mr. Tone and made no threats. He also did not initiate any suggestion of a fight.

**60**  The question of whether Mr. Cragg told Mr. Tone that he had a witness who had seen Mr. Tone damage his vehicle is a difficult one. Mr. Cragg was steadfast in his denial of making such an assertion and while there is a ring of truth to Ms. Buchanan's evidence to the contrary, for the reasons I have previously stated, I approach her evidence with caution where it seeks to cast blame or aspersions upon Mr. Cragg for the escalation of the disputes between Mr. Tone and Mr. Cragg. Further, although counsel for The District did ask Mr. Cragg on cross-examination whether he had told Mr. Tone that he had a witness to the vandalism, he did not directly confront Mr. Cragg with Ms. Buchanan's version of the events or otherwise challenge the veracity of Mr. Cragg's evidence on an issue that is strongly relied upon by The District as supporting a determination of contributory ***negligence***. Mr. Tone also did not confront Mr. Cragg with his own version of the event notwithstanding my advice to him that if he did not challenge Mr. Cragg on issues where he intended to provide contradictory evidence, his own testimony evidence might be given little weight.

**61**  After weighing the totality of the evidence in view of my assessment of the relative credibility of the witnesses, I am not satisfied that Mr. Cragg told Mr. Tone that he had a witness who had seen him vandalize his car that day.

**62**  After the first call to Mr. Tone, Mr. Cragg telephoned his brother, Peter Cragg, who lived nearby. He mentioned that he thought Mr. Tone had vandalized Ms. Buchanan's vehicle that morning and scratched his vehicle while it was parked at the Marina. During that telephone call, his phone rang and he saw that it was Mr. Tone. Mr. Cragg did not answer that call but did end the call with his brother.

**63**  Mr. Cragg testified that after the telephone call to his brother, the telephone rang again and Ms. Buchanan answered it. Mr. Cragg heard Ms. Buchanan say a series of "no, he's not going to fight you", and then she said "if you want to have a meeting with him, we can arrange to meet at the West Vancouver Police Department".

**64**  Mr. Cragg testified that Ms. Buchanan then told Mr. Cragg that Mr. Tone wanted to talk to him and passed the phone to Mr. Cragg. Mr. Cragg said that Mr. Tone started ranting and swearing at him and kept asking loudly for Mr. Cragg to have a fight with him. Mr. Cragg acknowledged that at the end of that call he swore at Mr. Tone and hung up on him. Mr. Tone testified that it was Mr. Cragg who was ranting and swearing at all times during the call and challenging him to a fight. I reject that evidence.

**65**  After that second telephone call, Mr. Cragg telephoned the WVPD on the non-emergency telephone number he had been given by police when he had met them earlier to complain about Mr. Tone threatening him from Hawaii.

**66**  The content of that telephone call is important. My review of the transcript of that call in the context of the evidence of the parties to it and my own consideration of the words spoken, leads me to conclude that the following is an accurate transcription of the words spoken by Mr. Cragg and Ms. Kimberly Kuypers (then Kimberly Hurley), the WVPD front desk complaint taker (who also from time to time worked as a dispatcher for the WVPD) who received that call:

**START TIME: 21:46:12**

DIS: Good evening, West Vancouver Police.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Hi, this is the non-emergency number is it? |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Great. Um I've got a problem with this really irate orangutan guy that lives in West Van. I live in West Van as well ... |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | ... and there's a bit of a file on him and he is gone nuts. |  |

DIS: Where is he?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Um he's at his house on Gisby. |  |

DIS: What's his address?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Um just one sec. |  |

DIS: Sure.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Joan. Just one sec sorry. |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Joan, Joan. Hi. [can you hang on for a sec?] |  |

DIS: Hi.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | It's [...] Gisby. |  |

DIS: Okay. And what is he doing?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Um he's called here. First of all he damaged my vehicle tonight. |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Um he damaged um his ex-wife's vehicle earlier today. And he is ah irate and um, ah verbally abusive and everything. He wants, he wants to, me to come outside, out on the street. Ah I live in Gleneagles. |  |

DIS: What's your address?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | I'm at [...] Gleneagles, um Gleneagles Place. And my name is George CRAGG. And um he wants, you know to have a big fight and you know all that and, and there's no way I'm ever going to do that but um what happened a year ago, his wife and he separated cause he's such a, an overbearing um angry, physically abusive ... |  |

DIS: Now where's this wife, ex-wife's vehicle?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Ah it was at her, where she's living now at her mother's house in Caufeild and I'm not sure the ... |  |

DIS: And it was damaged today?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | This morning yeah. |  |

DIS: This morning. And she reported that to the police?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | No she reported it to ah ICBC. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay and are you reporting your damage to your vehicle to the police? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Um yeah. |  |

DIS: And is your vehicle there?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | It's here at my house right now. |  |

DIS: What damage has been done to the vehicle?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Ah he got a key to it and keyed the, the ah, the back tailgate. |  |

DIS: And what's the licence plate on your vehicle?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Um just one sec. |  |

DIS: Sure. Where is he now, is he at home?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | He's at home and I'm at home. |  |

DIS: Okay. And yours is Gleneagles Place?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yes. [...] Gleneagles. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | And your name, your first name is George. CRAGG is your last name? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yes. C-R-A-G-G. |  |

DIS: C-R-A-G-G.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. Um yeah I'm just running out to my car. |  |

DIS: Sure.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | A black JEEP and it's ... [deleted for privacy purposes] |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | ... 966. |  |

DIS: 966.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay. And what time of day do you think that he has done this with the time frame that he did this to the vehicle? |  |
|  | GC: |  | Um between when I park, I parked the, the vehicle at Thunderbird Bowling, or sorry, Thunderbird um Marina. |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | And, right near my house at two o'clock and I just picked it up at eight o'clock and ah we noticed it. |  |

DIS: In there, when you got around about eight o'clock?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. |  |

DIS: Okay so the damage happened at Thunderbird Marina.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yes. |  |

DIS: Okay and you're at [...] Gleneagles.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Gleneagles Place. |  |

DIS: And he lives at [...] Gisby?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yes. |  |

DIS: What's his last name?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Ah TONE, T-O-N-E |  |

DIS: And his first name?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | David. |  |

DIS: Do you know how old David is?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah he's forty-three or forty-four. |  |

DIS: Forty-three or forty-four.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | Yeah. And he's got a bit of a history in West Vancouver. |  |

DIS: Yeah we'll do a, we'll do a background check ...

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah, yeah. |  |

DIS: ... and make sure we got all the information ...

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. |  |

DIS: ... before the officer goes to speak to him.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | First things first. I'm going to have the officer come out and speak with you regarding ... |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Okay. |  |

DIS: ... the history of this file.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Great. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | It's not just going to be a mischief to auto based on the history of the file. We'll get them to do some sort of an investigation there. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah, yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | And we'll have the officer out there shortly. Are you going to be home for the next little while? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Oh yeah, yes all night. |  |

DIS: Alright then.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Thanks (*unintelligible*). |  |

DIS: No problem. Thanks a lot.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Great. |  |

DIS: Actually can I get your call back number?

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. 9, 604 ... |  |

DIS: Yeah.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | ... [deleted for privacy purposes] |  |

DIS: Mm mmm (*affirmative*).

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | ... [deleted for privacy purposes] |  |

DIS: Okay great. Thanks so much.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | And, and there is a bit of a file on him between he and I but um I lodged a complaint of, he was threatening to kill me from Hawaii and so the officers came here and phoned him in Hawaii and he admitted he had done that so ... |  |

DIS: Okay.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | ... there is a file already. I don't know the file number but ah ... |  |

DIS: Okay.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | ... and prior to that a couple of years ago he beat the shit out of a guy in West Van. Just about killed him. And um ... |  |

DIS: Okay.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | GC: |  | ... the charges were dropped but I think you probably have some kind of something in the background on him, but he's ... |  |

DIS: Okay.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | ... six feet five and just a giant um angry man. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay. And you're not afraid that he's going to be showing up there anytime soon are you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Oh, I'll just lock the doors. |  |

DIS: No, okay.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Yeah. |  |

DIS: No problem.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Thanks. |  |

DIS: Thanks so much.

|  |  |  |  |
| --- | --- | --- | --- |
|  | GC: | Bye. |  |

DIS: Bye bye.

**END TIME: 21:50:34**

**67**  As it turns out, Ms. Kuypers had also taken the call from Mr. Cragg on March 13, 2001 concerning the late night threats made against Mr. Cragg by Mr. Tone but did not recall taking that call at the time of the call on August 19, 2001. I am satisfied that Ms. Kuypers' peripheral involvement and lack of recall of the details of that earlier call about the Hawaii threats is of no legal or evidentiary significance in relation to the issues of liability now before the Court.

**68**  Of some significance to the disputes between the parties is Mr. Cragg's response to Ms. Kuypers' question: "... and you are not afraid that he is going to be showing up there anytime soon are you?" In the transcript of the telephone call that was used in the pre-trial process, including during the discovery of Mr. Cragg, the response to that question was recorded as "No, I'll just lock the door".

**69**  When Mr. Cragg was examined for discovery, the start of that tape was played but for some reason the playback equipment malfunctioned. The examination of Mr. Cragg continued from a transcript which included the phrase "No. I'll just lock the door" which was at odds with other evidence given by Mr. Cragg at discovery that he was afraid that Mr. Tone would come over that night and that was why he called the police.

**70**  After listening to the tape at trial, Ms. Kuypers testified that she believed that the transcript using "No" rather than "Oh" was correct because she affirmed that statement by saying "No. OK".

**71**  I am satisfied that neither Mr. Cragg nor Ms. Kuypers had any real recall of the actual words used by Mr. Cragg and that the evidence of both suffers from reconstruction and is self-serving. I do not, however, find that Mr. Cragg deliberately intended to mislead because I am satisfied that discrepancies in his evidence were induced by and are explained by the use of an erroneous transcript on discovery.

**72**  I have decided that I must look to the words used by each of Mr. Cragg and Ms. Kuypers as I discern them from my review of the conversation in an objective way, in the context of the entirety of the telephone call and informed by the tone of voice used by each participant.

**73**  After doing so, I have concluded that Mr. Cragg was not fearful of an imminent confrontation at his home by Mr. Tone when he called the police. As he said on discovery, he did not believe that anyone would be driving that night and the tone and inflection of his voice in response to the question "you are not afraid that he is going to be showing up there anytime soon are you?" satisfies me that it was not something he had considered until the question was asked. I find that his response of "Oh, I'll just lock the door" was a reactive rather than a considered response.

**74**  Upon completion of the call at approximately 9:50 p.m., Ms. Kuypers forwarded an electronic summary of it to Gabriella Kriese, the WVPD dispatcher working that night. In substance it was a "damage to auto" report which would require a responding officer to eventually attend to view the damage when able to do so. Attendance the next day would be acceptable for such a dispatch.

**75**  After receiving Ms. Kuypers' electronic version of Mr. Cragg's complaint, Ms. Kriese did not dispatch the call for approximately 20 minutes.

**76**  Unfortunately, as it turned out, almost immediately after the call from Mr. Cragg to Ms. Kuypers ended (and well before any actual dispatch occurred), the lone member of the WVPD on duty that night in the patrol zone closest to the Cragg home was released from his duties in that area so that he could join that night's road supervisor for a coffee break.

**77**  Since it was a Sunday evening with few restaurants open, that coffee break was taken at the opposite end of The District. Accordingly, when Ms. Kriese did eventually initiate the dispatch of Mr. Cragg's complaint for action, it was directed to Corporal Strehlau who was then covering not only his own patrol area but also the zone vacated by his fellow officer. Also unfortunate is that when he was electronically dispatched by Ms. Kriese in relation to Mr. Cragg's problems, Constable Strehlau was engaged in the completion of a report into his investigation of a serious motor cycle accident on Cypress Bowl Road. After acknowledging the dispatch of the Cragg complaint, Constable Strehlau then travelled to the Cypress Bowl on-ramp on the Upper Levels Highway to continue writing his report of that accident.

**78**  Of great significance to the chronology of events that evening and to the credibility of Mr. Tone and Ms. Buchanan is that Mr. Tone's cellular phone records indicate that at 9:48 p.m., while Mr. Cragg was still on the telephone to Ms. Kuypers, Mr. Tone placed a call to Ms. Buchanan's cellular telephone that lasted almost 11 minutes. Although Ms. Buchanan denied any recollection of that call, I am satisfied by the documentary evidence of that call and Mr. Tone's later actions, that he not only talked to Ms. Tone about what had transpired but also learned from her that Mr. Cragg had called the police.

**79**  I reach that conclusion because:

1. Mr. Tone's cellular records establish that at approximately 10:16 p.m. he placed a 911 call that was forwarded to Ms. Kriese at the WVPD;
2. although the WVPD records indicate that a 911 call was received from Mr. Tone at approximately 10:14, I am satisfied that the apparent difference of two minutes is inconsequential and that the calls are one and the same; and
3. in that 911 telephone call, the following exchange occurred between Mr. Tone and Ms. Kriese:

**START TIME: 22:13:33**

DIS: Police emergencies, West Vancouver.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DT: |  | Not emergency but I need some police support at Gleneagles Place. |  |

DIS: What's the problem there?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | Ah domestic dispute. |  |

DIS: And what's your address on Gleneagles Place?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | I think it's [...]. |  |

DIS: [...]. And what is your name please?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | My name is David. |  |

DIS: And your last name David?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | TONE. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | And what seems, who are you having a problem with? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | I'm having a problem with a Mr. George CRAGG. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay and what is the domestic dispute that's happening this evening? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | Um he is physic, um um, he's accosting me. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Have you been injured sir? Have you been assaulted? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | No I have not. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay, so you do not need any ambulance attendance? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | No I do not. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay and where, and you are right now at [...]. Gleneagles Place? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | That is correct. |  |

DIS: Okay where do you live David?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | I live at [...] Gisby in West Vancouver. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay. Are you calling from inside the house or outside the house? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | I'm outside the house. I'm on my cell phone. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | You're on your cell phone. What kind of vehicle are you in sir? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | I'm in a Mercedes convertible. |  |

DIS: And what colour is your Mercedes.

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | Silver. |  |

DIS: And what's your cell number please?

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | ... [deleted for privacy purposes] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Where is this other person that you're involved with? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | He is in his, in the house in the residence. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | He's in Gleneagles, in the Gleneagles residence now. And what is this party's name? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | Mr. George CRAGG. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DIS: |  | Okay. And so can I confirm that you are not injured and you have not been assaulted, is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | That is correct. |  |

DIS: What is the dispute over this evening?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | DT: |  | The dispute over, is over a[n] altercation and threats that he has made to me. |  |
|  | DIS: |  | Okay. I'm going to ask you ah Mr. TONE to stay in your Mercedes. Ah we'll have an officer over to come speak with you in just a few moments. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | DT: | Thank you. |  |

DIS: Thank you, bye bye.

**END TIME: 22:15:23**

1. Mr. Tone admitted that when he made that call he lied to Ms. Kriese about his location. He testified that he was, in fact, on the Upper Levels Highway driving towards Mr. Cragg's home;
2. the evidence of Constable Seydalikhani of the WVPD establishes that the distance from Mr. Tone's home on Gisby Street to Mr. Cragg's home on Gleneagles is 12.7 kilometres and should have taken Mr. Tone approximately 15 minutes in driving time;
3. the police records of a 911 call from Ms. Tone during the assault on Mr. Cragg establish that the assault occurred at approximately 10:20 p.m., (approximately 5 minutes from the end of Mr. Tone's 911 call to the police); and
4. I entirely reject Mr. Tone's evidence that his call to the police was a "call for help". Notwithstanding his consumption of alcohol that night, his voice during the 911 call was controlled and deliberate and Corporal Strehlau who arrested him that evening less than 15 minutes after the call, made no observations of any impairment or other disordered behaviour.

**80**  In all of those circumstances, I am satisfied that the only plausible explanation for Mr. Tone's actions that night is that he was angered by Mr. Cragg's continued presence in Ms. Buchanan's life and his own loss of control over her and that he knew from Ms. Buchanan that Mr. Cragg had called the police. Notwithstanding her present lack of recall of the content of that conversation, I find that it defies reason and common-sense to suggest that in an 11 minute telephone conversation that commenced while Mr. Cragg was calling the police, Ms. Buchanan would not have told Mr. Tone what had happened. I am also satisfied that Mr. Tone left his residence that night fully intending to physically confront Mr. Cragg and called the police as part of his ongoing attempt to continue to paint Mr. Cragg as the aggressor in their disputes.

**81**  Almost immediately after receiving the telephone call from Mr. Tone, Ms. Kriese connected it to the earlier call from Mr. Cragg that she had caused to be dispatched to Constable Strehlau, and at approximately 10:17 p.m. contacted Constable Strehlau (who was then still at the Cypress Bowl on ramp writing his report of the motorcycle accident) both electronically and by radio transmission to tell him that he had better "hurry it up".

**82**  The evidence establishes that the Cypress Bowl on-ramp on the Upper Levels Highway is approximately 9.3 kilometres from the Cragg home and according to Constable Seydalikhani's timing of that route in similar conditions would generally require approximately 8 minutes of driving time. Although Constable Strehlau advised that it took him approximately 5 minutes that evening, I prefer Constable Seydalikhani's more precise evidence.

**83**  I find that given the totality of the circumstances, when Mr. Tone's 911 call to Ms. Kriese ended at approximately 10:17 p.m., no member of the WVPD was in a position to attend at the Cragg residence in time to prevent an altercation.

**84**  At about 10:20 p.m. (that being approximately 30 minutes after his call to the police), Mr. Cragg saw a Mercedes headlights in the driveway. He said that "I was expecting a police car, not a Mercedes". He grabbed Ms. Buchanan's hand, said "come with me", and ran up to the studio on the second floor. He went upstairs as a precaution because he could see down the length of the driveway from the studio window so that if there was any danger, he could run down the breezeway towards the suite above the garage which had its own exit and entrance. From there he could hide in the yard or run to his neighbours' or his brother's homes.

**85**  While at the upper storey window, Mr. Cragg saw Mr. Tone running down the driveway. He testified that he believed that only 30 seconds passed between the time he saw Mr. Tone's car and heard Mr. Tone crashing through his front doors yelling "I am going to kill you". Mr. Cragg then turned, with the plan of fleeing to the suite. Unfortunately, however, by then Ms. Buchanan had gone into the master bedroom which was in the opposite direction from his planned escape route. Mr. Cragg then ran back there to get her. He said that had he not done so he would have had time to escape and I accept that evidence.

**86**  After Mr. Cragg grabbed Ms. Buchanan's hand, they were able to go about five feet into the middle of a bridge way that overlooked the front entrance.

**87**  Mr. Cragg testified that he yelled at Ms. Buchanan to phone the police and turned to run but was caught by Mr. Tone who leaped on him. Mr. Cragg then grabbed a steel railing on the bridge way but Mr. Tone then grabbed his head and smashed it against the railing. Mr. Cragg was struck above his right eye and fell to the ground and Mr. Tone kneeled on his back and punched the back of his head at the base of the skull. Mr. Cragg lost consciousness. When he regained consciousness he was lying on the floor in the foyer on the ground floor. He did not know how he got there.

**88**  Mr. Tone testified that when he got to the Cragg residence he was "in a black rage" (notwithstanding his calm telephone call to the police 5 minutes earlier and Ms. Kriese's instructions to stay in his car). He admitted that immediately upon arrival he got out of the car, ran to the front door and kicked it in. He then, however, claimed that it was Mr. Cragg who was the aggressor and said that as he went through the doors, he saw Mr. Cragg up on the bridge way swearing and screaming "I am going to kill you." I reject all of Mr. Tone's evidence of alleged provocation by Mr. Cragg and find the assault occurred in the manner described by Mr. Cragg.

**89**  Mr. Tone's assault on Mr. Cragg lasted until Ms. Buchanan screamed at Mr. Tone to stop. Mr. Tone looked up and said "Do you want me to stop?" She said, "yes stop, get out". He stopped quickly and left the house.

**90**  Constable Strehlau arrived at the Cragg residence after the assault on Mr. Cragg had ended. He met Mr. Tone outside on the driveway and had a conversation with him.

**91**  Peter Cragg testified that about ten or fifteen minutes after he had last called Mr. Cragg, Ms. Buchanan telephoned. She was frantic and hysterical. She said that Mr. Cragg had been beaten up by Mr. Tone and that his head was smashed in. Peter Cragg hung up the phone, drove down to Mr. Cragg's house and was there within a minute to a minute and a half of Ms. Buchanan's call.

**92**  Peter Cragg testified that when he arrived, there was a police car parked at the house blocking the driveway and that Mr. Tone was leaning against it talking to a police officer. He asked Mr. Tone if his brother was all right and Mr. Tone answered "oh he is fine" in a very relaxed manner. Peter Cragg then asked Constable Strehlau if he had seen Mr. Cragg and that the officer said he had not.

**93**  Peter Cragg then ran down and entered the house and saw Mr. Cragg lying on the floor on the ground floor level with Ms. Buchanan cradling his head. His said Mr. Cragg's face was "a bloody mess", covered with blood and with blood running down his cheeks. He testified that one eye was swollen shut and the other eye was so badly damaged it was closed. He made sure Mr. Cragg was comfortable and then went back to speak to Constable Strehlau and told him "Get an ambulance, my brother has been beaten up badly".

**94**  Constable Strehlau then examined Mr. Cragg himself and called an ambulance which took Mr. Cragg to the hospital. Other police officers also attended and Mr. Tone was arrested and taken into custody.

**ANALYSIS AND DISCUSSION**

**95**  The evidence, including Mr. Tone's guilty plea to the charge of assault brought against him, conclusively establishes that Mr. Tone is liable to Mr. Cragg for the injuries suffered by Mr. Cragg on August 19, 2001. In addition, as I stated at the beginning of these reasons, I am satisfied that the evidence adduced at trial was incapable of supporting a defence of provocation arising from Mr. Tone's alleged anger concerning Mr. Cragg's relationship with Ms. Buchanan.

**96**  I turn next to my consideration of the remaining issues that must be decided.

**Is The District liable to Mr. Cragg by reason of the *negligence* of the WVPD in failing to prevent the assault by Mr. Tone?**

**97**  By reason of s. 20 of the ***Police Act***, R.S.B.C. 1966, c. 367, The District is statutorily liable for any torts committed by any municipal constable or employee of the WVPD in the execution of that person's duties.

**98**  Section 34(2) of the ***Police Act*** imposes duties upon the WVPD to, among other things, preserve the peace, act to prevent the commission of crimes and apprehend offenders. Specifically, it provides:

34(2) The municipal police department, under the chief constable's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the chief constable, under the regulations or under any Act.

**99**  In addition, s. 26(2) of the ***Police Act*** provides:

26(2) The duties and functions of a municipal police department are, under the direction of the municipal police board, to

1. enforce, in the municipality, municipal bylaws, the criminal law and the laws of British Columbia,
2. generally maintain law and order in the municipality, and
3. prevent crime.

**100**  Counsel for Mr. Cragg submits that in the circumstances of this case, the WVPD failed its statutory obligations by failing to fulfill its duty owed to Mr. Cragg to prevent Mr. Tone's assault upon him. Mr. Murphy submits that the WVPD, and particularly its employees Ms. Kuypers and Ms. Kriese, failed to meet the statutory and common law duty of care imposed upon the WVPD in: negligently failing to correctly classify Mr. Cragg's telephone complaint as a priority 2 dispatch; failing to appropriately and expeditiously dispatch an officer who could have intervened to prevent the assault; and also, having failed to do all of that, failing to warn Mr. Cragg of Mr. Tone's presence outside the home so that Mr. Cragg could have taken evasive action that would have prevented Mr. Tone's assault upon him.

**101**  In making his submissions concerning the alleged operative ***negligence*** of Ms. Kuypers and Ms. Kriese, Mr. Murphy relies specifically upon what he alleges was a breach of a duty of care owed to the public and specifically to Mr. Cragg by reason of their negligent failure to adhere to the procedures and standards expected of complaint takers and dispatchers employed by the WVPD in the circumstances of the risk he faced as a consequence of Mr. Tone's threats of confrontation.

**102**  Concerning his allegations relating to the WVPD's failure to warn Mr. Cragg of Mr. Tone's presence outside the home, Mr. Murphy places particular reliance upon the decision of MacFarland J. in ***Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*** [*(1998), 126 C.C.C. (3d) 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1GR-00000-00&context=) (Ont. Ct. Gen. Div.) [***Doe v. Toronto***], leave to appeal refused by O.C.A. *(1991), 74 O.R. (2d) 225*.

**103**  In ***Doe v. Toronto,*** a young woman residing in a second floor apartment was raped by a serial rapist whose *modus operandi* was to gain entry into second and third floor apartments by way of unlocked balconies occupied by young women in a specific area of Toronto. At trial, it was established that the police were fully aware of the means by which the rapist obtained entry and knew that Ms. Doe was one of a comparatively small number of potential victims. Despite that knowledge, the police failed to warn her of the risk she faced, thus denying her the opportunity to take protective measures by ensuring her balcony door was locked. The decision of the police not to warn was based upon their determination that to do so could cause hysteria which could scare off the rapist making him more difficult to apprehend.

**104**  In her decision, McFarland J. stated at 46:

The police are statutorily obligated to prevent crime and at common law they owe a duty to protect life and property. As Schroeder J.A. stated in *Schacht v. The Queen in Right of the Province of Ontario*, *[1973] 1 O.R. 221* (Ont. C.A.) at 231-2, *30 D.L.R. (3d) 641* (H.C.J.):

The duties which I would lay upon them stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject.

In my view, the police failed utterly in their duty to protect these women and the plaintiff in particular from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves.

**105**  Counsel for The District does not take serious issue with the propositions that in the appropriate circumstances the police may be found liable in operative ***negligence*** or for failing to warn a possible victim of a pending criminal attack upon that victim if the plaintiff proves that:

1. a duty of care to prevent a foreseeable harm existed;
2. that duty was breached; and
3. the breach caused or contributed to the plaintiff's loss.

**106**  Mr. Butcher does, however, submit that in the circumstances of this case:

1. there was no duty owed because:
2. the harm actually suffered by Mr. Cragg was not foreseeable; and
3. policy reasons should preclude the imposition of a duty to prevent the assault which occurred;
4. any duty owed was not breached;
5. The District's actions or omissions did not cause or contribute to the loss complained of; and
6. there was no duty to warn Mr. Cragg of Mr. Tone's presence.

**107**  I do not agree that the WVPD did not owe a duty of care to Mr. Cragg when he called to report the events of August 19, 2001. Mr. Cragg did what he had previously been instructed to do by Constable Derouin after the police had intervened at Mr. Cragg's request concerning Mr. Tone's threats from Hawaii. He called the non-emergency telephone line at the WVPD, reported the events that gave rise to immediate concerns and sought further assistance from the WVPD.

**108**  I am also satisfied that, to establish that the harm he suffered was reasonably foreseeable, Mr. Cragg is not, as submitted by the WVPD, obligated to establish that the actual harm he suffered (i.e. an assault upon him in his own home notwithstanding a locked door) was foreseeable. Rather he is only required to establish that a risk of harm from an altercation with Mr. Tone was reasonably foreseeable if the police did not appropriately respond to his request for intervention.

**109**  I find that in all of the circumstances, including the prior threats and the particulars of the events of August 19, 2001 of which Mr. Cragg made Ms. Kuypers aware (specifically that Mr. Tone was irate, was challenging Mr. Cragg to a fight and had previously badly beaten and almost killed another man), Mr. Cragg has met the legal and evidentiary burdens upon him of proving that in all of the circumstances the WVPD owed him a duty of care to protect him and that the risk of harm to him was reasonably foreseeable if Mr. Tone's actions were not constrained by appropriate police intervention.

**110**  I also do not agree with The District's submission that policy reasons should preclude the imposition of a duty upon the WVPD to prevent the assault which occurred.

**111**  In making that argument, Mr. Butcher relied upon the decision of the Supreme Court of Canada in ***Cooper v. Hobart***, [*[2001] 3 S.C.R. 537*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=), [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=), [*96 B.C.L.R. (3d) 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=) in which an investor had sued the Registrar of Mortgage Brokers for failure to oversee the conduct of an investment company. McLachlin and Major JJ., writing for the Court, noted (at [paragraph] 30) that even if sufficient proximity of relationship and reasonably foreseeable harm has been established in a given case:

... At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care." [Emphasis added.]

**112**  The District submitted that there is a divergence of authority on the question of the extent to which the police should be found liable to members of the public for failure to prevent crimes and referred to authorities in both the United Kingdom and in Canada concerning various factual situations where liability has been imposed or rejected at least in part due to considerations of public policy. In particular, Mr. Butcher referred to ***Hill v. Chief Constable of West Yorkshire***, [1988] 2 All E.R. 238, ***Brooks v. Commissioner of Police for the Metropolis***, 2005 UKHL 24, ***B.M. v. Attorney General for British Columbia*** [*(2004), 31 B.C.L.R. (4th) 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X083-00000-00&context=), [*2004 BCCA 402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X083-00000-00&context=), [*25 C.C.L.T. (3d) 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X083-00000-00&context=) and ***Hill v. Hamilton-Wentworth Regional Police Services Board*** [*(2005), 76 O.R. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B348-00000-00&context=), [*[2005] O.J. No. 4045*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGC1-JG02-S2MS-00000-00&context=) (Ont. C.A.).

**113**  I am satisfied that no policy considerations arise in this case that would or should preclude a determination of liability against The District. The WVPD has a statutory duty to keep the peace and to investigate and attempt to prevent crime. Ordinary citizens are required to leave law enforcement issues to the police and in return are entitled to expect that the police will fulfill their duties to the best of their abilities as authorized and mandated by the legislature and the common law. While those duties must be considered against the factual circumstances that give rise to any claim for an alleged breach, and while some claims may be too remote or cast the net of potential liability too wide, I am not satisfied that this is such a case. The duty The District's owed to Mr. Cragg was engaged when he called the WVPD for assistance as he had been instructed to do by them. No issues of remoteness or indeterminate liability to indeterminate claimants arise. Further, no issues of resource allocation or staffing limitations exist in this case that would give rise to policy considerations that could result in the preclusion of liability on those grounds.

**114**  The real issues to be determined in this case are whether the WVPD failed to fulfill the duty owed to Mr. Cragg by meeting the standard of care expected of them, and if not, whether that failure caused or materially contributed to the damage suffered by Mr. Cragg when he was attacked by Mr. Tone.

**115**  The analysis of those issues requires a consideration individually and cumulatively of the actions of the WVPD at two specific points in time: firstly, when Mr. Cragg made his call that ended at approximately 9:50 p.m. that initiated the involvement of the WVPD and, secondly, at approximately 10:15 p.m. when Mr. Tone called 911 and reported to the WVPD that he was outside the Cragg residence at a time when the WVPD were unable to attend at the scene.

**116**  On the evening of August 19, 2001, the WVPD patrol strength was at a minimum level comprised of four constables, a road supervisor, and a Sergeant in charge. Each Constable was assigned to one of the four patrol zones. Chief Constable Armstrong testified that working at minimum staffing levels was not unusual.

**117**  The supervisors that night were Corporal Strong and Sergeant Geisbrecht. The Sergeant's role was generally to remain in the office. The office staff comprised Ms. Kuypers, the front desk call taker and Ms. Kriese, the dispatcher.

**118**  Ms. Kuypers joined the WVPD in August 1999. Before that, she had one year of previous dispatching experience for a private company. She had also attended an eight month Public Safety and Communications course at Kwantlen College, which provides training for dispatchers.

**119**  Ms. Kriese had worked for the WVPD since 1980. She had been promoted through positions with the police from clerk to call taker and then to dispatcher and had been a dispatcher since 1988. All of Ms. Kriese's training was "in-house" with the WVPD.

**120**  In August 2001, the WVPD had no separately developed complaint taking or dispatch manuals or policies. The evidence establishes that the WVPD adopted and intended that its employees would generally adhere to the policies and procedures established by the Royal Canadian Mounted Police (the "RCMP") and the Vancouver Police Department in carrying out their call taking and dispatching duties on behalf of the WVPD.

**121**  Ms. Kriese testified that in August 2001 there were (and still are) four priority levels for dispatching calls. Priority 1 calls would mean any threat to human life in progress. Priority 2 calls would include any in progress calls such as "break and enters", assaults without weapons, possible impaired driving cases and residential alarms. Priority 3 calls were "routine calls" which would include historical break and enters, mischief to auto, and late reports of theft, all of which were not then in progress. Priority 4 calls were basically calls where there were no suspects and no police would be required, for example, reports of lost property.

**122**  Under cross-examination, Ms. Kriese or Ms. Kuypers, and in some cases both, adopted various aspects of the policies and procedures for call takers and dispatchers that have been put in place by either or both of the RCMP and the Vancouver Police Department. Specifically, they agreed that:

1. It is important to accurately and concisely relay all information necessary for the protection of the public and the safety of police officers.
2. When violence or the potential for violence exists, more than one officer should be dispatched.
3. All information received by a dispatcher or call taker should be judged in its most serious interpretation.
4. All available details should be relayed to officers with minimal alteration, deletion or misinterpretation.
5. A call taker must be alert, listen carefully for details and be particularly attentive to details given in the first part of any call.
6. A call taker must attempt to avoid pitfalls in communication by making assumptions and drawing conclusions without all available information and making sloppy observations by not listening actively for details.
7. A call taker or dispatcher must not act without having all available information.
8. A call taker or dispatcher must take care not to underrate a call due to, among other failures, not obtaining sufficient information, misunderstanding the seriousness of a call, disbelief in the seriousness of a call or giving insufficient attention to a call.

**123**  Concerning the classification and dispatching of calls, Ms. Kuypers, Ms. Kriese, or both, also agreed that:

1. Complaints involving threats should generally be dispatched as Priority 2 calls unless there is a reason to dispatch at a higher priority level.
2. Complaints involving domestic disputes should be dispatched with a high level of urgency due to the potential for violence and risk of physical harm, and the officers dispatched should be provided with details of any previous police intervention and any details of any prior use of violence. Cases of domestic disputes with verbal threats and no ongoing assault can be dispatched as Priority 2 but if there is an assault in progress or the potential for the use of weapons, a higher level of response is needed.

**124**  The WVPD did not in any way seek to disavow those standards as being reasonable or inapplicable to the circumstances of this case. The position of The District is that the WVPD met those standards in dealing with Mr. Cragg and processing his complaints.

**125**  Mr. Butcher did, however, submit that in assessing the actions of all members of the WVPD involved in the events of August 19, 2001, the Court must be careful not to hold Ms. Kuypers, Ms. Kriese or the officers of the WVPD to a standard of conduct which "one sitting in the calmness of a courtroom might later determine was the best course". See: ***Breen v. Saunders*** [*(1986), 71 N.B.R. (2d) 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW81-JW5H-X0S5-00000-00&context=), [*39 C.C.L.T. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW81-JW5H-X0S5-00000-00&context=) at [paragraph] 19 (Q.B.T.D.) and, must also not use hindsight to determine what would have been appropriate conduct. See: ***Goulet v. British Columbia***, [*[1987] B.C.J. No. 2778*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1N4-00000-00&context=) (Co. Ct.). I agree with those submissions.

**126**  I further agree that the observations of Southin J.A. in ***Roy v. British Columbia (Attorney-General)*** [*(2005), 38 B.C.L.R. (4th) 103*](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=), [*251 D.L.R. (4th) 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VD-00000-00&context=) (which dealt with the duty of care owed by a police officer to a prisoner in his charge) are also applicable to the standard of care owed by police call takers, dispatchers and officers to members of the public such as Mr. Cragg who call upon the police for assistance. At [paragraph] 36, Southin J.A. stated:

I take the following propositions to be established:

1. A peace officer owes a duty to his prisoner to take reasonable care for the prisoner's safety but he is not an insurer.
2. "[A]n error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not ***negligence***." [*Whitehouse v. Jordan,* [1981] 1 All E.R. 267 (C.A.) at 281, adopted by Craig J.A. in *Smith v. British Columbia (Attorney General)* [*(1988), 30 B.C.L.R. (2d) 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M348-00000-00&context=) (B.C.C.A.) at 363.]
3. The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations.
4. Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, the words which McPherson C.J.M., in *Anderson v. Chasney,* [*[1949] 2 W.W.R. 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2CK-00000-00&context=) (Man. C.A.), at 341, adopted from the American case of *Mehigan v. Sheehan,* 51 A. (2d) 632 (U.S.N.H.S.C. 1947), the matter is one of "non technical matters or those of which an ordinary person may be expected to have knowledge."

**127**  To similar effect, in ***Radke v. M.S. (litigation guardian of)*** [*(2005), 48 B.C.L.R. (4th) 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B20J-00000-00&context=), [*2005 BCSC 1355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B20J-00000-00&context=), in assessing whether an officer had breached the standard of care required of him, Bennett J. stated at [paragraph] 73, "it is necessary to determine whether he complied with the policy" and at [paragraph] 74 quoted from ***Noel (Committee of) v. Botkin*** [*(1995), 9 B.C.L.R. (3d) 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-6298-00000-00&context=), [*[1995] 7 W.W.R. 479*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-6298-00000-00&context=) at [paragraph] 65 (S.C.) (also a case involving injury in the course of a high speed police chase) where Clancy J. stated:

In summary, the question to be asked in assessing the conduct of police officers during pursuit is whether they, viewed objectively from the viewpoint of a reasonable police officer, acted reasonably and within the statutory powers conferred upon them. In considering that question, the Court must take into account that officers will be expected to perform the duties imposed on them by statute and to comply with policies adopted by the force to which they belong. A failure to comply with policy will not necessarily constitute ***negligence***, nor will an error in judgment. Officers are exempted from compliance with certain traffic rules, provided they meet the requirements of section 118 of the Motor Vehicle Act. There must be recognition that officers are required to exercise judgment in balancing the competing interests of arresting wrongdoers and protecting citizens.

**128**  Bearing those principles in mind, I recognize that in many respects the policies, procedures and standards recorded in the RCMP and Vancouver Police Department policy manuals referred to and adopted by Ms. Kuypers and Ms. Kriese set very high standards. The ability to meet those standards will, of course, be subject to the vagaries of the experience of the call taker or dispatcher, the volume of their work at the time that any call is received, the nature of other calls that may be in progress or require their attention, the judgment component of their tasks, and any other relevant exigencies that may affect their ability to perform in any particular situation.

**129**  Having said that, however, I am satisfied that the written polices, procedures and standards to which I have adverted and which were adopted by the WVPD, inform the reasonable standard of care that a member of the public is entitled to have observed by the WVPD in fulfilling its statutory obligations to maintain law and order and prevent crime. To the extent those procedures, policies or standards are not followed or met, the failure to do so requires reasonable explanation based upon relevant exigent or other material circumstances which mitigate against the enforcement of those standards.

**130**  In making that observation I do not cast any burden upon The District to disprove ***negligence***. The burden of proving both breach of the requisite standard of care and also that foreseeable damages were suffered as a consequence of that breach remains upon the plaintiff throughout. However, where there is a significant departure from the standards established in any industry or profession, the person so departing will bear an evidentiary burden of establishing that in the particular circumstances under consideration, such departure was reasonable.

**131**  Against that analysis I turn to Ms. Kuypers' performance of her duties as a call taker on August 19, 2001 when she received Mr. Cragg's telephone call that ended at approximately 9:50 p.m. I start with the message that she forwarded to Ms. Kriese for dispatch purposes at the conclusion of Mr. Cragg's call. I do so because it was that transmission that was fundamental to the WVPD's response to Mr. Cragg's concerns. The information provided by Ms. Kuypers was that:

DAMAGE TO VEH [VEHICLE] WHILE PARKED AT THUNDERBIRD MARINA 5776 MARINE DR, DAMAGE: VEH [VEHICLE] KEYED ON BACK TAIL GATE - COM [COMPLAINANT] BELIEVES MALE KNOWN TO HIM HAS CAUSED THIS DAMAGE - COM [COMPLAINANT] AND OTHER MALE HAVE PREVIOUS FILE INVOLVING WVPD - COM [CONPLAINANT] AT RES [RESIDENCE] NOW W/ [WITH] VEH [VEHICLE] - REQ [REQUEST] OFFICER ATT [ATTEND].

**132**  In examination in chief, Ms. Kuypers testified that when she submitted her summary of Mr. Cragg's phone call to Ms. Kriese for dispatch, she included what she considered to be the "pertinent information" based on the type of call she was handling. Her assessment was that the pertinent information was that damage had occurred to vehicles, there were no threats that had been made against Mr. Cragg at that time, and the other party was not at Mr. Cragg's residence at the time. She testified that she did not include Mr. Cragg's pejorative words about Mr. Tone in the summary because it was "derogatory to another person." She also thought that a routine (Priority 3) response was appropriate, because the complainant and his vehicle were at his home and "he was not concerned that the other gentleman would be there any time soon" to do anything else to his vehicle or himself. She also said she knew generally where the two addresses were and thought it important that the caller had requested the non-emergency line, was calm and spoke clearly.

**133**  In cross-examination, Ms. Kuypers acknowledged that she was told many things by Mr. Cragg that she did not pass on to Ms. Kriese. Specifically, she did not advise that Mr. Tone had "gone nuts", was "irate", was a "giant angry man" and wanted to fight Mr. Cragg that night. She also did not pass on information concerning Mr. Tone's previous violence against another man he "almost killed". Although she did make reference to a "previous file" involving the WVPD, she did not record that it had involved admitted death threats against Mr. Cragg by Mr. Tone, retrieve the file or suggest that it should be retrieved or reviewed by Ms. Kuypers. Further, although Mr. Cragg had made two references to Mr. Tone's "ex-wife", damage to her vehicle that day and to their separation, Ms. Kuypers made no inquiry into the relationship of Mr. Tone or of Ms. Buchanan to Mr. Cragg notwithstanding the history of threats.

**134**  After considering the totality of Ms. Kuypers' interaction with Mr. Cragg that evening and her assessment of his concerns, I have concluded that rather than approach the situation with an open mind as to potentially very serious consequences arising from the circumstances and Mr. Tone's past and present behaviour, she fixated on the call having been made on a non-emergency line and later upon concerns expressed by Mr. Cragg about the damage to his vehicle. Her fixation on the damage to the vehicle and pigeon-holing the complaint as such resulted in her failing to either fully listen to or appreciate the concerns raised by Mr. Cragg and also resulted in her failure to probe his concerns with an open mind to obtain a full appreciation of the situation.

**135**  In result, Ms. Kuypers not only failed to fully appreciate or evaluate the risk of harm being reported, but actively deflected Mr. Cragg from his real concerns about Mr. Tone's threatening behaviour and words by continually re-directing Mr. Cragg to issues and details related to the damage to his vehicle. I also find that her concerns for obtaining details about the vehicle damage caused her to not listen carefully to Mr. Cragg's utterances generally or to his responses to her questions that did not focus upon the vehicle claim. Accordingly, when Mr. Cragg responded to the question "you are not afraid that he is going to be showing up there anytime soon are you?" by saying "Oh, I'll just lock the door" as a reactive rather than a considered response, Ms. Kuypers misinterpreted Mr. Cragg's words as being a positive assertion that Mr. Cragg did not fear Mr. Tone. While standing alone, that misinterpretation would not be particularly significant, in the totality of the circumstances, and her under-appreciation of the urgency of the threats made by Mr. Tone, the result was a dispatch message that dramatically and fundamentally distorted the tenor of Mr. Cragg's complaints and the need for immediate police response.

**136**  Although counsel for The District emphasized that Ms. Kuypers thought that the matters being described by Mr. Cragg were historical and knew that Mr. Tone was not in the presence of the complainant so that she could reasonably consider that there was no imminent danger to Mr. Cragg and that therefore the totality of the call was reasonably classified as a routine call rather than as a priority 2 threat complaint, I do not agree.

**137**  I am satisfied that in dealing with Mr. Cragg and assessing the situation reported by him, Ms. Kuypers: failed to accurately and concisely relay all information necessary either for the protection of the public or the safety of responding police officers; failed to assess the potential for violence; failed to judge all information received by her in its most serious interpretation; failed to listen carefully to Mr. Cragg's concerns and in fact minimized those concerns and drew conclusions as to the seriousness of the situation without exploring obvious issues such as Mr. Cragg's relationship with Ms. Buchanan.

**138**  In all of those circumstances, I find that Ms. Kuypers' performance of her duties as a call taker in handling the call from Mr. Cragg on August 19, 2001, fell significantly below the standard of care expected of her. I do not agree that her erroneous classification of a threat situation with obvious potential for violent harm to Mr. Cragg as a low priority "mischief to auto" complaint arose from mere errors in judgment or by reason of the fact that the call did not originate as a 911 call. In my opinion, Ms. Kuypers negligently underrated Mr. Cragg's call by prejudging its seriousness, failing to explore obvious concerns that did not support that prejudgment and generally giving insufficient attention to the concerns raised by him. She then perpetuated those errors by transmitting the call for dispatch as a routine low priority mischief call with no hint of threat or violence either past or future.

**139**  In addition, by telling Mr. Cragg that "It's not going to be a mischief to auto based on the history of the file" and "We'll have the officer out here shortly. Are you going to be home for the next little while?" she compounded the effect of her negligent assessment by assuring Mr. Cragg of relatively immediate police intervention and protection when she was, in fact, conveying a low priority dispatch message that was to opposite effect.

**140**  I also find that there were not staffing or other work related exigencies at play that evening which could reasonably result in Ms. Kuypers' performance being evaluated against lower standards, policies and procedures than those generally expected by and of the WVPD. It was a relatively quiet mid-summer Sunday evening which the WVPD was adequately equipped and staffed to handle even at minimum staffing levels and Ms. Kuypers was under no pressure or strain from competing calls or from a volume of calls.

**141**  Importantly also, the evidence establishes that had Mr. Cragg's call been recorded for dispatch by Ms. Kuypers as a call with threat of violence, it would have been immediately dispatched and the officer who vacated the zone closest to the Cragg residence could have been recalled from the coffee break that was only authorized 15 seconds before the end of Mr. Cragg's call. That officer would have had ample time to attend the Cragg residence before Mr. Tone attended.

**142**  However, as I have noted above, after receiving Ms. Kuypers' transmission concerning the call from Mr. Cragg for dispatch, Ms. Kriese did not actually dispatch an officer for response to Mr. Cragg's concerns until more than 20 minutes after the call to Ms. Kuypers had ended. The explanation for that delay is not surprising. Ms. Kriese treated the call as a low priority damage to auto complaint that did not require immediate dispatch. She also did not dispatch it earlier because Constable Strehlau (who was covering the zone in which the Cragg residence was located because the usual officer had been cleared to leave his zone to have coffee with the road supervisor) had not himself reported as being clear of the motor vehicle accident on Cypress Bowl Road. I find that Ms. Kriese's actions were unremarkable and appropriate given the inadequate information that had been conveyed to her.

**143**  Although Ms. Kriese could perhaps have retrieved and reviewed the prior complaint file involving the threat from Hawaii, I am not satisfied that given the computer data changeover that was then in process and the length of time that such retrieval would likely have required, the failure to retrieve the file in any way materially increased the risk of harm to Mr. Cragg beyond that which resulted from the low level priority classification given to his complaint.

**144**  I also find it important to my assessment of Ms. Kriese's performance of her dispatch duties that when Mr. Tone's 911 call at 10:13 p.m. was taken by her, she almost immediately connected that call to Mr. Cragg's earlier call.

**145**  Concerning Mr. Tone's call, Ms. Kriese testified that she did not feel that Mr. Tone sounded irate. She thought he was calm. She thought his voice was even-toned. He told her there was no emergency, and that there had been no assault. She testified that there was nothing that made her think that he was dangerous or about to commit a crime and he agreed to remain in his vehicle. I find all of those observations to be consistent with Mr. Tone's demeanour and words as recorded.

**146**  Still, as a result of receiving that call from Mr. Tone, Ms. Kriese updated Constable Strehlau, advising that verbal threats had been made and that Mr. Tone was outside Cragg's residence. As soon as Constable Strehlau received that update, he headed towards the Cragg residence from his location at the on ramp of Cypress Bowl Road and the Upper Levels Highway at Code 2, leaving before the next broadcast by Ms. Kriese which began at 10:18 p.m..

**147**  Unfortunately, given the timing of events, Constable Strehlau was never in a position to effectively intervene to prevent Mr. Tone's assault on Mr. Cragg and all other officers were even less able to respond because of the original low priority assessment of Mr. Cragg's call.

**148**  That circumstance gives rise to the question of whether Ms. Kriese and the WVPD were negligent in not warning Mr. Cragg of the imminent danger he faced from Mr. Tone being outside his residence when the WVPD were not in a position to intervene physically.

**149**  Ms. Kriese offered two explanations for not calling Mr. Cragg to warn of Mr. Tone's presence outside at the Cragg residence. She testified that she did not want to "impede the investigator's investigation" and that because she did not know the "details about the individual inside" she was concerned about escalating a situation that appeared from her call with Mr. Tone to be calm.

**150**  Chief Constable Armstrong testified on discovery about his view of the role of a dispatcher on this topic. He said:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Would you agree it's proper for a dispatcher when she believes a complainant is in danger to among other things warn the complainant about the danger especially if the complainant isn't aware of some facts? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That would be prudent, yes. |  |

**151**  When that testimony was referred to Ms. Kriese, she agreed with Chief Constable Armstrong's evidence that it would be prudent to call the complainant. She also agreed that when Mr. Tone was outside the house, there was imminent danger.

**152**  On re-examination, however, she added that before calling the complainant to warn him she would have to take into account "the officers distance from the call and if the complainant would be in more danger if he had actually stepped outside or did anything himself to escalate a situation at all by using any force of his own". She further added that it would make a difference to her if the subject of the complaints was making complaints about the original complainant, as was the case with Mr. Tone in his complaints about Mr. Cragg in the 911 call.

**153**  In addressing the question of the police protocol in determining whether to warn someone of danger, Chief Armstrong testified that the police would conduct a risk assessment requiring an analysis of various factors, including: whether there is imminent danger; the vulnerability of the victim; the ability of the suspect to carry out the threat; the danger of the victim carrying out a pre-emptive strike and the ability of the police to control the situation.

**154**  When Ms. Kriese was required to deal with concerns arising from Mr. Tone's telephone call and its interplay with what she knew of the circumstances from her receipt and dispatch of Ms. Kuypers' assessment of Mr. Cragg's call, she was not fully informed of the situation faced by Mr. Cragg or the extent to which it had changed.

**155**  Ms. Kriese was unable to fully or adequately assess the risks faced by Mr. Cragg at the time of Mr. Tone's call because the totality of Mr. Cragg's complaints had been minimized by Ms. Kuypers who had also not relayed any of the details of Mr. Tone's aggressive behaviour or his past and present threats.

**156**  Unfortunately, Ms. Kriese did not re-involve Ms. Kuypers to obtain better details concerning the background to the emerging situation notwithstanding that would have been easy to do since they were in the same office. Ms. Kriese also did not ask for supervisory assistance from the officer in charge of the detachment that night. Had she done either, she may have received further information or advice that would lead her to telephone Mr. Cragg with a warning that would have given him time to escape and avoid the assault by Mr. Tone.

**157**  Having said that, I do not conclude that Ms. Kriese was negligent in failing to warn Mr. Cragg. I am satisfied that the circumstances faced by Ms. Kriese were exigent and that any errors that she made were errors of judgment based upon lack of sufficient information.

**158**  That conclusion does not, however, result in a determination that the WVPD is not liable in ***negligence*** for the damages suffered by Mr. Cragg.

**159**  Important to that conclusion is Chief Constable Armstrong's evidence that one of the factors that would be important to a risk assessment concerning whether to warn a citizen of danger is the ability of the police to control the situation.

**160**  I find that as a consequence of the ***negligence*** of Ms. Kuypers in processing and classifying Mr. Cragg's call that night as a low priority "damage to automobile call", the WVPD immediately lost control of the situation involving Mr. Tone and Mr. Cragg. I find that the loss suffered by Mr. Cragg as a consequence of the minimization of his concerns in face of the very real danger posed by Mr. Tone's threats materially contributed to by the actions of the WVPD and was foreseeable.

**161**  The WVPD had the time as well as the ability to make proper inquiries of Mr. Cragg to fully assess the situation faced by him. The WVPD also had the power and duty to respond appropriately to his concerns in a way that would have prevented Mr. Tone from attending at the Cragg residence without meaningful police intervention. While Ms. Kriese's decision not to warn Mr. Cragg can be excused by reason of her lack of knowledge of the totality of the situation, the WVPD itself cannot be so excused. Ms. Kuypers' actions and inactions as a first responder exacerbated an already dangerous situation by not providing Ms. Kriese with sufficient information to dispatch an officer to Mr. Cragg's home with sufficient priority and detail to protect the public peace and prevent crime when it was well within the ability of the WVPD to do so.

**162**  I accordingly find that The District is liable to Mr. Cragg by reason of the ***negligence*** of the WVPD in failing to prevent the assault upon him by Mr. Tone.

**Do Mr. Cragg's actions in confronting Mr. Tone alleging his responsibility for damage to the two vehicles require the apportionment of liability amongst all of the parties?**

**163**  Mr. Tone and The District submit that by his own actions on August 19, 2001, Mr. Cragg contributed to the damages suffered by him by unreasonably provoking Mr. Tone and that by application of the ***Negligence Act***, *R.S.B.C. 1996, c. 333*, the liability for those damages should be apportioned as between Mr. Cragg and the defendants.

**164**  The defence of provocation is well known to the criminal law. In Canada it may, in certain very strict circumstances, apply to reduce guilt for the offence of murder to that of manslaughter. The essence of the defence of provocation in Canadian criminal law is that in causing the death of a victim, the accused responded suddenly and violently to an act or insult by that victim that was of such a nature as to deprive an ordinary person of the power of self-control and did so before his or her passion had time to cool.

**165**  The "defence" of provocation also has a long history in the civil law where it may operate to reduce the damages awarded to a victim who may have provoked a tortfeasor's actions. See: ***Percy v. Glasco et al*.**, [*[1872] O.J. No. 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC01-JWR6-S02H-00000-00&context=), 22 V.C.C.P. 521 (Ont. Ct. Common Pleas), ***Holt v. Verbruggen*** (1981), 20 C.C.L.J. 29 (B.C.S.C.) and ***Erickson v. Hall***, [*[1995] B.C.J. No. 2475*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G215-00000-00&context=) (S.C.).

**166**  A determination that a tortfeasor was provoked by the actions of a victim may also serve as a basis for a finding of contributory ***negligence*** on the part of the victim. See: ***Bruce v. Coliseum Management Ltd. (c.o.b. Uncle Charlies) et al.*** [*(1998), 56 B.C.L.R. (3d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0YS-00000-00&context=), [*165 D.L.R. (4th) 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0YS-00000-00&context=), (C.A.) [***Bruce***]; ***Adkens v. Hunter***, *2003 BCSC 97* and ***Verigin v. Regnier***, [*[1996] B.C.J. No. 2130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S167-00000-00&context=) (S.C.).

**167**  In ***Bruce***, the Court of Appeal cited with approval the following statement in Allen M. Linden, *Canadian Tort Law*, 7th ed. (Vancouver: Butterworths, 2001) at 85:

In order to amount to provocation, the conduct of the plaintiff must have been "such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault". Prior incidents would have relevance only "if it were asserted that the effect of the immediate provocative acts upon the defendant's mind was enhanced by those previous incidents being recalled to him and thereby inflaming his passion". One cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor. [Footnotes omitted.]

**168**  I have previously rejected Mr. Tone's provocation defence to the extent that it was based upon his alleged anger arising from Mr. Cragg's relationship with Ms. Buchanan. I did so because Mr. Tone's actions in assaulting Mr. Cragg were deliberate and based upon his desire for revenge rather than as a consequence of any loss of the power of self-control.

**169**  Notwithstanding that determination, Mr. Tone and the WVPD each assert that Mr. Cragg contributed to the damages suffered by him on August 19, 2001 by failing to properly or prudently take care to avoid injury.

**170**  Counsel for the WVPD submitted that the mere fact of making the first telephone call to Mr. Tone on August 19, 2001 was "an act of immense foolishness and certainly a failure to avoid a danger of which he should reasonably have perceived, given everything he knew about Mr. Tone". Mr. Butcher submitted that in making that telephone call and in engaging Mr. Tone verbally in the second call that night, Mr. Cragg "escalated a situation which, in all probability, would have ended with no harm, as had all other incidents involving Mr. Tone". He also submitted that if there was a real risk to Mr. Cragg, "he had a duty, given his knowledge of the background of the day's events, to leave the house and seek a place of safety, such as the police station".

**171**  The District asserts that Mr. Cragg's conduct went beyond a mere failure to avoid injury and constituted actual fault, in terms of substandard conduct of both defamation and provocation, so that Mr. Cragg must be found to be liable for his contribution to the losses he suffered. It submits that using the traditional "but for" test of causation, Mr. Cragg's phone calls were a significant contributory factor to his loss and that "but for" the phone calls, Mr. Tone would almost certainly have simply remained at home that night.

**172**  In making those submissions, The District relies on numerous authorities that have determined that the word "fault" as used in s. 2(b) of the ***Negligence Act*** as the foundation for a finding of an apportionment of liability for damages, includes but is much broader than ***negligence***. See: ***Yule v. Parmley and Parmley***, [*[1945] 2 D.L.R. 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JSXV-G0WY-00000-00&context=) (B.C.C.A.) per Sidney Smith J.A. at 329 rev'd on other grounds [*[1945] S.C.R. 635*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B05R-00000-00&context=), ***Bell Canada v. COPE (Sarnia) Ltd.*** [*(1980), 11 C.C.L.T. 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCG1-F2TK-22V3-00000-00&context=) (Ont. H.C.J.), aff'd (1980), O.R. (2d) 571 (C.A.) and ***Anderson v. Stevens*** [*(1981), 29 B.C.L.R. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X262-00000-00&context=), [*125 D.L.R. (3d) 736*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X262-00000-00&context=) (S.C.).

**173**  The submissions of the WVPD and of Mr. Tone relating to Mr. Cragg's "fault" in calling Mr. Tone on August 19, 2001 to confront him with his suspicions relating to the damage to the two vehicles and in communicating further with Mr. Tone once the discussion got heated, are premised upon the proposition that the evidence of Mr. Tone and of Ms. Buchanan as to what transpired in those telephone calls is reliable. In particular, they are founded upon the assertion that in the first telephone call Mr. Cragg had untruthfully and provocatively told Mr. Tone that he had a witness who had seen Mr. Tone damage his vehicle.

**174**  For those reasons I have discussed in some detail in [paragraph] 13 and 14 of these reasons, unless I have reached a different conclusion with respect to any specific evidentiary point or issue where the evidence of Mr. Tone is in conflict with that of either Mr. Cragg or Ms. Buchanan, I prefer their evidence. Also, unless I have reached a different conclusion concerning any particular evidence or issue, where the evidence of Ms. Buchanan is in direct conflict with that of Mr. Cragg, I accept Mr. Cragg's evidence.

**175**  Further, for reasons addressed in [paragraph] 52 through 61 of these reasons,I have determined after weighing the totality of the evidence in view of my assessment of the relative credibility of the witnesses that:

1. Ms. Buchanan asked Mr. Cragg to give Mr. Tone one more chance before calling the police and that he agreed to do so.
2. Mr. Cragg called with intent to ask Mr. Tone to leave them alone and did not seek recompense for the damage.
3. Although Mr. Cragg did swear at Mr. Tone in response to Mr. Tone's aggressiveness towards him, he did not use the words attributed to him by Mr. Tone and made no threats and did not suggest that he wanted to fight Mr. Tone.
4. I am not satisfied that Mr. Cragg told Mr. Tone that he had a witness who had seen him vandalize his car that day.

**176**  Those evidentiary determinations preclude a finding that Mr. Cragg's actions on August 19, 2001 were either provocative or otherwise sufficiently blameworthy to attract liability under s. 2 of the ***Negligence Act***. While it is possible that "but for" the telephone calls Mr. Tone would not have left his home that night, absent a finding of fault on Mr. Cragg's part, that possibility is of no legal consequence.

**177**  Since Mr. Cragg was not contributorily negligent, the liability of the defendants is joint and several so that, subject to the laws governing indemnification, all of his loss is borne by each. See: ***Reekie v. Messervey*** [*(1989), 36 B.C.L.R. (2d) 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JF75-M3TB-00000-00&context=) at 328, [*59 D.L.R. (4th) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JF75-M3TB-00000-00&context=) (C.A.); ***Leischner v. West Kootenay Power and Light Co****.* [*(1986), 70 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=), [*24 D.L.R. (4th) 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) (C.A.) and ***Dixon v. Eldorado Development Corporation*** [*(1999), 68 B.C.L.R. (3d) 370*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1DV-00000-00&context=), [*[2000] 1 W.W.R. 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1DV-00000-00&context=) (S.C.).

**178**  That is not the end of the matter, however, since, as between the defendants, the indemnification provisions of the ***Negligence Act*** must be considered and applied. Section 4 of the ***Negligence Act*** provides:

4(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

1. Except as provided in section 5 if 2 or more persons are found at fault
2. they are jointly and severally liable to the person suffering the damage or loss, and
3. as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

**179**  In ***Cempel v. Harrison Hot Springs*** [*(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=), [*[1998] 6 W.W.R. 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.) at [paragraph] 19, Lambert J.A. (for the majority) stated:

... The ***Negligence*** *Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances. [Emphasis in original.]

**180**  Applying those principles to the degrees of blameworthiness or fault of each of Mr. Tone and the WVPD, I conclude that as between the defendants for the purposes of indemnification Mr. Tone is 85 percent liable and The District is 15 percent liable for the damages suffered by Mr. Cragg as a consequence of Mr. Tone's attack upon him on August 19, 2001.

**181**  Unless the parties are able to agree upon damages, they are at liberty to apply to set dates for the continuation of this trial.

B.M. DAVIES J.

**End of Document**

[***Davis v. Conroy, [2013] B.C.J. No. 585***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G29G-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

Heard: March 11-13, 2013.

Judgment: March 26, 2013.

Docket: M110230

Registry: Vancouver

**[2013] B.C.J. No. 585** | [*2013 BCSC 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1GJ-00000-00&context=)

Between Sandra Joanne Davis, Plaintiff, and David Conroy and Malaspina Coach Lines Ltd., Defendants

(28 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Motor vehicles — Liability of driver — Liability of owner — Action by plaintiff for damages for injuries dismissed — Plaintiff slipped and fell while alighting from motor coach owned and operated by defendants — Plaintiff lost her balance and fell without *negligence* on part of either defendant — No evidence that motor coach was unsafe, that handrail would have prevented plaintiff's fall, that stool was deficient or that driver training was deficient — Driver took reasonable care to avoid injury to plaintiff and whether or not he cautioned passengers to watch their step as they disembarked would not have prevented plaintiff's fall.**

**Tort law — Vicarious liability — Liability of employer for acts of employee — Action by plaintiff for damages for injuries dismissed — Plaintiff slipped and fell while alighting from motor coach owned and operated by defendants — Plaintiff lost her balance and fell without *negligence* on part of either defendant — No evidence that motor coach was unsafe, that handrail would have prevented plaintiff's fall, that stool was deficient or that driver training was deficient — Driver took reasonable care to avoid injury to plaintiff and whether or not he cautioned passengers to watch their step as they disembarked would not have prevented plaintiff's fall.**

**Transportation law — Carriers — Liability — Civil actions — Boarding and alighting — Defective equipment — *Negligence* — Passengers — Injury by carrier and employees — Action by plaintiff for damages for injuries dismissed — Plaintiff slipped and fell while alighting from motor coach owned and operated by defendants — Plaintiff lost her balance and fell without *negligence* on part of either defendant — No evidence that motor coach was unsafe, that handrail would have prevented plaintiff's fall, that stool was deficient or that driver training was deficient — Driver took reasonable care to avoid injury to plaintiff and whether or not he cautioned passengers to watch their step as they disembarked would not have prevented plaintiff's fall.**

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| Action by the plaintiffs for damages for injuries sustained in a slip and fall accident. In May 2009, the plaintiff was injured when she slipped and fell when alighting from a motor coached owned by the defendant Malaspina Coach Lines Ltd. and driven by Malaspina's employee, the defendant, Conroy. At the time of the accident, the plaintiff was 66 years of age and suffered from rheumatoid arthritis. The plaintiff alleged that Conroy was negligent in failing to take reasonable steps to assist her when she stepped out of the coach and onto a stool from which she fell and that he failed to warn passengers to watch their step. The plaintiff further alleged that Malaspina was vicariously liable for the Conroy's ***negligence*** and was directly liable for failing to adequately train Conroy in the use of the stool, failing to use a stool that was safe, failing to inspect the stool to ensure it was safe and in failing to provide a handrail on the motor coach that would have prevented her from falling.  HELD: Action dismissed.  The plaintiff lost her balance and fell without ***negligence*** on the part of either defendant. There was no evidence that the motor coach was unsafe or that a handrail would have prevented the plaintiff's fall. There was nothing that suggested that Malspina's training of its drivers was deficient. There was nothing deficient in the design of the stool used. Conroy took reasonable care to avoid injury to the plaintiff. Whether or not he cautioned passengers to watch their step as they disembarked would not have prevented the plaintiff's fall. |

**Counsel**

Counsel for Plaintiff: E. Goodman, E.S. Holden.

Counsel for Defendants: J. Locke.

**Reasons for Judgment**

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

**1**   On May 13, 2009, the plaintiff fell when alighting from a motor coach owned by the defendant, Malaspina Coach Lines Ltd. and driven by Malaspina's employee, the defendant, David Conroy. I am to determine liability only.

**2**  The plaintiff alleges Mr. Conroy was negligent in failing to take reasonable care to assist her when she stepped out of the coach and onto a stool from which she fell. He is also alleged to have failed to give an oral warning to the passengers "to watch your step".

**3**  Malaspina is alleged to be vicariously liable for the ***negligence*** of Mr. Conroy and to be directly liable for, inter alia, failing to train Mr. Conroy adequately in the use of the stool to assist passengers to disembark safely; failing to use a stool that was safe; failing to inspect the stool to ensure it was not a hazard to those who used it; and failing to provide a handrail on the motor coach that would have prevented the plaintiff from falling.

**4**  The plaintiff was almost 66 years old at the time of the fall. She has suffered from rheumatoid arthritis for many years.

**5**  In May 2009 the plaintiff travelled by ferry and coach to see a friend in Gibsons on the Sunshine Coast. The plaintiff had taken this trip to see her friend on many previous occasions and had travelled with Malaspina to do so.

**6**  On her return from Gibsons, the plaintiff embarked on the coach at a location in Gibsons. The plaintiff did not use a cane or any other aid to walking. She boarded the coach without apparent difficulty. Mr. Conroy saw her board the coach and saw nothing remarkable about her condition. He believed that she was in her late 50s to mid 60s.

**7**  The coach travelled to the Langdale Terminal of BC Ferries and when it boarded the Queen of Surrey to travel to Horseshoe Bay was parked near the bow of the ship. The passengers left the coach. The plaintiff testified that she was one of the last to leave. Mr. Conroy testified there were several other passengers who disembarked after the plaintiff.

**8**  The coach was manufactured in the late 1970s and Colleen Ismail, a witness for Malaspina, believed the coach had been in service with Malaspina since about 1980.

**9**  Passengers alighting from the coach left from a door on the right front and descended four stairs. To the right of the stairs there was a handrail. The door was hinged on its left and opened outwards. There was no handrail on the inside of the door. A photograph of the open door of a different coach, not owned by Malaspina, was placed in evidence by the plaintiff. The photograph shows a handrail affixed to the inside of the door of that other coach. The handrail is set at about a 45 degree angle with the upper end placed so that a person descending could reach the top of the handle as her descent began.

**10**  Ms. Ismail is a long serving senior employee of Malaspina. She was responsible for purchasing the stool from which the plaintiff fell. She was shown the photograph of the railing on the door of the other coach. It was suggested to her that it would have been safer for passengers on the Malaspina coach if a similar handrail had been installed. Ms. Ismail's response was that so far as she knew the rail would have been installed when the coach shown in the photograph was manufactured. Ms. Ismail commented that Malaspina did not design the coach on which the plaintiff travelled. It was also proposed to Mr. Conroy in cross-examination that Malaspina could have made its coach safer by installing a handrail on the door. Mr. Conroy, quite properly in my opinion, responded that he had no means of knowing what mechanisms were installed within the door and it would not be appropriate for Malaspina to attempt to attach a railing which had not been attached by the manufacturer.

**11**  The evidence does not persuade me that a handrail on the door would have prevented the plaintiff from falling. She had often descended stairs on a coach of similar design to the coach she travelled on in May 2009 without incident. The lack of a handrail on the door does not explain the fall. Nor am I persuaded that Malaspina demonstrated a failure to take reasonable care by retaining in service a coach without a handrail on the door. No evidence was offered that the coach driven by Mr. Conroy on May 13, 2009, was not reasonably safe for its intended purpose. The evidence disclosed that like the plaintiff, large numbers of other passengers, over many years, travelled on that coach without any report of injury caused by the absence of a handrail on the door.

**12**  The plaintiff testified that she heard no cautionary words spoken by Mr. Conroy to passengers who were about to disembark, to the effect that they should watch their step. It was suggested to Mr. Conroy, in cross-examination, that he had not cautioned the passengers in this way before they disembark on the ferry, as the company manual required. Mr. Conroy insisted he had done so while driving and approaching the ferry terminal.

**13**  In my opinion whether or not Mr. Conroy told the passengers to watch their step as they disembarked had nothing to do with to the plaintiff's fall. There were signs inside the coach saying "watch your step", one of which was printed in large letters on the inside of the door. More importantly the plaintiff testified she was concerned and even had a "fright" when she saw the stool on the deck of the ferry as she began to descend the stairs of the coach. The plaintiff needed no warning to watch her step. Her rheumatoid arthritis made her wary of stairs. Mr. Conroy had no reason to know of the plaintiff's medical condition.

**14**  Before any of the passengers disembarked Mr. Conroy placed the stool immediately adjacent to the bottom step of the exit from the coach. Without the stool the last step onto the ferry deck would have been too high for some passengers. With the stool in place a passenger would step down approximately six inches. It was not suggested that was too great a distance for the plaintiff to step down.

**15**  The stool was usually kept on the coach and before passengers disembarked the driver would place the stool in its proper location at the foot of the stairs and then stand near the stool to offer assistance to passengers if necessary. Mr. Conroy followed this procedure. He has long experience dealing with passengers with mobility difficulties. I reiterate he had no reason to believe the plaintiff had any greater mobility difficulties than any other person of her apparent age.

**16**  The plaintiff had not previously ridden on a Malaspina coach driven by Mr. Conroy, but testified he did what other drivers had done when assisting passengers and observed that "they are all very good". That evidence does not suggest Malaspina's training of its drivers to assist passengers was deficient.

**17**  The stool had a flat surface with material to enhance friction. It had four legs angled away from the stool when in use, and when not in use they were folded under the stool. The feet of the stool had rubber or plastic tips to increase friction. The stool was somewhat narrower than the bottom step on the coach. The plaintiff testified the stool had been placed off centre to the right as she looked down at it when she began her descent. Despite her concern and even "fright" she said nothing to Mr. Conroy as she descended the stairs.

**18**  The plaintiff maintained her hold on the handrail to her right as she descended the stairs and on reaching the bottom step of the coach, put her right foot on the top of the stool. There is no suggestion her foot slipped on the stool or that it was not firmly placed on the stool. She testified that her shoe did not overlap the edge of the stool. If the stool was not centred with the bottom step of the coach that does not provide an explanation for the fall. She then intended to place her left foot on the stool. Her evidence is that she was looking at the stool. She began to place her left foot on the stool and Mr. Conroy extended his right hand towards her. Her evidence is that he took hold of her left elbow. The plaintiff testified that as he took her elbow she began to fall forward onto her hands and knees on the ferry deck. She testified Mr. Conroy said "oh my god I thought I had you but I guess I didn't". The plaintiff testified that "it seemed to me the stool slipped" and that the ferry deck was wet with rain water.

**19**  Mr. Conroy's description of the fall and its surrounding circumstances is somewhat different. He testified that he placed the stool properly and, as is his practice, tested its stability with his foot. He said he did so, not because of any concerns about stability, but because that is simply his habit. He denied the deck was wet. Several passengers left the coach and then the plaintiff came down the stairs herself. As she reached the bottom of the stairs, Mr. Conroy described her as looking for the location of the elevator on the ferry, and that she asked him about the location of the elevators. The plaintiff denied she asked about the elevator and insisted she was looking at the stool as she placed her right foot on it and then attempted to do the same with her left. Mr. Conroy testified that he extended his right hand towards the plaintiff as she reached the bottom of the stairs. He denies he took the plaintiff's left elbow in his hand. He said he usually extended his hand to women beyond a certain age, which age he did not specify, but which obviously in his mind applied to the plaintiff. He testified that he did so as "a courtesy" but it was clear that he considered some women to need greater assistance than others. Mr. Conroy testified that he extended his right hand and at the same time the plaintiff extended her left hand towards his right hand. Their hands briefly touched as the plaintiff began to fall. Until that moment for both the plaintiff and Mr. Conroy, her descent down the stairs and onto the stool had no features that distinguished it from any similar occasion.

**20**  In my opinion it made no difference to the unfortunate outcome whether Mr. Conroy attempted to take the plaintiff's elbow or her hand. In cross-examination it was suggested to Mr. Conroy that the gesture of extending his hand was a "come to me" type of gesture that lured the plaintiff into moving towards him, thereby causing her to lose her balance. In my view, the evidence does not support that proposition.

**21**  The law imposes a duty on persons in Mr. Conroy's position to take reasonable care to avoid injury to a passenger. Mr. Conroy met that standard. If he had grasped the plaintiff's elbow more firmly than she testified he did, there is no reason to believe that would have prevented her from falling. The same can be said about taking her hand if his recollection is correct. The fall might have been prevented if Mr. Conroy had stepped forward and taken a firm hold on the plaintiff with both hands, but he could not reasonably have foreseen she might lose her balance in the way she did and therefore he could not reasonably foresee that he should take extra, more forceful precautions, in guiding the plaintiff from the coach.

**22**  The plaintiff testified that it seemed to her that the stool slipped and perhaps this explains why she fell. The plaintiff does not actually say the stool slipped. She says it "seemed" to have done so. This perception was apparently reinforced both by her recollection that there was rain water on the deck and that after her fall the stool was no longer where Mr. Conroy had initially placed it. An equally plausible explanation for the change in position of the stool, is that it was pushed by the plaintiff when she fell. I cannot find the fall was caused by the stool slipping.

**23**  I will add that even if the stool slipped, that would not necessarily impose liability on the defendants. In my view there is nothing deficient in the design of the stool. It had been used for some time without incident. It had been used by Mr. Conroy on multiple occasions. Mr. Conroy had no experience of the stool slipping when it was used by other passengers on that day or any other day. Moreover, I am not satisfied the ferry deck was slippery. The plaintiff on walking away after falling found that it was not slippery. There may have been some rain water on the deck but if there was that does not tell me the stool slipped.

**24**  Actionable ***negligence*** is not proven simply because an event happens that causes a person to be injured. That person must prove that the defendant could reasonably have foreseen that a breach of duty by the defendant to take reasonable care could cause injury to that person. I can detect no breach of duty by Mr. Conroy or by the defendant Malaspina.

**25**  In cross examination the plaintiff suggested to Mr. Conroy that he was fabricating his evidence. In argument the same suggestion was made. This suggestion arose from Mr. Conroy's two written reports to his employer. The plaintiff submits the first report was provided late and was deceptive by omitting damaging details.

**26**  I do not accept that characterization of Mr. Conroy's evidence. In my opinion his reports were late because immediately after the plaintiff's fall Mr. Conroy had been assured that she had experienced no significant injury, and when a week later he prepared his first report he attempted to remember the details of an incident that had happened quickly and without warning and which immediately afterwards the plaintiff had assured him had not caused her any injury. Lapses in recollection are not indicative of a witness who is deliberately distorting the truth. In fact they are often indicative of a witness who is attempting but failing to recall events accurately. I have no doubt the plaintiff also failed to remember accurately every detail of the circumstances of her fall. I am satisfied that both parties gave their evidence while attempting to tell the truth as best they could.

**27**  In my opinion, the plaintiff lost her balance and fell without ***negligence*** on the part of either defendant.

**28**  The action is dismissed with costs.

K.N. AFFLECK J.

**End of Document**

[***Faircrest v. Buchanan (c.o.b. Connolly Lodge), [2015] B.C.J. No. 821***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2C8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W. Ehrcke J.

Heard: February 12, 2015.

Judgment: April 27, 2015.

Docket: S116211

Registry: Vancouver

**[2015] B.C.J. No. 821** | 2015 BCSC 657 | 2015 CarswellBC 1090 | 253 A.C.W.S. (3d) 244 | 19 C.C.L.T. (4th) 148

Between Roslin Faircrest, Plaintiff, and Myrna Buchanan and Fraser Health Authority operating a public hospital under the name Connolly Lodge and the said Connolly Lodge, Defendants

(68 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Causation — Causal connection — Foreseeability and remoteness — Contributory *negligence* — Apportionment of liability — *Negligence* statutes — Duty of care — Action by volunteer at residential mental health facility for damages for fractured left hip and soft tissue injuries sustained when head nurse at facility collided with her allowed — Nurse committed tort of trespass to person — She was negligent and her employer was vicariously liable for her *negligence* — Nurse was 60 per cent responsible for collision and plaintiff was 40 per cent responsible for collision — Plaintiff was heedless of nurse just as nurse was heedless of her.**

**Tort law — Trespass — To person — Battery — Action by volunteer at residential mental health facility for damages for fractured left hip and soft tissue injuries sustained when head nurse at facility collided with her allowed — Nurse committed tort of trespass to person — She was negligent and her employer was vicariously liable for her *negligence* — Nurse was 60 per cent responsible for collision and plaintiff was 40 per cent responsible for collision — Plaintiff was heedless of nurse just as nurse was heedless of her.**

**Tort law — Vicarious liability — Liability of employer for acts of employee — Action by volunteer at residential mental health facility for damages for fractured left hip and soft tissue injuries sustained when head nurse at facility collided with her allowed — Nurse committed tort of trespass to person — She was negligent and her employer was vicariously liable for her *negligence* — Nurse was 60 per cent responsible for collision and plaintiff was 40 per cent responsible for collision — Plaintiff was heedless of nurse just as nurse was heedless of her.**

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| Action by Faircrest against the defendants Buchanan and the Fraser Health Authority. Faircrest was a volunteer at Connolly Lodge which was a residential mental health facility that was operated by the Authority. She was 60 years old, she stood five feet and two inches tall and she weighed 95 pounds. She had rheumatoid arthritis and this caused to walk more slowly than most people of her age. The staff at the Lodge needed to be constantly aware of the possibility of a patient at the Lodge becoming violent. Buchanan was the Lodge's head nurse and she was employed by the Authority. She was five feet and six inches tall. On November 25, 2009 she unintentionally bumped into Faircrest when she left her office to attend to a patient. Faircrest fell down and suffered a fractured left hip and soft tissue injuries. Buchanan was originally a defendant but Faircrest discontinued the action against her.  HELD: Action allowed.  This matter was suitable for summary determination. Buchanan committed the tort of trespass to the person. The Authority acknowledged that Buchanan owed Faircrest a duty of care and Faircrest was injured in the collision. The damage was caused by Buchanan's breach. Faircrest's arthritis, age or stature had nothing to do with the injuries that she sustained. It was reasonably foreseeable that if Buchanan, who weighed 185 pounds and who did not watch where she was going, collided with a female volunteer, that volunteer might fall and suffer physical injuries. Buchanan had a duty to react quickly to patient disturbances. However, she could not be heedless of other persons in the Lodge. She was negligent and the Authority was vicariously liable for her ***negligence***. Faircrest was partly responsible for the collision because she was heedless of Buchanan just as Buchanan was heedless of her. The Authority was 60 per cent responsible and Faircrest was 40 per cent responsible for the collision. The assessment of damages would be determined in a subsequent proceeding. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 9-4

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

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(1), s. 3(2), s. 3(3)

**Counsel**

Counsel for Plaintiff: M.G. Bolda.

Counsel for the Defendants: R.J. Bailey, T. Young, A/S.

[Editor's note: A corrigendum was released by the Court August 13, 2015; the change has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **W. EHRCKE J.** |

**INTRODUCTION**

**1**  The plaintiff, Roslin Faircrest, was a volunteer at Connolly Lodge (the "Lodge"), a residential mental health facility operated by the defendant Fraser Health Authority ("Fraser Health") when, on November 25, 2009, a nurse employed by Fraser Health at the Lodge, Myrna Buchanan, unintentionally bumped into her while leaving her office to attend to a patient (the "Collision"). Roslin Faircrest fell down and suffered a fractured left hip and soft tissue injuries. She commenced an action claiming damages for her injuries.

**2**  Nurse Buchanan was originally a defendant, but the plaintiff has discontinued the action against her, and Fraser Health has agreed that if Nurse Buchanan was negligent, then Fraser Health will not dispute that they are vicariously liable.

**3**  The matter now comes before me on an application by the defendant Fraser Health for summary judgment under Rule 9-7 of the Supreme Court Civil Rules. Both parties agree that the matter is suitable for summary determination. The defendant seeks an order that the action be dismissed. The plaintiff seeks an order for judgment in her favour on the issue of liability. If the plaintiff is successful, then both parties have agreed that the assessment of damages can be determined in a subsequent proceeding.

**FACTS**

**4**  Following examinations for discovery, the parties were able to agree on a Joint Statement of Agreed Facts, which has been filed as an exhibit to the affidavits of Pat Eskola. Additional evidence filed on this summary trial includes the affidavit of Roslin Faircrest sworn February 5, 2015, the affidavit of Myrna Buchanan sworn September 13, 2013, and the affidavit of Judith Macrae sworn July 29, 2014. Ms. Macrae is the Clinical Director of Fraser Health. Based on this material, the facts may be summarized as follows.

**5**  Connolly Lodge, which opened in March 2002 on the grounds of Riverview Hospital in Coquitlam, is a tertiary residential care home for long-term intensive psychosocial rehabilitation of patients requiring assistance in managing their mental health illness.

**6**  There are two other buildings on the Riverview Hospital grounds for mental health patients, which are called Cottonwood and Cypress.

**7**  Fraser Health usually has one nurse and two rehabilitation workers on staff during the day shift from 7:00 a.m. to 7:00 p.m. (the "Staff'). There is also a contracted cleaner who cleans during the day.

**8**  Connolly Lodge has 20 beds for mental health patients. These patients typically suffer from mental health illnesses such as schizophrenia, schizoaffective disorder and bipolar disorder. Some of the patients can become easily upset and turn violent. Some of the patients over the years have been charged with serious assaults, including murder.

**9**  The Staff need to be constantly aware of the possibility of a patient at the Lodge becoming violent. It is not uncommon for patients to threaten violence or become violent towards other patients and staff. Assaults are a common concern for the Staff. Threats of violence and actual incidences of violence from the patients could occur as little as a few times a month up to as much as several times in one shift.

**10**  Some of the patients are allowed to leave the hospital during the day if they are supervised by staff or volunteers.

**11**  At the time of the incident on November 25, 2009, the volunteer program at Connolly Lodge had only recently been put in place. Volunteers are not staff, nor do they receive the same training as staff.

**12**  All staff and volunteers are given a personal protection alarm, which hangs on a cord around the neck. When they press the alarm, all staff from the Lodge, Cottonwood, and Cypress are warned of someone's urgent need for help and will come to help. If the situation escalates, then the Staff can call on an emergency phone for an outside security company to provide one or two security guards. Staff can also call for the RCMP if necessary.

**13**  Ms. Faircrest had been screened and accepted by an independent contractor, the Fraser North Community Volunteer Connections society, as a volunteer with Fraser Health. She started volunteering with Fraser Health in 2005. Her role at that time was screening kindergarten-aged children for hearing aids. She has also volunteered at a breast-feeding clinic and a flu clinic.

**14**  Ms. Faircrest applied to be a volunteer with Fraser Health in 2009 after seeing an advertisement at the Lodge requesting volunteers. She phoned a volunteer coordinator who was organizing the volunteers on behalf of Fraser Health. She was interviewed by the volunteer coordinator and started volunteering at the Lodge in August 2009.

**15**  Ms. Faircrest's view of her responsibilities as a volunteer at the Lodge was that she talk to patients, listen to them, and otherwise interact with them.

**16**  Ms. Faircrest attended the Lodge once or twice a week from August until the date of the incident. She was given a personal protection alarm in case of any potentially dangerous or violent situations arising with the patients.

**17**  At the time of the Collision, Ms. Faircrest was 60 years old, stood about 5'2" tall and weighed about 95 lbs. She has, and had at that time, rheumatoid arthritis in her kneecaps, ankles and fingers, which caused her to walk more slowly than most people of her age, but she did not use a walker, a cane or any walking aides. She owned a battery powered scooter, but she only used it a few times a year for longer excursions. She did not inform Fraser Health of her scooter, and she never used it at the Lodge.

**18**  Nurse Buchanan had been a psychiatric nurse for 30 years at the time of the Collision and worked at the Lodge since it opened in 2002. She has regular training in non-violent crisis intervention as part of her training with Fraser Health.

**19**  At the time of the incident, Nurse Buchanan was 5'6" and weighed 185 lbs. She does not wear glasses or contact lenses for seeing long distances, but she does wear reading glasses.

**20**  Nurse Buchanan was the head nurse at the Lodge, and all staff reported to her. Her role was to oversee every aspect of activity that took place at the Lodge during her 12-hour shift, including responsibility for what went on at the Lodge while she was there, but her duties did not include supervising or coordinating the volunteers. Safety was a priority.

**21**  Volunteers were not required to report to the head nurse upon arrival or before interacting with patients, but Nurse Buchanan was aware that Ms. Faircrest was at the Lodge the day the Collision occurred. Prior to the Collision, she had safety concerns about Ms. Faircrest being a volunteer at the Lodge, but she did not tell her employers about those concerns.

**22**  The Collision was the first such occurrence involving any injuries that Ms. Buchanan has had with other Staff, volunteers or patients while working.

**23**  Nurse Buchanan started her shift at 7:00 a.m. on the day of the incident, and Ms. Faircrest's shift as a volunteer began around 1:00 or 2:00 p.m. Her husband was also volunteering at the Lodge that day.

**24**  There were two rehabilitation workers on shift that day, Stephanie Kohrs and Christine Balinski.

**25**  At about 3:15 in the afternoon, a patient, Ms. Jaworski, started to become visibly upset. She was crying, yelling and screaming and was becoming increasingly agitated. Ms. Jaworski walked from the main entrance through the middle of the Lodge and turned right towards her room past the nursing office and staffroom.

**26**  Ms. Jaworski was known by staff and Nurse Buchanan to be violent on occasion when she became overly agitated. She had at times flipped tables over, slammed doors shut, and started fights with other patients.

**27**  Ms. Faircrest had been preparing to bake with another patient in the kitchen area. She was walking towards the building entrance when she first heard and saw Ms. Jaworski. Ms. Faircrest asked Ms. Jaworski if everything was okay. Ms. Faircrest was stationary and a few feet outside of the door of the office at this time. Ms. Faircrest watched Ms. Jaworski come in the main entrance, walk by the nursing station and turn towards the section of the Lodge where her room was. Ms. Faircrest continued to watch Ms. Jaworski right up to the point that the Collision occurred.

**28**  Nurse Buchanan was in the nursing office when Ms. Jaworski started to become agitated and yell and scream. Ms. Jaworski would become agitated like this several times during a typical day. Nurse Buchanan quickly got up and left the office in order to calm Ms. Jaworski. She was in a hurry to get to the patient when the Collision occurred.

**29**  Nurse Buchanan was looking straight at Ms. Jaworski as she proceeded out of the office. She observed Ms. Jaworski running and screaming. Nurse Buchanan's pace was a brisk walk.

**30**  Nurse Buchanan had taken about two or three steps out of the office and towards Ms. Jaworski when the Collision occurred. Nurse Buchanan's front and left side collided with the right side of Ms. Faircrest's body. Ms. Faircrest wobbled for a moment, before falling and landing on her left side, causing her injury.

**31**  Nurse Buchanan did not fall over. She apologized to Ms. Faircrest immediately afterwards.

**32**  Neither woman saw each other before the Collision. Both of them were watching Ms. Jaworski.

**33**  Nurse Buchanan was walking straight on a line to intercept Ms. Jaworski, watching Ms. Jaworski.

**34**  There were no independent witnesses to the Collision.

**THE POSITIONS OF THE PARTIES**

**35**  In her amended notice of civil claim, the plaintiff alleges four alternative bases of liability: breach of the *Occupiers Liability Act,* *R.S.B.C. 1996, c. 337* (the *"Act")*; negligent walking, negligent permission; and trespass to the person.

**36**  The defendant denies liability under each of these four heads.

**THE *OCCUPIERS LIABILITY ACT***

**37**  It is not disputed that Fraser Health was an occupier within the meaning of the *Act*.

**38**  Pursuant to s. 3(1) of the *Act*, an occupier of premises owes a duty to take reasonable care to see that a person on its premises will be reasonably safe in using the premises.

**39**  That section provides:

1. (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.

**40**  Section 3(2) stipulates that the duty of care applies in relation to the condition of the premises, activities on the premises, or conduct of third parties on the premises. However, pursuant to s. 3(3), an occupier has no duty of care to a person in respect of risks the person willingly assumed, other than a duty not to create a danger with intent to harm the person or damage property, or to act with reckless disregard to the safety of the person or the integrity of the person's property.

**41**  In *Agar v. Weber,* [*2014 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B196-00000-00&context=), the British Columbia Court of Appeal discussed the relationship between liability under the *Act* and the common law of ***negligence***:

[29] In ***negligence***, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [*[1999] 1 S.C.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41J-00000-00&context=) at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *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=); *Hussack v. Chilliwack School District No. 33*, [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=) at para. 54. [Emphasis in original.]

[30] The standard of care under the *OLA* and at common law for ***negligence*** is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[31] Under the statutory test for occupiers liability, the Court in *Waldick v. Malcolm*, *[1991] 2 S.C.R. 456* described the standard of care at 472:

...the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable". [Emphasis in original.]

[32] Similarly, in *Ryan v. Victoria (City)*, the Court described the standard of care for ***negligence*** as follows:

[28] 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 the 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.

**42**  Thus, in the present case, the issue in relation to liability under the *Act* is whether Fraser Health breached its duty to take such care as in all the circumstances of the case was reasonable to see that Ms. Faircrest would be reasonably safe in using the premises.

**43**  Unlike many occupier liability actions, there is no evidence here that Ms. Faircrest's injuries were caused by design flaws, physical hazards or dangers inherent to the property. Rather, the claim appears to be that Fraser Health should have known and taken steps to ameliorate, or otherwise warn volunteers at the Lodge, of the possibility that nurses might move quickly through the Lodge when responding to a patient crisis.

**44**  As *Agar v. Weber* and *Waldick v. Malcolm* make clear, the duty under the *Act* to take reasonable care in the circumstances to make the premises safe, is necessarily very specific to each fact situation. In the present case, the most salient fact is that the Lodge is a mental health care unit intended to provide care to patients who are prone to violence. Thus, the duty of care owed by Fraser Health to volunteers at the Lodge must be understood in light of the everyday reality of the Lodge and its attendant emergency situations.

**45**  It is obvious that there will be some risk to those who volunteer at such a mental health facility. Fraser Health took steps to ameliorate the risk by requiring volunteers to wear personal protection alarms and by having a system in place for Staff to assist in emergencies, and by having its employees, such as Nurse Buchanan, take non-violent intervention courses to handle mental health patients.

**46**  The incident in the present case was unusual, in that it did not directly involve an interaction between a mental health patient and a volunteer. Rather, it involved unintentional contact between a nurse responding to an emergency and a volunteer. Such an occurrence had never before happened at the Lodge, and in all the circumstances, it is not reasonable to expect that Fraser Health should have foreseen the risk and taken steps to prevent it. There is no liability under the *Act*.

**NEGLIGENT PERMISSION**

**47**  In the alternative, Ms. Faircrest submits that Fraser Health was negligent in permitting her to work as a volunteer at the Lodge or in failing to warn her that she might get knocked down by a nurse.

**48**  Ms. Faircrest concedes in her response to application that this is "admittedly not the plaintiff's strongest argument." I agree with that assessment.

**49**  The incident here, involving a collision between a nurse and a volunteer, was not only unforeseen; it was not reasonably foreseeable. Nothing like this had ever happened before. I cannot accept that Fraser Health had a duty of care to Ms. Faircrest either to prevent her from working as a volunteer or to warn her that a nurse might bump into her and cause her to fall.

**TRESPASS TO THE PERSON**

**50**  Next, Ms. Faircrest submits that Nurse Buchanan committed the tort of trespass to the person and that Fraser Health is therefore vicariously liable for damages.

**51**  The tort of trespass to the person, which includes battery, was discussed 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=). There, Chief Justice McLachlin, for the majority, wrote at paras. 4-5:

4 This Court has long affirmed this proposition. In *Cook v. Lewis*, [*[1951] S.C.R. 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=), at p. 839, Cartwright J. stated that "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault'."

5 In *Larin v. Goshen* [*(1974), 56 D.L.R. (3d) 719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPR1-JCBX-S1VV-00000-00&context=) (N.S.C.A.), at p. 722, Macdonald J.A., citing numerous authorities, stated: "The law in Canada at present is this: In an action for damages in trespass where the plaintiff proves that he has been injured by the direct act of the defendant, the onus falls upon the defendant to prove that his act was both *unintentional and without* ***negligence*** on his part, in order for him to be entitled to a dismissal of the action." [Emphasis in original.]

**52**  She continued at para. 8:

8 The traditional rule, as noted, is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant: see *Scott v. Shepherd (*1773), 2 Black. W. 892, 96 E.R. 525 (K.B.); *Leame v. Bray* (1803), 3 East 593, 102 E.R. 724 (K.B.). The burden is then on the defendant to allege and prove his defence. Consent is one such defence.

**53**  In *Scalera*, the primary issue was who bore the onus of proving that the application of force was without consent. The Court reaffirmed the traditional view that for the tort of trespass to the person, the onus is on the defendant to prove any defence, including consent.

**54**  In the present case, it is clear that Nurse Buchanan directly interfered with the plaintiff's person. No issue arises about consent. Nurse Buchanan would have a defence to the tort of trespass to the person if the interference was neither intentional nor negligent.

**55**  The plaintiff does not suggest that Nurse Buchanan intentionally collided with her. The question then, is whether she was negligent. That is a question which, in these circumstances, is best examined under the next heading.

**NEGLIGENT WALKING**

**56**  Ms. Faircrest submits that Nurse Buchanan was negligent in bumping into her and that Fraser Health is vicariously liable for the injuries she suffered as a result.

**57**  The parties are in agreement that there are four elements to be proved by the plaintiff in an action for ***negligence***, as set out in para. 3 of *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=):

[3] A successful action in ***negligence*** requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of ***negligence*** in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's ***negligence***. In other words, his damage are too remote to allow recovery.

**58**  The first and the third elements are not in issue, since Fraser Health acknowledges that Nurse Buchanan owed the plaintiff a duty of care and that the plaintiff was injured in the Collision. Fraser Health also acknowledges that it is vicariously liable if Nurse Buchanan is found to have been negligent.

**59**  As to the fourth element, Fraser Health contends that even if the plaintiff's injuries were in fact caused by the Collision, they were too remote to warrant damages, and therefore, legal causation has not been established. Fraser Health submits that a person of ordinary fortitude would not have fallen as a result of the Collision, or if she did, she would not have sustained injury.

**60**  I do not agree. There is no evidence that Ms. Faircrest's arthritis, age, or stature had anything to do with her sustaining injuries in the Collision. Although she may have walked more slowly than others, that was not a relevant factor in the outcome. It was reasonably foreseeable that if Nurse Buchanan, who weighed 185 lbs., while not watching where she was walking, collided with a female volunteer, that volunteer might fall and suffer physical injuries. The injuries are not too remote to warrant damages, if the standard of care was breached.

**61**  We come then to the third element, breach of the standard of care. The standard of care in the case of collisions between pedestrians was described in this way by Dhillon J. in *Mills v. Moberg* [*(1996), 27 B.C.L.R. (3d) 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61V9-00000-00&context=) (S.C.) at para. 6:

The duty of pedestrians to one another is to act as an ordinary person would in the circumstances, using the degree of care and vigilance which the circumstances and the interests of others using the walkway demand.

**62**  In that case, Dhillon J. found a delivery driver liable in ***negligence*** for having knocked over another pedestrian as he walked around the corner of his truck in a mall parking lot, causing the 76-year-old plaintiff to fall and break her hip. She wrote at para. 6:

In this case, the defendant, Moberg, failed to consider the possibility of other pedestrians in the parking lot despite the configuration of the lot which necessitated pedestrians to cross the lot to reach the shops. Given the proximity of the mall to long term care and rehabilitation facilities and given Moberg's regular presence at the mall, Moberg should have been alert to the presence of pedestrians including disabled persons in the vicinity. He did not look to his right as he quickly rounded the rear of his delivery van to reach the driver's door. His failure to look for other pedestrians was the cause of the collision.

**63**  In the present case, it is, of course, relevant that Connolly Lodge is a residential mental health facility and that Nurse Buchanan had a duty to react quickly to the disturbance caused by one of the patients. Nevertheless, her quick reaction was no reason to be heedless of other persons standing or walking in the Lodge who might be in her path as she proceeded to attend to the patient. Her failure to notice the presence of the plaintiff in her path caused the Collision.

**64**  I therefore find that Nurse Buchanan was negligent, and that Fraser Health is vicariously liable for her ***negligence***.

**CONTRIBUTORY *NEGLIGENCE***

**65**  Fraser Health has pleaded the provisions of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333* and submits that the plaintiff was contributorily negligent. As Fraser Health put it in its written submissions:

With respect to the claims under the *Act*, for negligent walking and for trespass to the person, the plaintiff stopped just outside the nursing station. She ought to have known once she heard Ms. Jaworski start to become agitated that the only nurse in charge at the Lodge would be the first responder. By continuing to stand near the entrance of the nursing station as she did and stare at Ms. Jaworski, she left herself in the way of Nurse Buchanan. It behooved her to recognize the situation and to move out of the way.

**66**  I agree with that assessment. The plaintiff was partly responsible for the Collision because she was heedless of Nurse Buchanan, just as Nurse Buchanan was heedless of her. The plaintiff should have realized that when the situation arose with Ms. Jaworski, staff would have to respond quickly, and volunteers should ensure that they do not block their path. I find Ms. Faircrest to be 40% responsible for the Collision.

**CONCLUSION**

**67**  I agree with the parties that this matter is suitable for summary determination under Rule 9-7, and I find, on the issue of liability, that Fraser Health is vicariously liable for the ***negligence*** of Nurse Buchanan in causing the injuries to Ms. Faircrest. I find that Fraser Health is 60% responsible, and that Ms. Faircrest is 40% responsible for the Collision.

**68**  As agreed by the parties at the outset of this summary trial, the assessment of damages may, if necessary, be determined in a subsequent proceeding.

W. EHRCKE J.

\* \* \* \* \*

**CORRIGENDUM**

Released: August 13, 2015

[1] This is a corrigendum to my reasons for judgment dated April 27, 2015.

[2] The reference to Rule 9-4 in paras. 3 and 67 should be to Rule 9-7.

W. EHRCKE J.

**End of Document**

[***Fong v. Lew (c.o.b. Chuck Lew & Co.), [2015] B.C.J. No. 554***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60GW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: September 16-20, 23-27, 30, October

1, 7, 2013; September 2-5, 8-11

and 22-24, 2014.

Judgment: March 24, 2015.

Dockets: S107180, S108092

Registry: Vancouver

**[2015] B.C.J. No. 554** | 2015 BCSC 436

Between Michael Kwok Sheun Fong, Fung Sui Fong and Cindy Siu Ying Fong, Plaintiffs, and Chuck Lew Q.C. carrying on business as Chuck Lew & Company and Russell Lew, Defendants And between 672496 B.C. Ltd., Plaintiff, and Chuck Lew Q.C. carrying on business as Chuck Lew & Company and Russell Lew, Defendants

(304 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — Liability — Business and investment advice — Standard of care and *negligence* — *Negligence* — In real estate transactions — Search of title — Mortgages — Providing ineffective mortgage security — In loan transactions — Consequences of *negligence* — Professional *negligence* actions by family and corporation against lawyers retained on loan transactions allowed in part — With respect to loans by corporation, evidence did not establish plaintiffs instructed defendants to have prepayment penalty paid into trust, and defendants met standard of care in advising plaintiff shares in private company were not good security — With respect to loans by family, defendants were not retained generally to give business advice — Defendants' only breach of retainer was failing to register extension agreements, but this did not cause damages as there was insufficient money to recover anyway, so plaintiffs awarded $1,000.**

**Professional responsibility — Self-governing professions — Duties — Duty of care — Standard of care — *Negligence* — Liability — Damages — Professions — Legal — Barristers and solicitors — Professional *negligence* actions by family and corporation against lawyers retained on loan transactions allowed in part — With respect to loans by corporation, evidence did not establish plaintiffs instructed defendants to have prepayment penalty paid into trust, and defendants met standard of care in advising plaintiff shares in private company were not good security — With respect to loans by family, defendants were not retained generally to give business advice — Defendants' only breach of retainer was failing to register extension agreements, but this did not cause damages as there was insufficient money to recover anyway, so plaintiffs awarded $1,000.**

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| --- |
| Actions by the family and their corporation alleging professional ***negligence*** against lawyers retained with respect to a loan transactions. In the corporate action, the plaintiffs alleged the defendants failed to hold a prepayment penalty in trust and were negligent in giving advice. The plaintiff corporation made a series of loans to a borrower who owned a hotel, all secured by mortgages. The borrower decided to sell the hotel, so requested mortgage payout statements from the plaintiffs. The plaintiffs initially wanted six months of interest paid into trust as a prepayment penalty, but then met with the borrower and agreed to give him six months to pay the penalty. The plaintiff also agreed to lend the borrower another $150,000, secured by shares in a private business. The plaintiff claimed he would not have made this loan had the defendants properly advised him. The borrower went bankrupt and the plaintiff ended up not recovering. The plaintiff family made four loans to another borrower totalling $835,000, which went into default. The plaintiffs alleged the defendants were negligent in failing to properly advise them, failing to obtain personal guarantees, letting borrower's counsel prepare loan documents, failing to notify the plaintiffs of more than $1.1 million prior charges on the property, and failing to obtain undertakings respecting utilities and taxes. After the plaintiff had loaned $635,000, the borrower asked the plaintiff to take alternate security so a hotel property could be sold. The plaintiff agreed to accept a third mortgage on a church property and a charge on a liquor license in exchange for giving discharges on two mortgages. Later, when the borrower needed refinancing, the plaintiffs signed a postponement agreement that gave the new lender priority over its charges. The plaintiffs alleged the defendants did not provide proper advice on these transactions.  HELD: Action allowed in part.  It was not accepted that the plaintiffs instructed the defendants to require the prepayment penalty to be paid into trust. Once the borrowed agreed to the penalty, there was no reason to have it held in trust, nor did the written agreement reached by the plaintiff and borrower refer to such a requirement. The defendants duly advised the plaintiff that shares in a private company were not good security. Furthermore, the plaintiff had already reached an agreement with the borrower before he approached the defendants and later made a further unsecured loan, so his assertions he would not have made the loan had he known better was not accepted. With respect to the loans by the plaintiff family, while the borrower's counsel prepared the loan documents, the defendants reviewed them and negotiated changes, and the plaintiffs did not point to anything that should or should not have been included. There was no evidence the plaintiffs ever instructed the defendants to obtain personal guarantees and the defendants did not. Prior to the first advance of money, the documentary record suggested the defendants did not discuss the SST lien and property taxes owing on the property, which was not best practice, but the express terms of the mortgage required payment of taxes and the plaintiffs were told about mortgages registered in priority to theirs. The defendants specifically advised the plaintiff of other charges registered against the property but the plaintiff chose to accept the borrower's assertions there was sufficient security. Prior to the second loan, the defendants advised the plaintiffs of mortgages ahead of theirs and were never asked to find out the amounts; instead the plaintiffs went to the borrower for information. The plaintiff agreed to discharge the mortgages in exchange for alternate security without first obtaining legal advice from the defendants. The defendants did breach their retainer in failing to register the extension agreements. However, no actual damages occurred as the extension agreements would not have ranked higher than the plaintiffs' third mortgage on which they had been unable to recover. The plaintiffs were awarded $1,000 nominal damages. When the borrower requested the plaintiffs sign the postponement agreement so he could retain refinancing, the plaintiff negotiated directly with the borrower, and had been duly informed of charges on the property. The defendant released the signed postponement agreement once the plaintiff gave instructions to do so. |

**Statutes, Regulations and Rules Cited:**

Personal Property Security Act, R.S.B.C. 1996. c. 354,

**Counsel**

Counsel for the Plaintiffs: K. Wiebe and J. Wittman (September 16-20, 23-27 and 30, October 1 and 7, 2013); J. Henshall (September 2-5, 8-11 and 22-24, 2014).

Counsel for the Defendants: John G. Dives, Q.C. and Eric Stanger.

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**Reasons for Judgment**

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| **E.J. ADAIR J.** |

**Introduction**

**1**  This trial involved two professional ***negligence*** actions against Mr. Chuck Lew and Mr. Russell Lew (Mr. Chuck Lew's son), who carried on a law practice as partners in the firm of Chuck Lew & Co. (*Lewco*). The plaintiffs in Action No. S107180, Michael Fong, Fung Fong and Cindy Fong, are all members of the same family. Michael Fong and Cindy Fong are spouses, while Fung Fong is Mr. Fong's mother. I will refer to the individual plaintiffs collectively as the *Fong Family*. The plaintiff in Action No. S108092, 672496 B.C. Ltd. (*672*), is a Fong Family company, over which Michael Fong exercised *de facto* control. I will refer to Action No. S107180 as the *Fong Family Action*, and I will refer to Action No. S108092 as the *672 Action*.

**2**  For convenience, a glossary of abbreviations is found at Appendix "A". The "meaning" should be read as incorporated in these Reasons. The first use of a term that appears in the glossary will be in italics and underlined (for example *Fong Family*, above).

**3**  The plaintiffs say that they retained Chuck Lew (and, from time to time, Russell Lew) to act for them in their capacity as lenders in a number of loan transactions, and to provide legal services (which included the preparation of mortgage and other legal documents intended to secure repayment of the loans) and also legal advice concerning the transactions. The plaintiffs assert that both Chuck Lew and Russell Lew breached the applicable standard of care and that, but for the defendants' breach, they would not have made the loans at all. The plaintiffs therefore assert that the defendants' ***negligence*** caused them to suffer the losses claimed in these actions. The Fong Family claims it has suffered losses of over $800,000 (less recoveries of about $87,000). 672 asserts that it has suffered losses of about $195,000.

**4**  The defendants say that both actions must be dismissed. They say that they provided all of the security that the plaintiffs requested, and that they provided reasonable legal advice within the context of the business arrangements that Mr. Fong had made in relation to the loans. Chuck Lew and Russell Lew do not deny that the plaintiffs incurred losses on the loans, but they say that the losses resulted from business decisions made by Mr. Fong and the nature of the agreements he made relating to security for loans. They say that, even if the plaintiffs could prove that the defendants breached the standard of care, the evidence does not support a finding that links such a breach causally with any of the losses claimed.

**5**  I will first set out some basic background information about the parties. Then, I will review the legal principles applicable to the claims and review a number of the cases cited in closing argument. Next, because credibility and reliability of witnesses are significant issues in this case, I will set out my observations and conclusions on these.

**6**  I will then turn to the merits of the claims. In my opinion, the transactions in issue are the subject of separate retainers, and I intend to deal with them accordingly. I will first address the transactions in issue in the 672 Action and the merits of the claims in that action. Finally, I will address the transactions in issue in the Fong Family Action and the merits of the claims in that action.

**The Parties**

1. **The Fong Family**

**7**  Mr. Fong is in his late 50s. He is married to Cindy Fong. The couple have three sons. Mr. Fong is one of seven children and is the eldest son in the family. Mr. Fong testified that in 1990, he was given a full power of attorney by his parents to make investments with the family's money. His father died in February 2008.

**8**  Mr. Fong graduated from Kitsilano Secondary School. He then spent five years at the University of British Columbia, studying mathematics and economics. However, according to Mr. Fong, he did not graduate because he was unable to pass his English exam. In the early 1980s, Mr. Fong studied accounting and qualified as a certified general accountant. He worked for three years in an accounting firm. He then took a year and a half off from work. Next, Mr. Fong studied to become a real estate agent, and started work in that field in about 1986. It was around the time that Mr. Fong began working in real estate that he became acquainted with Chuck Lew. Mr. Fong sold real estate in Vancouver for a number of years, splitting his time between commercial (about 40%) and residential sales. However, by 1999, he felt he was burned out and ready for another change in career. He was interested in hotels and pubs, and started looking for investment opportunities in those businesses.

**9**  In the early 2000s, Mr. Fong operated and managed a pub in Surrey. But after about three years, he again took time off from work. He worked for about a year as the manager for the "Oasis" Hotel, until about the end of October 2006. By then, he was again feeling burned out. He travelled with his parents to Hong Kong and took time off. In about May 2007, he began working part-time as a doorman at the Empress Hotel in Chilliwack and did that until about August 2007. During that time, he was living in Chilliwack, rather than with his family in Vancouver. He has not had paid employment since about the summer of 2007.

**10**  Although it was alleged in the notices of civil claim filed in both actions that Mr. Fong was particularly vulnerable to, and reliant on, the defendants because he suffered and suffers from acute clinical depression for which he takes medication, the plaintiffs never tendered any medical opinion evidence to substantiate any diagnosis. I find these allegations not to be proven.

**11**  Cindy Fong is in her early 50s and has always been a stay-at-home mother. She graduated high school in China. She speaks and writes English only a little. Mr. Fong's mother, Fung Fong, is in her early 80s. She neither reads nor speaks English. She lives with Mr. Fong and Cindy Fong.

1. **The Lews**

**12**  Chuck Lew graduated from UBC law school in 1956. He wrote the bar exams in 1957 and then went to work for the law firm of Boughton & Company. He remained there for about seven years, handling a variety of legal work, including real estate work. In 1963, Chuck Lew started a law firm with several other lawyers, and they practiced together for several years. Mr. Lew was doing mostly real estate work. Beginning in about 1970, he began practicing on his own and continued as a sole practitioner until his son Russell joined him. Chuck Lew carried on a solicitor's practice and rarely went to court. He acted mainly for individuals and small businesses. There were some practice areas (such as personal property security) that, especially in later years (including the years in issue in these actions), he left to Russell Lew.

**13**  Russell Lew attended law school at Seattle University and graduated in 1984. He then took courses at the University of Ottawa law school, in order to qualify for the bar admission program in B.C. Russell Lew was called to the Bar in B.C. in August 1987. Since his call to the Bar, he has practiced as a general practitioner, handling a variety of matters including real estate transactions, corporate and commercial transactions and some litigation. Russell Lew joined his father's firm in the late 1990s, and they have practiced together as partners since. In 2005 and 2006, about 10% of his practice was commercial lending on the lender's side.

**14**  Although, for example, Chuck Lew throughout his career has frequently handled real estate transactions, I find that neither Chuck Lew nor Russell Lew should be seen as having special expertise in any particular legal field. The standard of care that will apply to them (as discussed further in the next section) is that of a reasonably competent and diligent solicitor.

**Applicable Legal Principles**

**15**  Although claims based on breach of fiduciary duty are pleaded in both Actions, Mr. Henshall confirmed in closing submissions that the plaintiffs were not pursuing those claims. The claims in issue therefore have their legal basis in tort and breach of contract.

**16**  There is no doubt that (in the absence of express contractual terms) a solicitor's duty of care to a client is the same, whether the claim is brought in tort or in contract: see ***Central Trust Co. v. Rafuse***, [*[1986] 2 S.C.R. 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=), at pp. 206 and 210. There is also no dispute that the defendants in this case owed the plaintiffs a duty of care.

**17**  To establish liability in ***negligence***, a plaintiff must show that: (a) the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty by failing to fulfill or observe the relevant standard of care; (c) the plaintiff sustained damage or loss; and (d) the damage or loss was caused, in fact and in law, by the defendant's breach of duty. The general standard of care applicable here is that of a reasonably competent and diligent solicitor: see, e.g., ***Central Trust v. Rafuse***, at pp. 208-209.

**18**  In an action against a solicitor for ***negligence***, it is not enough to say that the solicitor has made an error in judgment or shown ignorance of some particular part of the law. However, the solicitor will be liable if his or her error or ignorance was such that than an ordinarily competent solicitor would not have made it. See, for example, ***Banyay v. Christie and Co.***, [*2001 BCSC 1165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6174-00000-00&context=), at para. 24 (citing ***Brenner v. Gregory***, [*1972 CanLII 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=), [*30 D.L.R. (3d) 672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=) (Ont. H.C.J), at p. 677). On the other hand, a solicitor is not an insurer of the client's commercial success: see ***Midland Mortgage Corp. v. Jawl & Bundon***, [*1999 BCCA 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1BM-00000-00&context=), at para. 13.

**19**  In ***Tiffin Holdings Ltd. v. Millican*** [*(1964), 49 D.L.R. (2d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-F81W-219M-00000-00&context=) (Alta. S.C.), at pp. 218-219, aff'd [*[1967] S.C.R. 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22MN-00000-00&context=), Riley J. expressed these views on the standard of care expected of a solicitor:

The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor.

It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.

. . .

In this case I have not had the advantage of evidence tending to show what an ordinarily competent lawyer would have done.

The obligations of a lawyer are, I think, the following:

1. To be skilful and careful.
2. To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
3. To protect the interests of his client.
4. To carry out his instructions by all proper means.
5. To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
6. To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

**20**  This list has been cited with approval a number of times in B.C. See, for example: ***Zink v. Adrian***, [*2005 BCCA 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VG-00000-00&context=), at para. 23; ***Newton v. Marzban***, [*2008 BCSC 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1BS-00000-00&context=), at para. 605; and ***Duckett v. McKinnon***, [*2012 BCSC 2147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23B-00000-00&context=), at para. 37.

**21**  Here, there was no expert opinion evidence on the applicable standard of care. Mr. Dives objected to the admissibility of the reports of the plaintiffs' expert, Mr. Richard Ledding, and, in the result, I ruled that the reports were inadmissible.

**22**  However, there are certainly solicitor's ***negligence*** cases that are heard and decided in the absence of any opinion evidence. ***Graybriar Indust. Ltd. v Davis & Co.***, [*1990 CanLII 1572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=), [*46 B.C.L.R. (2d) 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=) (S.C.) and ***Tiffin*** are two examples. Both Mr. Henshall and Mr. Dives rely on the discussion and analysis in case authorities as informing the details of standard of care that should apply here.

**23**  Mr. Henshall cites ***Graybriar*** (at B.C.L.R. p. 181) as authority for the proposition that a client who goes to a lawyer with respect to a land transaction is entitled to expect the lawyer to investigate the state of any title that is germane to the matter and to explain to the client exactly what the state of the title portrays.

**24**  Mr. Henshall says that the admissions made by the defendant solicitor in ***Low v. Albas***, [*2013 BCSC 1916*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23PD-00000-00&context=) (at para. 3), are in keeping with the standard of care owed by a reasonably competent solicitor handling the registration and discharge of security for a client. In that case, the solicitor admitted that he owed a duty to the client not to discharge a prior mortgage before he had confirmed registration of a new mortgage, and that he also owed a duty to in fact register the new mortgage (which he had not done at all). Thus, Mr. Henshall says that the standard of care applicable to a reasonably competent solicitor handling secured lending transactions includes actually registering the security, and not discharging old security before the new security is registered.

**25**  Mr. Henshall cites ***Major v. Buchanan***, [*1975 CanLII 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M46C-00000-00&context=), [*61 D.L.R. (3d) 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M46C-00000-00&context=) (Ont. H.C.J.) and ***Zink*** in support of his submission that the standard of care applicable to a reasonably competent solicitor imposes a duty on the solicitor to warn the client of the risk involved in a course of action contemplated by the client (or by the solicitor on the client's behalf), and of exercising reasonable care and skill in advising the client.

**26**  In addition to ***Zink***, Mr. Henshall also cites ***Freemont Development Co. Ltd. v. Zipursky***, [*[1983] B.C.J. No. 1451*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-FJTD-G200-00000-00&context=) (S.C.), at paras. 93 and following, for the proposition that a reasonably competent solicitor has an obligation to review and understand the potential shortcomings and problems in a client's proposed course of action.

**27**  On the standard of care generally, Mr. Henshall also relies on Chapter III ("Advising Clients") of the Canadian Bar Association ***Code of Professional Conduct*** (2009).

**28**  Mr. Dives cites ***Enola Apartments Ltd. v Young*** [*(1979), 30 R.P.R. 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCG1-JBT7-X17G-00000-00&context=) (Ont. H.C.J.) for the proposition that a solicitor does not have a duty to advise a client on the value of an investment or security, but has a duty only to advise and inform the client concerning anything affecting the legal aspect of the investment or security. He cites ***Girardet v. Crease & Co.***, [*1987 CanLII 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X1J8-00000-00&context=), [*11 B.C.L.R. (2d) 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X1J8-00000-00&context=) (S.C.) for the proposition that failing to engage in what would be sound or preferred practice by a first-rate lawyer (for example, repeating advice many times, or recording advice and reasons for the advice in writing for the client) is not equivalent to a breach of the standard of a reasonably competent solicitor.

**29**  Mr. Dives cites ***MacIntosh v. Rosborough & Co.***, [*1990 CanLII 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2WD-00000-00&context=) (B.C.C.A.) for the proposition that a solicitor does not have an obligation to advise a client about things the client already knows (although Taylor J.A., for the court, was careful to say that he did not wish to be understood to suggest that a solicitor owes a lesser duty of care to someone acquainted, for whatever reason, with legal matters than to someone who is unfamiliar with such matters). Mr. Dives also notes Mr. Justice Thackray's comment in ***Graybriar***, at p. 179, concerning the scope of advice a reasonably competent solicitor should be expected to give:

In *Income Trust Co. v. Watson* [*(1984), 26 B.L.R. 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-JCBX-S0H4-00000-00&context=), [*35 R.P.R. 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-JCBX-S0H4-00000-00&context=) (Ont. H.C.), there is an annotation which suggests that courts should be very cautious in imposing duties on solicitors to warn clients of business risks unless the risks are entirely or substantially legal risks of which it would be unreasonable to presume the client would be aware.

**30**  The scope of the solicitor's retainer is an important factor in addressing the standard of care. This point is made in ***Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp***, [1978] 3 All E.R. 571 (Ch. D.), at p. 583:

There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' as establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck* [[1972] 2 Lloyd's Rep. 172], *Griffiths v. Evans* [ [1953] 2 All E.R. 1364] and *Hall v. Meyrick* [ [1957] 2 All E.R. 722] demonstrate that the duty is directly related to the confines of the retainer.

**31**  ***Midland Bank*** has been cited in B.C. with approval on this point. See, for example: ***Zink***, at para. 21 and ***Marbel Developments Ltd. v. Pirani***, [*[1994] B.C.J. No. 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1HF-00000-00&context=) (S.C.), at para. 25.

**32**  Mr. Henshall cites ***Morton v. Harper Grey Easton*** [*(1995), 8 B.C.L.R. (3d) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62K7-00000-00&context=) (S.C.), at para. 34, for the proposition that, all other things being equal, the client's version of the retainer is to be preferred over the solicitor's.

**33**  The traditional test for determining causation in ***negligence*** cases is the "but for" test, which requires the plaintiff to prove on a balance of probabilities that his or her loss would not have occurred but for the ***negligence*** of the defendant: see ***Newton v. Marzban***, [*2008 BCSC 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1BS-00000-00&context=), at para. 749 (citing ***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 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 paras. 21-22).

**34**  A finding of breach of duty is a separate factual issue from that of causation: see, for example, ***Graybriar***, at p. 181. Causation cannot be assumed from breach of duty. There must be proof that the breach of duty caused damage or loss to the plaintiff. A plaintiff who proves duty, breach of the standard of care and damages will still be unsuccessful in the action unless the plaintiff proves a causal link between the breach of the standard of care and the damage: see ***Graybriar***, at p. 181.

**35**  The causation issues in this case are often based on the assertion that the client would have behaved differently (and avoided a loss) if only the client had received proper legal advice. In that respect, I have found the following observation of Neilson J. (as she then was) in ***Newton*** to be helpful:

[761] I adopt the view of Groberman J. in ***Sports Pool Distributors Inc. v. Dangerfield***, [*2008 BCSC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-2060-00000-00&context=) at para. 97, that in cases of professional ***negligence*** a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in ***Hong Kong Bank of Canada v. Touche Ross & Co.*** [*(1989), 36 B.C.L.R. (2d) 381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JF75-M3S4-00000-00&context=) at 392 (C.A.):

It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

**Credibility and Reliability of Witnesses**

**36**  The credibility and reliability of witnesses are significant features of these actions.

**37**  I am going to begin with Mr. Fong, since, although there are two other individual plaintiffs, much of the outcome of both actions depends on his evidence and credibility.

**38**  Mr. Fong's credibility and reliability are critically important. He was the person negotiating all of the transactions and making all of the decisions concerning how the plaintiffs' money was going to be dealt with, what investments were going to be made and how (if at all) loans were going to be secured. He was also the only person giving instructions to the defendants. His credibility and reliability also matter a great deal because the plaintiffs' primary position is that, if they had received proper legal services and advice, they would not have made the investments at issue at all. As a result, the plaintiffs' cases depend on the credibility and reliability of Mr. Fong's evidence concerning what he would have done if only he had received proper legal services and advice, as well as his evidence about advice received (or not, as the case may be).

**39**  Mr. Fong's credibility and reliability are very important on the issue of the defendants' retainer with respect to each transaction in issue. The test described in ***Morton v. Harper Grey*** is framed in terms of "all other things being equal." However, if the client is not credible, "all other things" are not equal.

**40**  Mr. Fong's credibility and reliability are also very important because of the way the Fong Family Action has been framed and pleaded. Individual plaintiffs who join together to sue present the possibility that, depending on the circumstances, a defendant might owe different or separate duties to each individual plaintiff, and that one plaintiff might fail to prove a case although another succeeds. For example, in the context of a solicitor's ***negligence*** case, one of the complaints might be that there was an obligation on the solicitor to refer a plaintiff out for independent legal advice. However, no such allegations have been made here.

**41**  The Fong Family Action has been pleaded, presented and argued on the basis that the Fong Family members stand or fall together, that if the defendants' obligations were discharged in respect of Mr. Fong, they were also discharged in respect of Fung Fong and Cindy Fong, and that if the defendants have no liability to Mr. Fong, they have no liability to Fung Fong or Cindy Fong either.

**42**  I have concluded that Mr. Fong is neither a credible nor a reliable witness. He was evasive, combative and argumentative on cross-examination. He often made a speech, rather than provide a responsive answer to a question. He was eager to criticize and blame Chuck Lew especially (and, to a lesser extent, Russell Lew), and to justify and defend his own conduct, and in my opinion, this perspective strongly permeated his testimony, both during his direct examination and his cross-examination. He sometimes displayed a memory for details that, if it were genuine (which I conclude is unlikely), would be remarkable. For example, he pin-pointed the time of an event in March 2008 down to the exact minute, and also testified to precise times of day on September 20, 2007 when he had discussions with Russell Lew. However, such precision, taken with other significant matters that he could not remember, was suspicious, as if he had memorized certain facts, or drew conclusions (which then became his evidence), from documents he had reviewed. Some of his evidence (for example, about a pre-payment penalty amount being placed in trust) simply did not make sense in the context of other evidence. There were significant inconsistencies between his evidence at trial and his discovery evidence. For example, at trial, he contradicted his discovery evidence concerning receipt of an important document (Ex. 113), in circumstances where being fixed with knowledge of the contents of the document would be incompatible with the position he was advancing.

**43**  Of course, I am not obliged to reject all of a witness's evidence simply because I have concluded the witness is not credible or reliable. The art of assessment of credibility involves examination of various factors such as: the witness's ability and opportunity to observe events; the firmness of the witness's memory; the witness's ability to resist the influence of interest to modify his or her recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether a witness has a motive to lie; and the demeanour of a witness generally. See ***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=). Moreover, the assessment of a witness's credibility must reasonably subject the witness's story to an examination of its consistency with the probabilities of the surrounding conditions or circumstances. 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 circumstances. See ***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 pp. 356-357.

**44**  Generally speaking, I accept Mr. Fong's evidence where it is consistent with reliable documentary evidence or other reliable evidence, or where Mr. Fong makes statements against the plaintiffs' interest.

**45**  The trial took an unusual and unexpected turn during the second full day of Mr. Fong's cross-examination, on September 27, 2013. These events are also relevant to the credibility and reliability of Mr. Fong, Fung Fong and Cindy Fong.

**46**  Although the two Actions had been filed in 2010, Mr. Fong testified on cross-examination that, until August 2013, neither his mother nor his wife knew that they were suing Chuck Lew and Russell Lew. This was something he had kept from both of them, and he did not tell them until after they had been examined for discovery. Fung Fong confirmed in her evidence that she only found out in 2013 that she was suing Chuck Lew (and presumably Russell Lew). According to Cindy Fong, she did not know that she was suing Chuck Lew (and Russell Lew) when she was examined for discovery in August 2013.

**47**  On October 1, 2013, at the request of the plaintiffs' then counsel, I granted an adjournment of the trial so that Fung Fong and Cindy Fong could obtain independent legal advice. Even though Mr. Fong was then under cross-examination, he was relieved of any restrictions on who he could speak to about the cases or his evidence. The initial request was for a short adjournment. However, when the trial reconvened on October 7, 2013 (and after Fung Fong and Cindy Fong had obtained independent legal advice), the plaintiffs' then counsel asked for leave to withdraw from the cases, which I granted, and the trial was adjourned generally.

**48**  However, neither Fung Fong nor Cindy Fong sought a mistrial, on the basis that their interests were separate from Mr. Fong's. Rather, the trial reconvened in September 2014, with new counsel (Mr. Henshall) acting for all plaintiffs. Mr. Dives's cross-examination of Mr. Fong then resumed. In my view, the reasonable and logical inference in those circumstances is that Fung Fong and Cindy Fong accepted and endorsed how the Actions had been pleaded and presented up until the adjournment in October 2013.

**49**  However, one thing was different when the trial reconvened in September 2014. When Fung Fong and Cindy Fong testified, they both emphasized their trust in and reliance on "the lawyer" (Chuck Lew in particular). When giving evidence, Fung Fong, for example, would frequently volunteer that she trusted the lawyer. Otherwise, she recalled very little. Based on her evidence-in-chief, Cindy Fong appeared to know very little about what Mr. Fong was doing, although she went along with it. Both Fung Fong and Cindy Fong were very defensive on cross-examination, to the point of being evasive. For example, when confronted with an uncomfortable question on cross-examination, Cindy Fong would often respond with "I don't understand." At trial, both Fung Fong and Cindy Fong were intent on communicating a particular point of view helpful for their cases: that, in acting as they did, they relied on and trusted the lawyers, who provided nothing or next to nothing by way of advice or service.

**50**  However, when passages from their examinations for discovery in August 2013 were put to them during cross-examination, a different picture emerged. When they were examined for discovery, neither was aware she was suing the defendants and had no reason to mention or criticize either of them. At trial, when discovery evidence was put to Fung Fong, she resisted providing a responsive answer or attempted to distance herself from discovery answers where she said she trusted Mr. Fong. Instead, she criticized the lawyers and repeated that she trusted "the lawyer."

**51**  At trial, Cindy Fong denied that she knew what was to be signed when she arrived at Lewco to sign documents. However, at her examination for discovery, she testified that she "knew about what was to be signed." When her discovery evidence was put to her, Cindy Fong said that she knew legal documents were to be signed, but not the contents. Nevertheless, she agreed that she knew the legal documents had to do with money Mr. Fong was lending and that Mr. Fong told her the documents needed to be signed to do what he wanted to do. At her examination for discovery, Cindy Fong said that Mr. Fong told her that he was lending money out and that was good enough for her "because I trusted his own insight and his own experience." When the discovery evidence was put to her on cross-examination, Cindy Fong added that she trusted Chuck Lew's experience and professionalism. She acknowledged that when she was examined for discovery, she did not think that Chuck Lew had done anything wrong, but she now thought he had. However, she denied that she was now saying she trusted Chuck Lew because she now knew that she was suing him.

**52**  I have concluded that Fung Fong's and Cindy Fong's evidence at trial concerning the defendants is not reliable, and I cannot give it much (if any) weight. It was given against the unusual background of the adjournment of the trial, and I have concluded that very likely influenced their evidence at trial. There are significant inconsistencies between their evidence on examination for discovery (when they had no reason to make statements about how much they trusted Chuck Lew) and their evidence at trial. Those inconsistencies lead me to conclude that their evidence at trial has been tailored to suit the positions advanced by the plaintiffs in the litigation. In my opinion, their discovery evidence is probably the more reliable.

**53**  I have concluded that Chuck Lew's memory of events is not reliable, especially when there are no contemporaneous documents available to refresh it.

**54**  The evidence at trial began with Chuck Lew being called as the first witness in the plaintiffs' case and being subjected to cross-examination by plaintiffs' counsel as an adverse witness. Many documents were put to Chuck Lew during that cross-examination, which created the impression that Mr. Lew had often failed to do things that a reasonably competent solicitor would attend to for a client. Chuck Lew generally accepted propositions put to him by cross-examining counsel, and he did not argue or resist when it was put to him that things were not done that should have been done. However, further documents put to Mr. Lew during his cross-examination by Mr. Dives gave a more complete picture of the work that had been done, and frequently showed that Chuck Lew had been too quick to accept and agree with failings put to him on cross-examination by plaintiffs' counsel.

**55**  I will give a couple of examples to illustrate the point.

**56**  During cross-examination on September 17, 2013, it was put to Chuck Lew that an *SST lien* on the *Church Property* had been in place since the very first loan was advanced by the Fong Family to Rossland Recreation Holdings Ltd. (*Rossland*) in March 2008. Chuck Lew agreed. However, other evidence (including a Land Title Office search, Ex. 68) showed conclusively that the Church Property was not even owned by Rossland until May 2009 and that the SST lien was not registered until June 2009. I cannot place any weight on Mr. Lew's answer because the assumptions in the question were false, based on other reliable evidence.

**57**  It was also put to Chuck Lew (during cross-examination on September 17, 2013) that extension agreements mentioned in a letter from Mr. Peter Kletas dated July 14, 2009 were extension agreements relating to a Howard Johnson Hotel in Winnipeg. Again, Mr. Lew agreed. However, other reliable evidence showed that extension agreements in relation to the Howard Johnson Hotel were not raised by anyone until toward the end of August 2009, in relation to the IMOR Capital Corp. (*IMOR*) refinancing. Again, since the assumptions in the question were false, Chuck Lew's answer does not advance the cases at all.

**58**  In my opinion, Chuck Lew's cross-examination at trial simply confirmed that, absent the documentary record (and often even with it), his memory of what happened was poor and not very reliable. As a result, I am prepared to rely on Chuck Lew's evidence of events only where it is supported by credible and reliable documentary evidence or the evidence of another witness whose evidence I accept as reliable.

**59**  Russell Lew was also called as an adverse witness in the plaintiffs' case. I conclude that his evidence is generally reliable. There were some inconsistencies between his evidence on discovery and his evidence at trial, but in my opinion, they were inconsequential.

**60**  Mr. David Grewal was called as a witness in the plaintiffs' case. Mr. Grewal is a very experienced businessperson. He was the principal of Rossland (which owned the *Thunderbird Hotel*) and West One Enterprises (Port Hardy) Ltd. (*West One*) (which owned the *Seagate Hotel*), and also the principal of the company that owned the Howard Johnson Hotel in Winnipeg. He negotiated the terms of the Fong Family's loans that are in issue with Mr. Fong. I have concluded that I need to be cautious about relying on Mr. Grewal's evidence. The Fong Family recovered a judgment against him in relation to one of the loans in issue, and the judgment amount remains unpaid. He therefore has a motive to support the Fong Family's case against the defendants. Moreover, his memory of events appeared to be poor and selective, and although he likely had at least some relevant documents available that might have refreshed his memory, none was forthcoming.

**The 672 Action**

**61**  The 672 Action concerns events in September 2007: an alleged failure by the defendants to hold a 6-month interest prepayment penalty of about $44,700 in trust; and alleged ***negligence*** on the part of the defendants in relation to a loan of $150,000 made by 672. However, some additional background is necessary to appreciate the context in which the events in September 2007 occurred.

1. **Background**

**62**  In 2003, Mr. Fong identified what he considered a suitable investment, in the Empress Hotel in Chilliwack. At his direction and under his control, the Fong Family resources were going to be put to work to earn income (in the form of interest on the investment) to support the family members (including Mr. Fong, Cindy Fong and their children). Chuck Lew and Lewco were retained to do the legal work in connection with the investment. 672 was incorporated for the purpose of making the investment. The amount proposed to be invested was $650,000.

**63**  Originally, Mr. Fong had plans to purchase an interest in the Empress Hotel, rather than make a loan. According to Mr. Fong, in the summer of 2003, he had had some negotiations with Mr. Nazir Kassam and his partner, who held the shares in Warren Investments Ltd. (*Warren*), the company that owned the Empress. The original idea was that Mr. Kassam would sell his interest in Warren, and Mr. Fong went about raising money to buy it. However, according to Mr. Fong, Mr. Kassam changed his mind and decided not to sell. According to Mr. Fong, he then decided to make a loan to Warren, secured by a mortgage on the Empress. He and Mr. Kassam agreed that loan would be for $650,000.

**64**  Mr. Fong then wrote out a form of agreement with Mr. Kassam (Ex. 76). According to Mr. Fong's written agreement, the loan was to be secured by a second mortgage in the amount of $650,000 with interest at 14%, calculated semi-annually. The term was five years, and it was a closed mortgage. The purpose of the loan was to pay out the existing second mortgage and allow Mr. Kassam to buy out his partner in Warren. Mr. Kassam and his spouse were to be guarantors. Mr. Fong stipulated that two months' mortgage payments were to be paid in advance, held in trust and then applied to the last two months' mortgage payments. The agreement contained a term concerning the hotel's liquor licences.

**65**  A copy of Ex. 76 was then provided to Chuck Lew, and formed the basis of his instructions in connection with preparation of the legal documents for 672's loan to Warren. In due course, the documents were prepared, the loan was advanced and the second mortgage in favour of 672 was registered. There are no complaints by 672 concerning the legal services provided by Chuck Lew or Lewco in connection with this loan.

**66**  According to Mr. Fong, he felt comfortable doing business with Mr. Kassam. In 2004, he and Mr. Kassam agreed that 672 would make another loan of $250,000. The loan was to be secured by a mortgage over property on which Mr. Kassam operated another business, the "Owl Pub" in Osoyoos. Again, Mr. Fong wrote out by hand the terms of the agreement (Ex. 78). This loan was for $250,000, secured by a second mortgage with interest at 12% the first year and 14% for the remaining four years of a 5-year term. The loan was being made to a numbered company, 631825 B.C. Ltd. (*631*), and Mr. Fong required the shareholders (one of whom was Mr. Kassam) to give personal guarantees of the mortgage. Mr. Fong stipulated that 672 was to be named as a loss payee under the mortgagor's insurance.

**67**  Again, Chuck Lew was retained to act for 672 in connection with this loan. Mr. Fong's handwritten agreement (Ex. 78) formed the basis of Mr. Lew's instructions. In due course, the legal documents were prepared, the mortgage was registered and the loan was advanced. There are no complaints by 672 concerning the legal services provided by Chuck Lew or Lewco in connection with this loan.

**68**  In March 2007, 672 made another loan to Warren. This loan was secured by a mortgage registered on the Empress Hotel land. The principal amount of the mortgage was stated to be $262,000 with interest at 14% payable monthly. This mortgage, by its terms, was an open mortgage, repayable by the mortgagor at any time without bonus or penalty. There are no guarantors or covenantors. Neither Chuck Lew nor Lewco did any of the legal work in connection with this loan.

**69**  In August 2007, Mr. Kassam agreed to sell the Empress Hotel. The sale was expected to complete in September.

**70**  According to Mr. Fong, as of mid-August 2007, he was occupying a room at another of Mr. Kassam's businesses, an Esso station and truck stop, which operated under the name "Trans Canada Truck Stop." He was not working. But the business at the Truck Stop interested him, and he spent time observing it. He learned about the sale of the Empress Hotel directly from Mr. Kassam. Mr. Fong had recently gone through some difficult times. He had not had full-time work since the fall of 2006, and his last employment has been working part-time as a doorman at the Empress Hotel earlier in 2007. He had become addicted to crack cocaine. However, according to Mr. Fong, Mr. Kassam had offered him a job as the general manager of the Thunderbird Hotel in Port Hardy beginning in September 2007, and Mr. Fong decided as of mid-August 2007 to stop using cocaine. According to Mr. Fong, he has not used cocaine since. I accept his evidence.

**71**  In anticipation of completion of the sale of the Empress on September 21, 2007, the solicitors for Warren wrote to Chuck Lew requesting payout statements for the two mortgages registered in favour of 672. Russell Lew contacted Mr. Fong to inquire whether Lewco was going to be retained in connection with the discharges of the mortgages.

**72**  672's mortgage for $650,000 was a closed mortgage. There was no express provision in the mortgage concerning any penalty for pre-payment. Mr. Fong discussed the consequences of this with both Chuck Lew and Russell Lew in the context of Lewco providing a payout statement to Warren's solicitors. Mr. Fong was not prepared to accept an initial proposal of a three-month penalty and instead wanted a penalty of 6 months' interest. There was some discussion about having an amount held back on the completion of the sale pending resolution of the issue concerning the penalty amount. However, by September 18, 2007, Chuck Lew and Russell Lew had confirmed that case law supported Mr. Fong's claim for a penalty of 6 months interest on pre-payment of a closed mortgage. Chuck Lew sent a communication (Ex. 18) to Warren's solicitor with payout statements that included a pre-payment penalty of 6 months' interest (about $45,000) on the $650,000 mortgage. The communication advised Warren's solicitor that discharges would be provided on his undertaking to pay the amounts in the statements.

**73**  However, on September 19, 2007, Mr. Fong and Mr. Kassam met and agreed to a change in the arrangements. Mr. Fong was very precise that the meeting took place on September 19, 2007 "after 6 o'clock." Mr. Kassam was agreeable to paying a 6-month interest penalty, but he asked Mr. Fong if he could get some kind of a break on it. At trial, Mr. Fong explained that he knew Mr. Kassam well, that Mr. Kassam was someone who kept his word, and that Mr. Fong "liked his style" and wanted to try and keep a good relationship with him. Mr. Fong decided to go along with what Mr. Kassam was asking, and give him six months to pay the interest penalty amount. They agreed that if, within six months, Mr. Kassam had another project in which Mr. Fong could invest, he would give Mr. Kassam a credit of $20,000. Otherwise, the full amount of the penalty would be paid.

**74**  In addition, according to Mr. Fong, Mr. Kassam also told him during this meeting that he needed $150,000 to install a tank at the Esso station and was looking for a loan in that amount. When Mr. Fong asked what security Mr. Kassam could provide for this loan, Mr. Kassam offered a pledge of his shares in the company 628466 B.C. Ltd. (*628*) that operated Trans Canada Truck Stop. Mr. Fong explained that, at the time, he fully expected that Mr. Kassam would repay the whole of the loan and redeem any security, because the Truck Stop business was definitely worth more than $150,000. According to Mr. Fong, he told Mr. Kassam that he did not expect to walk in and take over the business, so he did not ask Mr. Kassam any detailed questions about Mr. Kassam's arrangements with Esso. Mr. Fong explained that, during the summer of 2007, Mr. Kassam offered him a 50% interest in the business for $100,000. He said that Mr. Kassam told him he had a 20 year lease with Esso, that had another 10 years to run and that Mr. Kassam had to buy most of his inventory from Esso. But at the time, Mr. Fong was not very interested in what Mr. Kassam was telling him about the business, implying that he did not pay much attention to it.

**75**  Mr. Fong and Mr. Kassam then signed a written agreement. The agreement (Ex. 80) (incorporating handwritten revisions) provided as follows:

1. Mr. Fong agrees to waive the six month interest penalty related to early payment of the 2nd mortgage on the Empress Hotel. In lieu of this accommodation, Mr. Fong shall receive a credit of $20,000 if he decides to invest in any of Mr. Kassam's projects within the next six month period commencing from the closing of the Empress Hotel. If Mr. Fong does not decide to participate in any of Mr. Kassam's projects, he shall receive a sum of six months interest penalty at the end of [the] six month period.
2. Mr. Fong agrees to advance $150,000 from the proceeds of the fourth mortgage for a period of one year. This sum will be secured by Mr. Kassam pledging the shares of Trans Canada Truck which will be placed in an escrow account and it shall bear an interest rate of 12% per annum, paid monthly starting November 1, 2007.

"Trans Canada Truck" was the business name for 628.

**76**  I find that Mr. Fong and Mr. Kassam made and signed their agreement before Mr. Fong consulted either Chuck Lew or Russell Lew.

**77**  According to Mr. Fong, at the September 19 meeting, he told Mr. Kassam that he needed to have the amount of the interest penalty held in trust, and Mr. Kassam agreed. However, I do not believe Mr. Fong's evidence. I note that, since Mr. Kassam was (according to Mr. Fong) asking for time to pay the interest penalty, the proposition that, in September 2007, he would nevertheless agree with Mr. Fong to pay the full amount into trust makes no sense, and there is nothing in Ex. 80 about such a thing being done. The idea of having the pre-payment penalty amount paid intro trust was something that Mr. Fong had discussed with Chuck Lew before Warren agreed to pay a penalty of 6 months, in anticipation of a dispute about the amount. However, once Warren agreed to pay the 6-month penalty, there was no reason to put money into trust pending resolution of a dispute about payment of a 6-month penalty, because the anticipated dispute had already been resolved.

**78**  According to Mr. Fong, he told Mr. Kassam that he needed to have his lawyer review their agreement (Ex. 80) because he was not familiar with the concept of using shares as security. Mr. Fong then sent a copy of the agreement to Lewco.

**79**  Mr. Fong and Russell Lew agree that they discussed the concept of taking security over shares in a private company to secure the loan for $150,000. Mr. Fong and Russell Lew agree that Russell Lew told Mr. Fong shares in a private company were not very good security. However, according to Mr. Fong, Russell Lew made that observation before Mr. Fong told him about the nature of 628's business and that he would pay $250,000 for the business if he were buying it. As Mr. Fong recalled, after that exchange, Russell Lew did not tell him to forget about the idea of making the loan, but carried on to prepare documents relating to the loan and security. On the other hand, Mr. Fong agreed on cross-examination that he was not very interested in the details of 628's arrangements with Esso because he was sure that Mr. Kassam was going to pay the money back and he did not see any real risk that the loan would not be repaid.

**80**  Mr. Fong testified that, around 2:30 in the afternoon on September 20, 2007, he had a discussion with Russell Lew about the security that Mr. Kassam was proposing to give. He testified that he received advice from Russell Lew that, once the security was registered, no one could touch the shares or the business, and that if Mr. Kassam was unable to repay the loan, Mr. Fong could walk in and take over the business. Mr. Fong repeated this evidence about the advice he says he received several times during the trial. However, I do not believe that Russell Lew gave any such advice to Mr. Fong, and it was not put to Russell Lew, during his cross-examination as an adverse witness, that he did.

**81**  Two written agreements were then prepared, probably by Russell Lew. Both are dated September 20, 2007.

**82**  The first agreement (Ex. 86) is between Warren and 672. It records in the recitals the second and fourth mortgages registered in favour of 672, that the second mortgage is closed and that a six month penalty (referred to as the "Bonus") is to be paid, and that "Warren has requested [672] to delay the payment of the Bonus on the following terms." This agreement then provides:

1. [672] agrees to delay receipt of the Bonus for a period of six months following the closing of the sale of the Property, and [672] will receive the following:
2. a credit of $20,000 towards any projects (the "Projects") that Warren may invest in the future and to which [672] may wish to participate; and
3. in the event [672] does not wish to participate in any Projects up to March 21, 2008, the sum of $44,740.85 being the Bonus shall become immediately due and payable together with interest thereon calculated at the rate of 14% per annum from September 21, 2007.
4. [672] agree[s] to advance the sum of $150,000 (the "Loan") to Warren for a period of one (1) year from September 20, 2007. The Loan will be secured by Nazir Habib Kassam ("Nazir") granting a Purchase Money Security Interest of the 120 Class A Common Voting Shares owned by Nazir . . . . The Loan will bear interest at the rate of 12% per annum with interest payments to commence November 1, 2007.

. . .

**83**  This document is signed by Mr. Fong on behalf of 672, and by Mr. Kassam on behalf of Warren and in his personal capacity. It reflects, and is consistent with, the basic terms of the written agreement signed by Mr. Fong and Mr. Kassam on September 19, 2007 (Ex. 80). Like that document, it does not mention anything about the 6-month interest penalty amount being held in trust. Rather, it provides that interest on the unpaid amount is to be paid at 14%. Such a provision, in my opinion, is inconsistent with Mr. Fong's evidence that the interest penalty amount was always to be held in trust, although it is consistent with Warren being given six months to pay the interest penalty (which is what Mr. Kassam asked for on September 19). It is another reason why I do not believe Mr. Fong's evidence that he and Mr. Kassam agreed that the 6-month penalty was to have been held in trust.

**84**  The second agreement (Ex. 22) is a "Security Agreement" between Mr. Kassam and 672, whereby Mr. Kassam pledged his shares in 628 as security for his indebtedness to 672. The security interest is stated to be granted under the ***Personal Property Security Act*** (*R.S.B.C. 1996, c. 359*). The agreement is signed by Mr. Kassam. A financing statement was duly registered in the personal property registry.

**85**  On September 26, 2007, after the closing of the sale of the Empress Hotel, Mr. Fong attended at Lewco's office to pick up a cheque. Chuck Lew had prepared a brief reporting letter (Ex. 94), a statement of funds disbursed from trust (Ex. 177) and a statement of Lewco's account (Ex. 91). At trial, Mr. Fong recalled that, while at Lewco's office, he took a quick look at the statement of funds disbursed from trust, and that he was unhappy he (or rather 672) was paying legal fees, something that he raised with Chuck Lew.

**86**  The statement of funds disbursed from trust shows the funds received to discharge 672's two mortgages on the Empress Hotel, and the deduction of $150,000 for the loan to Mr. Kassam. Nothing is shown as being received for the 6-month interest penalty amount. This is consistent with the basic agreement Mr. Fong made with Mr. Kassam on September 19, 2007. The statement is inconsistent with Mr. Fong's evidence that the 6-month interest penalty amount was to be paid on closing and deposited into trust. Mr. Fong testified that he received the statement without any explanation. However, the statement is straightforward, and I think it would be easily understood by Mr. Fong, especially given his training and background as a certified general accountant and a real estate agent. Mr. Fong reviewed the statement sufficiently to notice that Lewco's account had been paid from trust and be upset about it. In the circumstances, I do not consider any further explanation of the statement was necessary. Its contents are another reason why I do not believe Mr. Fong's evidence that the 6-month penalty amount was to have been held in trust.

**87**  In October 2007, Mr. Fong (using money from Fung Fong's account) made an unsecured loan of $25,000 to 628. He did not consult with either Chuck Lew or Russell Lew about this loan.

**88**  Mr. Kassam began paying interest on the $150,000 loan in November 2007.

**89**  Warren did not pay the 6-month interest penalty amount when it came due in March 2008. Around this time, Mr. Kassam introduced Mr. Fong to Mr. Grewal (who, as I noted above, was called as a witness in the plaintiffs' case). Mr. Kassam had managed some hotel properties for Mr. Grewal. Mr. Fong identified Mr. Grewal as someone that he wanted to do business with, and the feeling was mutual. Their business dealings form the basis for the claims in the Fong Action, and I will come to them shortly.

**90**  However, at this point, I conclude that Mr. Fong did not pursue Mr. Kassam for the 6-month interest penalty amount when it came due because he was interested in developing his business relationship with Mr. Grewal and thought Mr. Kassam and Mr. Grewal were business partners. It was not because Mr. Fong believed the interest penalty amount was sitting in Lewco's trust account. If Mr. Fong in fact believed the money was sitting in trust, there is no logical explanation for why he would not have asked Chuck Lew or Russell Lew to release it to 672 when the amount came due in March 2008. However, he did nothing. This is another reason why I conclude that Mr. Fong's evidence that the 6-month penalty amount was to be held in trust is not credible.

**91**  According to Mr. Fong, in the fall of 2008, he learned from Mr. Grewal that Mr. Kassam was bankrupt. In October 2008, steps were taken to realize on the security (the pledge of shares in 628) given by Mr. Kassam for the $150,000 loan, based on the documents prepared and signed in September 2007. However, nothing was recovered on account of the amount outstanding on the loan.

**92**  Nothing was recovered in respect of the 6-month interest penalty either.

1. **Discussion and analysis**

**93**  I will first address the claim made in respect of the interest penalty amount.

**94**  In its Notice of Civil Claim, 672 pleads (para. 33 (a)) that on September 19, 2007, Mr. Fong and Mr. Kassam agreed that the amount of the interest penalty ($44,740.85) "was to be forwarded as part of the closing on the sale of the [Empress] Hotel in addition to the monies required to discharge the mortgages and was to be held in trust for six months." I find that there was never any such agreement, and I reject Mr. Fong's evidence to the effect that there was. In my view, and as I have explained above, Mr. Fong's evidence that the penalty amount was to be held in trust was neither credible nor reliable.

**95**  672 also pleads (Notice of Civil Claim para. 37) that, prior to signing Ex. 80, Mr. Fong contacted Chuck Lew and asked for advice. However, I find that Mr. Fong and Mr. Kassam signed their agreement (Ex. 80) before Mr. Fong consulted either Chuck Lew or Russell Lew. The facts alleged in the Notice of Civil Claim have not been made out on the evidence.

**96**  672 pleads further (Notice of Civil Claim para. 39) that Mr. Fong specifically instructed Chuck Lew that Mr. Fong did not wish 672's two mortgages to be discharged unless the prepayment penalty "was deposited and held in trust by the Defendants for the six month period." I find that there was never any such discussion, and that Mr. Fong and Mr. Kassam never had any agreement about placing the interest penalty amount in trust.

**97**  In the Legal Basis section of the Notice of Civil Claim, 672 pleads (at para. 4(c)) that the defendants breached their duty of care and the terms of their retainer by "failing to ensure that the [interest penalty amount] was held [in] trust prior to" providing the mortgage discharges, or alternatively, by failing to place the solicitor for Warren on undertakings not to use the discharges until he had forwarded funds including the interest penalty amount in trust to the defendants. In closing argument, Mr. Henshall submitted that if Chuck Lew had ensured that the interest penalty amount was held in trust, 672 would not have suffered the loss of the bonus.

**98**  It is true that, if the money had been placed in trust, the interest penalty would have been paid from the money in trust. But on September 19, 2007, after Chuck Lew had sent a communication (Ex. 18) requiring the interest penalty amount to be paid (along with the balances due under the mortgages) in exchange for discharges, Mr. Fong made an agreement with Mr. Kassam inconsistent with the money being placed in trust. Rather, as Mr. Kassam requested, Mr. Fong agreed to give Mr. Kassam six months to pay the interest penalty amount, requiring also that he pay interest on the amount unpaid. The defendants' conduct was in accordance with the instructions they received from their client, in accordance with their retainer, and in accordance with the agreement Mr. Fong made on behalf of 672.

**99**  I find that 672 has failed to show any breach by the defendants of any duty of care, or any breach by the defendants of their retainer, in relation to the prepayment penalty.

**100**  I turn next to the claim in respect of the $150,000 loan.

**101**  During his examination-in-chief, Mr. Fong testified to the effect that he did not know much of anything about lending money to a franchise business. He said, for example, that if he had known that the master franchisor could remove Mr. Kassam and 628 from the business if they defaulted under the franchise agreement, he would not have made the $150,000 loan to Mr. Kassam.

**102**  In closing submissions, Mr. Henshall argued that a reasonably prudent lawyer would have given Mr. Fong this advice in relation to the $150,000 loan:

1. Mr. Kassam was not permitted under the terms of his contract with Esso to hypothecate or transfer the shares of 628 and therefore the proposed security was ineffective against Esso;
2. Esso, without notice to Mr. Fong, could terminate its relationship with 628 on many grounds and take over the premises and the business. Mr. Fong would have no recourse against Esso or the business and would be left empty handed;
3. in the event of a default by Mr. Kassam, Mr. Fong could not step in and take over the business;
4. the assets of 628 were already subject to a general security agreement in favour of another creditor, and the shares of 628 might have no value in any event; and
5. Mr. Fong should not accept the shares of 628 as security, at least not without obtaining concessions from Esso and carrying out further due diligence of the indebtedness of 628.

**103**  Mr. Henshall submits that, if Chuck Lew or Russell Lew had given Mr. Fong this advice, Mr. Fong would not have loaned the $150,000 because he would have rejected a security interest in the 628 shares as security for the loan. Essentially, 672 says that if only Mr. Fong had been properly advised, he never would have made the loan of $150,000. This, of course, is a hypothetical. The plaintiff bears the onus of proof on causation, and this includes proving that it would have done something differently if properly advised.

**104**  One of the problems with 672's argument is that Mr. Fong did not come to Lewco until after he had already made his agreement with Mr. Kassam. Whether Mr. Kassam was in a position and willing to offer any additional security, or whether he would have accepted without protest Mr. Fong's subsequent termination of the agreement on the basis that the security offered was unsatisfactory, is unknown. Russell Lew told Mr. Fong that shares in a private company were not very good security. Perhaps a first-rate lawyer would have gone further and made every effort to drive that point home in the most forceful way possible. However, that is not the standard the applies: see ***Girardet v. Crease***, above. In my opinion, Russell Lew was not negligent in not going further than he did.

**105**  More critically for 672, I do not find Mr. Fong's evidence about what he would have done if only he had been properly advised at the time to be credible. He had already been told by Russell Lew that the security Mr. Kassam had offered (and he had accepted) was not very good. But there is no indication that he ever went back to Mr. Kassam to ask for something more or better by way of security, or that he even considered doing so. In September 2007, Mr. Fong was interested in continuing to do business with Mr. Kassam, and had made his own (positive) assessment about Mr. Kassam's ability to run a successful business. Later that fall, he made an unsecured loan of $25,000 to Mr. Kassam, which is consistent with his positive opinion about Mr. Kassam and his trustworthiness, and Mr. Fong's wish to do further business with him. There was no evidence Mr. Fong had any other potential investments in mind or available for the $150,000, and the money had to be put to work to generate interest income for the Fong Family (which it did, until Mr. Kassam defaulted). Against the background of events in the fall of 2007, I think it unlikely that Mr. Fong, after having made a commitment to Mr. Kassam, would have gone back to him and said there would be no loan unless Mr. Kassam could offer better and more satisfactory security.

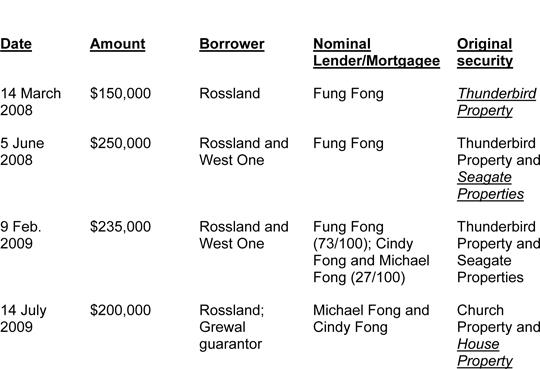
**106**  672 asserts that the defendants were negligent because they failed to include 628 as a party to Ex. 86. I am not persuaded that this was a step a reasonably competent and diligent solicitor would have taken. However, and more fundamentally, 672 has failed to demonstrate any damage caused by not having 628 as a party.

**107**  I find that 672 has failed to prove that, but for the failure by the defendants to give the legal advice 672 says ought to have been given, 672 would not have made the loan of $150,000 to Mr. Kassam. Further, I find that, in relation to the $150,000 loan, 672 has failed to show any breach of duty that caused 672 a loss, or any breach by the defendants of their retainer.

**108**  The 672 Action is, accordingly, dismissed.

**The Fong Family Action -- the Fong Family's Loans -- Overview**

**109**  The Fong Family made a total of four loans to Mr. Grewal's companies Rossland and West One, as follows:



**110**  The first two loan amounts ($150,000 and $250,000) are often referred to as two "tranches" or advances on a total loan of $400,000, which is the amount of the loan described in the related mortgage documents.

**111**  The total amount of the loans made by the Fong Family and in issue in the Fong Family Action is, therefore, $835,000.

**112**  As I will note below, on each of the loans, the Fong Family received monthly payments, pursuant to the terms of the mortgages, from the first payment due date until the mortgages went into default. The total paid to the Fong Family while the loans were in good standing was about $106,000. Occasionally, fees were also paid by the borrower to members of the Fong Family. For example, in relation to the $235,000 loan, a fee of $10,000 was deducted from the gross loan proceeds and paid to Cindy Fong.

**113**  By early 2010, all of the loans had gone into default. The Fong Family recovered about $87,000 through realization on their security. They sued Mr. Grewal on his personal covenant on the $200,000 loan and recovered a judgment against him, which, as of trial, remained unpaid. According to Mr. Fong, he investigated whether Mr. Grewal had any personal assets, but the investigation turned up nothing.

**114**  I find that Mr. Fong negotiated all of the loans with Mr. Grewal. Fung Fong and Cindy Fong were not involved in any manner, and I find that both Fung Fong and Cindy Fong were content to leave investment of the Fong Family's money entirely up to Mr. Fong. I find that Mr. Fong made the decision concerning which member (or members) of the Fong Family would be the lender, and that he did not consult with either his mother or his wife on this point. He also did not ask for any legal advice about it from either Chuck Lew or Russell Lew.

**115**  I find that each loan (and each advance in relation to the $400,000 loan) was the subject of a separate retainer. I also find that, contrary to what the Fong Family assets in the Fong Family Action Notice of Civil Claim, the defendants were not retained to, "at all times . . . minimize any business risks associated with [the Fong Family's] business transactions," nor were the defendants retained to "provide advice regarding . . . the nature of the Plaintiffs' business transactions and any potential issues [the defendants] saw in those transactions which could leave [the Fong Family] to adverse risk." The defendants' retainer in relation to each transaction was much more limited, as I will discuss below. Mr. Fong made the business decisions and assessed the business risks. The defendants were not retained to protect against, or give advice about, the business risks inherent in the transactions.

**116**  In my opinion, the evidence shows that the defendants did not engage in what would be preferred practice by a first-rate lawyer: see ***Girardet v. Crease***, at p. 371. However, that is not the standard to be applied in relation to these claims. The standard is that of a reasonably competent solicitor.

**The $400,000 Loan to Rossland and West One**

1. **Mr. Fong is introduced to Mr. Grewal**

**117**  Mr. Fong was introduced to Mr. Grewal by Mr. Kassam in early March 2008. Mr. Kassam had been leasing three hotels (the Thunderbird and Seagate Hotels and the Howard Johnson Hotel in Winnipeg) from Mr. Grewal's companies, although the arrangements concerning the Port Hardy hotels had been terminated about six months earlier so that, as Mr. Grewal put it, Mr. Kassam could concentrate on the Howard Johnson Hotel. As Mr. Fong recalled, Mr. Kassam told him that he and Mr. Grewal might have a proposal for Mr. Fong concerning the Thunderbird Hotel. The three of them met in Langley. Mr. Fong had been told a little about the Thunderbird Hotel by Mr. Kassam the previous summer, when Mr. Kassam offered Mr. Fong a job there. However, Mr. Fong had never been to the Thunderbird Hotel.

**118**  Mr. Grewal wanted to do some renovations at the Thunderbird Hotel, and also at the Seagate, and needed a loan. According to Mr. Grewal, he had been told by Mr. Kassam that Mr. Fong was getting (or had already received) money from the sale of the Empress Hotel. Thus, there was an opportunity for Mr. Grewal and Mr. Fong to do business with one another.

**119**  According to Mr. Fong, at the meeting, Mr. Grewal asked for a loan of $400,000 to do some renovations at the Thunderbird. As Mr. Fong recalled, he asked Mr. Grewal for some specifics of the business, for example: how many rooms the hotel had; whether there was a pub or nightclub; and whether accounts payable were up to date. According to Mr. Fong, he also asked Mr. Grewal about other charges against the hotel and was told there were three mortgages totalling about $1.05 million, but that Mr. Grewal was planning to put a new first mortgage in place and discharge those mortgages. Once that was done, the mortgage for the Fong Family loan would be in second place. According to Mr. Fong, Mr. Grewal told him the new first mortgage was "already in process," which Mr. Fong took to mean that the application had been submitted and was being processed. According to Mr. Fong, he told Mr. Grewal at the meeting that the charges ahead of the mortgage for the Fong Family loan could not be more than $1.1 million.

**120**  The following day, March 7, 2008 (a Friday), Mr. Grewal sent a letter (Ex. 34) to Mr. Fong. The letter reads in part:

As per our discussion yesterday, there is a first mortgage on the above property for $500,000 and a second and third collateral security, totaling $550,000. You can register your mortgage after that. We are in the process of arranging a new first mortgage to pay off all the existing mortgages, so then your mortgage will be a second mortgage on the property. The mortgage should read, no interest and no payment are payable on the mortgage, only interest of 10% start, if and when, Nazir Kassam defaults on his obligations on Howard Johnson Airport Hotel, Winnipeg.

**121**  There is no mention of the Seagate Properties in Ex. 34. At trial, Mr. Grewal testified that, at their first meeting, he talked to Mr. Fong about the Fong Family being given security on both the Thunderbird Property and the Seagate Properties. I do not believe his evidence. If, based on the discussions at the initial meeting, the Fong Family was going to be given security over both the Thunderbird Property and the Seagate Properties, Mr. Grewal never gave any reasonable explanation for why he did not mention this in Ex. 34. Mr. Grewal's evidence is also inconsistent with a later communication from his lawyer, Mr. Peter Kletas, when security over the Seagate Properties is expressly offered as additional security if and when the full amount of the $400,000 loan was advanced (Ex. 105). I find that, at their initial meeting, Mr. Fong and Mr. Grewal did not discuss the Fong Family receiving security over both the Thunderbird Property and the Seagate Properties, nor did Mr. Grewal make such an offer.

**122**  Mr. Fong dropped off a copy of Mr. Grewal's letter (Ex. 34) at Chuck Lew's office. According to Mr. Fong's handwritten notes on the letter (and despite what was typed), he and Mr. Grewal had agreed that interest would be paid over the term of the mortgage, and Mr. Fong noted interest rates beginning at 10% the first year and increasing to 12% in the third year. This letter served as Chuck Lew's initial instructions from Mr. Fong concerning the first loan to Rossland.

**123**  According to Mr. Fong, he told Chuck Lew that Mr. Grewal's lawyer would be sending over a copy of the legal descriptions so that Chuck Lew could prepare the documents, and that he wanted Chuck Lew to review Mr. Grewal's letter and if there were any problems to call him.

**124**  Chuck Lew received a Land Title Office search of the Thunderbird Property from Mr. Kletas, Rossland's lawyer. This communication from Mr. Kletas is consistent with Ex. 34 and inconsistent with Mr. Grewal's evidence that, at his initial meeting with Mr. Fong, the security was to be over both the Thunderbird Property and the Seagate Properties. Chuck Lew noted an SST lien registered against the Thunderbird Property in November 2007, although there is a note "paid" beside it. Mr. Lew could not state reliably when the note was made. Based on evidence relating to the $250,000 advance (which I discuss below), I conclude that, as of March 2008, the SST lien had not been paid.

**125**  Over several days the following week, Chuck Lew and Mr. Kletas communicated with one another concerning the loan and the related documents. Mr. Fong also provided some further instructions to Chuck Lew and his legal assistant, Judy Tong, concerning the loan.

1. **$150,000 is advanced on March 14, 2008**

**126**  On March 13, 2008, Mr. Fong came to Lewco's office to drop off a cheque for $150,000 in respect of the loan to Rossland. He spoke to Ms. Tong. The Fong Family were not in a position to fund the full $400,000 as of March 2008, because they were waiting for 672's mortgage on the Owl Pub to be paid out. As a result, the loan to Rossland was reduced to $150,000, with the plan that, when the additional funds became available, a further amount ($250,000) would be advanced. According to Mr. Fong, he reminded Ms. Tong that the Fong Family's mortgage on the Thunderbird Property was to be in second place and there were to be no more than $1.1 million in charges ahead of the Fong Family's mortgage. According to Mr. Fong, he did not speak to either Chuck Lew or Russell Lew, and I accept his evidence on that point.

**127**  Ms. Tong made notes (Ex. 37) of her discussion with Mr. Fong (and some other matters) for Chuck Lew. The notes are generally consistent with Mr. Fong's evidence about what he discussed with Ms. Tong. Chuck Lew then sent a communication (Ex. 38) to Mr. Kletas's office. He provided his comments on the draft mortgage he had received from Mr. Kletas, suggesting different terms than the prescribed standard mortgage terms. He also required confirmation that "the new first mortgage" (i.e., the mortgage Mr. Grewal told Mr. Fong he was in the process of obtaining) would retire all the existing mortgages, that the principal amount of that mortgage did not exceed $1.1 million and that the Fong Family would have a second mortgage. Chuck Lew also explained the situation concerning the amount of the loan. He advised that his firm was "in funds" of $150,000 and that the balance of $250,000 would be advanced when the mortgage on the Owl Pub was paid out, but that if the mortgage on the Owl Pub was not paid out, the amount of the loan to Rossland could not be $400,000.

**128**  Mr. Kletas wrote back to Chuck Lew on March 13 (Ex. 35). He accepted the mortgage terms that Chuck Lew had suggested. He advised Chuck Lew that there was no new first mortgage to be registered at this time, and that Rossland was in the process of arranging it. This is what Mr. Fong had been told by Mr. Grewal on March 6. Mr. Kletas said that he understood "our mutual clients have discussed this issue and are in agreement with respect to the priorities." He asked Mr. Lew to obtain instructions from Mr. Fong as soon as possible, since Rossland wanted funding to take place "today." Mr. Fong agreed that he got a copy of Mr. Kletas's letter on March 13. I find that Mr. Fong knew, as of March 13, 2008, that there would be no "new first mortgage" paying out the existing mortgages on title to the Thunderbird Property, enabling the Fong Family mortgage to then be registered in second place.

**129**  Funding of the loan did not take place on March 13, 2008.

**130**  On March 14, 2008, Mr. Kletas wrote to Chuck Lew (Ex. 104), saying that he had been advised by his client that "our mutual clients are meeting this morning to resolve the outstanding issues with respect to this mortgage." The main issue was the amount owing on the charges that would be ahead of the Fong Family mortgage. Mr. Kletas advised that Rossland wished to have $150,000 advanced "today," and hoped that any of Mr. Fong's concerns could be resolved at the meeting.

**131**  Mr. Kletas sent two more letters to Chuck Lew on March 14, to address the issue of the amounts owing on the prior charges. In the first (Ex. 105), Mr. Kletas said:

Further to your request yesterday afternoon, we confirm that we have requested payout statements from the various lenders who have registered mortgages on title. We expect that we shall receive written confirmation from Envision Credit Union/Kultak Financial Inc. sometime this morning.

**132**  Mr. Kletas then set out the information he had respecting the mortgages in favour of IMOR, Envision/Kultak, and Kimball and Sandra Nelson (the *Nelsons*). With respect to the Nelsons' mortgages, he said these were *inter alia* mortgages covering both the Thunderbird Property and the Seagate Properties, and that although Mr. Nelson did not have his files with him, he had indicated the Seagate mortgage was for $300,000 and the Thunderbird mortgage was for $229,000. Mr. Kletas enclosed a copy of a payout statement from IMOR. Mr. Kletas went on to say:

We are advised by our client that upon the advance of the $250,000.00 from this new mortgage, our client will authorize that your client register a collateral mortgage on the Seagate Hotel . . .

It is our understanding that our mutual clients are meeting at our client's office this morning and reviewing this information.

**133**  Mr. Fong acknowledged that on March 14, he received, or at the very least saw, a copy of Ex. 105.

**134**  Mr. Kletas sent a second letter (Ex. 106), shortly after the first, enclosing a copy of an information statement respecting the amount owing on the Envision/Kultak mortgage.

**135**  Based on the information provided by Mr. Kletas in Ex. 105 and Ex. 106, the existing charges on the Thunderbird Property, and the amounts owing, were as follows:



**136**  Mr. Fong and Mr. Grewal confirmed that they met the morning of March 14, 2008. According to Mr. Fong, Mr. Grewal was waiting for the confirmations of the mortgage amounts to come in from the prior chargeholders. This is consistent with what Mr. Kletas was reporting to Chuck Lew. Mr. Fong saw the confirmation of the amount owing on the Envision/Kultak mortgage (per Ex. 106). However, according to Mr. Fong, based on what he was told by Mr. Grewal about the Nelsons' mortgages, Mr. Fong concluded that the mortgages on Thunderbird were under $1.1 million, and even though the Fong Family mortgage was not going to be in second position, he was prepared to close and fund $150,000.

**137**  According to Mr. Fong, Mr. Grewal then asked him to contact Chuck Lew's office (presumably to give instructions to make the advance), which Mr. Fong did. He did not speak to Chuck Lew, but reached Ms. Tong and told her that the mortgage could be funded. According to Mr. Fong, Ms. Tong asked him to confirm his instructions in writing, which he did in a fax sent from Mr. Grewal's office. Mr. Fong's fax (Ex. 107) said:

Dear Judy,

Re Port Hardy Mortgage

Please inform Chuck to go ahead [with] the mortgage. Dave [Grewal] wish to pick up the mortgage fund today. Thank you for your attention.

**138**  After receiving confirmation of Mr. Fong's instructions, Chuck Lew then sent a trust cheque for $149,005.54 ($150,000 less Lewco's fees and disbursements) to Mr. Kletas on his undertaking not to release the funds from his trust account until the Fong Family's mortgage was registered with a satisfactory post-index search. Chuck Lew also confirmed that if $250,000 was not advanced, the principal amount of the mortgage (stated to be $400,000) would be modified to show that only $150,000 was advanced.

**139**  The mortgage (Ex. 108) was registered on March 14, 2008, under no. CA725091. The express mortgage terms contained (among other things) covenants by the mortgagor regarding payment of taxes (para. 5.2) and insurance (para. 5.7).

1. **$250,000 is advanced in June 2008**

**140**  As of May 2008, 672's mortgage on the Owl Pub had still not be paid out. There was a dispute over the amount required to be paid to obtain a discharge, and the dispute was over the amount of an interest penalty. The mortgagor (631) was prepared to pay a 3-month penalty. However, that was not acceptable to Mr. Fong. He instructed Chuck Lew to offer to settle with payment of a 5-month penalty. The offer was accepted and the proceeds of $263,258.17 were paid to Lewco in trust on June 2, 2008.

**141**  According to Mr. Fong, he and Mr. Grewal talked to one another on June 2 concerning the $250,000 advance -- the second tranche of the $400,000 loan. They agreed that a mortgage for $400,000 would be registered against both the Thunderbird Property and the Seagate Properties. This is consistent with the offer contained in Mr. Kletas's March 14, 2008 letter to Chuck Lew (Ex. 105). They also agreed that, from the $250,000, a "processing fee" would be paid to Mr. Fong and an additional fee of $2,500 would be paid to address the loss on the exchange from US dollars to Canadian dollars when the $150,000 loan was made. There is no evidence that they ever discussed Mr. Grewal giving a personal guarantee.

**142**  On June 3, 2008, Mr. Grewal faxed Chuck Lew the legal descriptions and parcel identifiers for the Seagate Properties (four in total) (Ex. 111). Later that day, Mr. Kletas sent a letter (Ex. 40) to Chuck Lew with the same information, following up on a phone call. Mr. Kletas also confirmed that the mortgage registered in March would be discharged, and a new mortgage registered with the new parcel identifiers. He also advised that his client wished to receive the remaining funds the following day (June 4) and asked that the new mortgage documents be sent for execution as soon as possible.

**143**  Mr. Fong wrote up the terms he and Mr. Grewal discussed on June 2 in a fax note to Chuck Lew (Ex. 41), which was sent later in the day on June 3. This note provided Lewco's additional instructions in connection with the advance of $250,000. Chuck Lew noted on the fax that Mr. Fong called on June 3 and that the processing fee to be paid to Mr. Fong was to be 1 1/2%, rather than 2%.

**144**  Ultimately, it was Russell Lew, rather than Chuck Lew, who looked after the legal work for the $250,000 advance.

**145**  On June 4, 2008, Lewco had Land Title Office searches done of the Thunderbird Property and the Seagate Properties. The search of the Thunderbird Property continued to show the SST lien registered in November 2007. The search of the Seagate Properties showed a judgment registered in favour of the Workers' Compensation Board in February 2008. Mr. Grewal sent a fax to Chuck Lew late in the day attaching property tax statements for the Seagate Properties. Lewco also arranged for an agent to obtain certificates from the District of Port Hardy concerning property taxes and utilities for both the Thunderbird Property and the Seagate Properties. These certificates showed arrears of taxes owing by both Rossland and West One (over $50,000 each) in addition to current taxes and utilities. Lewco obtained a corporate search for West One and also requested that Mr. Kletas provide copies of the 2007 and 2008 annual reports submitted under the B.C. ***Business Corporations Act*** (*S.B.C. 2002, c. 57*) for West One.

**146**  According to Mr. Fong, no one at Lewco shared any of the information in these documents with him. However, he acknowledged in cross-examination that, when the $250,000 was advanced, he knew a significant portion was going towards paying property taxes.

**147**  On June 4, 2008, Mr. Kletas sent a letter (Ex. 113) to Lewco, to the attention of both Chuck Lew and Russell Lew. He enclosed a number of documents (including the new Form B mortgage) signed by his clients, as well as his corporate opinion for Rossland and West One. He confirmed that, on receipt of the mortgage proceeds, he undertook to pay the 2007 property taxes for Seagate and Thunderbird. He gave a further undertaking to attend to the payment and discharge of both the SST lien registered against the Thunderbird Property and the judgment registered in favour of the Workers' Compensation Board against the Seagate Properties. He placed Chuck Lew and Russell Lew on an undertaking that, on registration of the new mortgage, they would attend to the discharge of the original mortgage within 15 days.

**148**  At trial, Mr. Fong denied receiving a copy of Ex. 113. During his examination-in-chief, he also said that if he had known about any issues with property taxes or SST or utilities, he would not have advanced the first $150,000 to Rossland. However, on Mr. Fong's cross-examination, evidence from his examination for discovery concerning Ex. 113 was put to him. Then, he had testified that he thought Russell Lew had sent a copy of Ex. 113 to him. He testified further that he read the letter quickly and felt that it was somewhat odd that the borrower's lawyer was setting up the undertakings. He went further and commented on both the SST lien and the Workers' Compensation Board judgment. With respect to the SST lien specifically he said:

so if they want to deduct the social service tax from the proceeds, I agree, because that's the lien.

When asked at trial if the answers he gave on discovery were true, Mr. Fong said that they were true "at that time."

**149**  As of June 4, 2008, the $250,000 advance had not yet been funded.

**150**  On June 5, 2008, Russell Lew wrote to Mr. Kletas (Ex. 170). He advised that the new mortgage for $400,000 (and assignment of rents) had been registered against the Thunderbird Property and the Seagate Properties, and he enclosed Lewco's trust cheque for $240,000, being the balance of the mortgage proceeds payable after the various deductions (including the processing fee to Mr. Fong). The funds were sent to Mr. Kletas on the undertakings in his June 4, 2008 letter (Ex. 113) and on two additional undertakings: (a) Mr. Kletas attend to payment of the unpaid utilities owing to the District of Port Hardy and provide written confirmation within three days; and (b) Mr. Kletas attend to execution of an acknowledgement of receipt by mortgagors and return to Lewco within three days. Russell Lew advised that the requirement for insurance binders naming the lender as loss payee had been waived. The letter shows "cc: Mr. Fong," however Mr. Fong denied receiving a copy.

**151**  At trial, during Russell Lew's cross-examination as an adverse witness, it was put to Mr. Lew that in his June 5 letter, he did not put Mr. Kletas on any undertakings concerning payment of SST and that he was concerned about whether the SST lien had been paid off. Some discovery evidence was put to him where he was asked to admit it was an oversight not to put Mr. Kletas on an undertaking to pay any unpaid SST, and Russell Lew agreed it could be called an oversight. However, as became clear later in the trial, Mr. Kletas, in his June 4 letter (Ex. 113), put himself on an undertaking to attend to payment and discharge of the SST lien, and Russell Lew, in his June 5 letter (Ex. 170), forwarded the loan proceeds on Mr. Kletas's undertakings in his June 4 letter. On a fuller and more accurate picture, the "oversight" vanished.

**152**  The new Fong Family mortgage securing the $400,000 loan was registered on June 5, 2008 under number FB176838. It replaced the mortgage registered in March 2008.

**153**  According to Mr. Fong, Mr. Kletas was unhappy about being placed on an undertaking to pay the utilities and complained to Mr. Grewal, who in turn complained to Mr. Fong. Mr. Fong was unhappy about Russell Lew placing Mr. Kletas on this undertaking when he did, and expressed the view that it should have been done earlier in the process. In any event, he gave instructions to Russell Lew to waive it. Russell Lew advised Mr. Kletas by fax on June 9, 2008 (Ex. 174) that the undertaking to pay utilities had been waived.

**154**  In due course, Mr. Kletas confirmed fulfillment of his undertakings to Russell Lew.

1. **Discussion and analysis**

**155**  The Fong Family alleges that, in relation to the first advance of $150,000, the agreement with the borrower was that:

1. the loan would be secured by a mortgage on the Thunderbird Property;
2. that mortgage would rank in fifth position, provided the amount owing to the prior chargeholders was no more than $1.1 million;
3. Mr. Grewal would personally guarantee repayment of the loan; and
4. no funds would be advanced to the borrower, until confirmation was received that: (i) the total amount of the prior charges was no more than $1.1 million; (ii) all property taxes and utilities were paid up to date; and (iii) appropriate insurance coverage was in place, listing the Fong Family as a loss payee.

**156**  The Fong Family asserts they gave instructions accordingly to the defendants, and also instructed the defendants that they were to prepare all the necessary documents.

**157**  The Notice of Civil Claim does not make any specific allegations in relation to the second advance of $250,000, but it can probably be read as making the same allegations in respect of both advances on the $400,000 loan.

**158**  The Fong Family says the defendants were negligent in a number of particulars, including:

1. failing to give the Fong Family advice about potential risks or legal issues with the terms of the loan;
2. failing to advise the Fong Family of the risks associated with lending money to a corporation without a personal guarantee;
3. failing to ensure that Mr. Grewal gave a personal guarantee;
4. allowing counsel for the borrower to prepare the loan documentation;
5. failing to notify the Fong Family of communications that showed the total outstanding on the prior charges exceeded $1.1 million; and
6. failing to place Mr. Kletas on appropriate undertakings, including to ensure that utilities and property taxes were paid up to date, and that there was an appropriate endorsement on the insurance policy.

**159**  The Fong Family asserts that, in relation to the first advance of $150,000, Chuck Lew's conduct was "rife with errors and omissions." They say further that, if Chuck Lew had done what a reasonably competent solicitor should be expected to do and had informed Mr. Fong of the actual amounts of the mortgages registered ahead of the Fong Family on title, the property taxes due and the amount of the SST lien, Mr. Fong would not have agreed to make the advance of $150,000 and his business relationships with Mr. Grewal would have come to an end. The Fong Family says that Chuck Lew's failure to properly investigate title to the Thunderbird Property and report to Mr. Fong created problems going forward, because Mr. Fong continued to believe that less than $1.1 million was registered ahead of the Fong Family mortgage, and held that belief when both the advance of $250,000 and the second loan of $235,000 were made. The Fong Family says that Chuck Lew breached the terms of his retainer, which required that the loan be funded only if the prior indebtedness on title to the Thunderbird Property was less than $1.1 million, and that, if Chuck Lew had advised Mr. Fong of the true state of the indebtedness on title, Mr. Fong would not have advanced the loan.

**160**  In short, the Fong Family says that, but for the ***negligence*** of Chuck Lew and Russell Lew (who handled the second advance), and their breach of their retainer, the Fong Family would not have made the loan of $400,000 to Rossland at all. Further, the Fong Family at least implies that, since they would not have made the $400,000 loan (or even the first advance of $150,000), they would not have made any of the loans to Rossland and West One. Therefore, the defendants' ***negligence*** caused the whole loss.

**161**  In my opinion, at least some of the Fong Family's complaints levelled against the defendants cannot amount to ***negligence*** or breach of the defendants' retainer, even if they are not examples of preferred or best practices.

**162**  For example, the Fong Family complains that Chuck Lew and Russell Lew did not prepare the loan documents. Rather, they permitted Mr. Kletas, the borrower's lawyer to do that. This is true. However, no specific item was identified as something that would have been included in the loan documents by any reasonably competent solicitor acting for a lender, that Chuck Lew or Russell Lew omitted to include, to the prejudice of their clients. On the other hand, the evidence discloses that Chuck Lew and Russell Lew (when he was involved) reviewed the documents drafted by Mr. Kletas. They provided comments and requests for changes, which Mr. Kletas accepted and incorporated.

**163**  The Fong Family complains that the defendants were negligent, and breached their retainer, in not requiring a personal guarantee from Mr. Grewal. I am not persuaded that any reasonably competent solicitor would have, in the circumstances, insisted on a personal guarantee from Mr. Grewal as a condition of a client making the loan. There was no evidence that Mr. Fong instructed either Chuck Lew or Russell Lew to obtain a personal guarantee from Mr. Grewal or that it was part of their retainer to do so. Moreover, the evidence shows that when Mr. Fong wanted a personal guarantee of a loan made to a corporation, he specifically asked for one. That is what he did in connection with the loans to Mr. Kassam's companies, and that is what he did in connection with the $200,000 loan to Rossland (described below).

**164**  Although, during his evidence, Mr. Grewal was asked whether he would have been prepared to agree to changes to what he and Mr. Fong discussed and agreed on, Mr. Grewal was not asked at trial how he would have responded if he had been asked to give a personal guarantee of the $400,000 loan to Rossland. I conclude that, when Mr. Grewal was prepared to give a personal guarantee, he negotiated that directly with Mr. Fong, and neither of them waited for a lawyer to suggest it. Mr. Fong was not asked whether he would have refused to make a loan to Rossland if Mr. Grewal had been asked to give a guarantee and refused. In my view, it is pointless to speculate. In any event, nothing has been recovered on the guarantee Mr. Grewal did give. Even if a reasonably competent solicitor would have asked for a personal guarantee, and Mr. Grewal had agreed to give one, the defendants' failure to ask has not caused the Fong Family any loss.

**165**  I conclude that, in March 2008, before the advance of $150,000, Chuck Lew probably did not discuss with Mr. Fong the SST lien on title, or whether Rossland was up-to-date on the property taxes on the Thunderbird Property. There is nothing in the documentary record to indicate Chuck Lew raised the issues with Mr. Kletas, or, in relation to the advance of $150,000, placed Mr. Kletas on any undertakings in relation either to discharge of the SST lien or payment of property taxes. I do not endorse Chuck Lew's approach as an example of good or thorough practice. However, the express mortgage terms did include a provision concerning the payment by the borrower of all taxes (including utilities).

**166**  Chuck Lew's failure to discuss the registration of the SST lien on title, or matters regarding unpaid property taxes, with Mr. Fong, might be said to be a breach of the standard of care of a reasonably competent solicitor (as described in ***Graybriar*** at p.181, for example), in that Chuck Lew did not explain to Mr. Fong exactly what the state of title portrayed. On the other hand, I find that Mr. Fong had been told about the mortgages registered in priority to the Fong Family mortgage, and the amounts owing on those charges. I find that he had been told that both of the Nelsons' mortgages were registered against the Thunderbird Property. Again, a first-rate solicitor may have spent more time with Mr. Fong with a view to driving points home, but that is not the test. Mr. Fong was not an unsophisticated client. Rather, he had a background in accounting and real estate, and had been involved in mortgage lending (including drafting his own agreements) since at least 2003. I find that, after being provided with the relevant information and discussing matters with Mr. Grewal, Mr. Fong made his own decision that the advance of $150,000 was adequately secured, and gave instructions to Chuck Lew to proceed to complete the transaction.

**167**  Mr. Fong testified that if he had known about the SST lien and unpaid property taxes, he would not have advanced the initial $150,000 of the $400,000 loan. This type of hypothetical is one of the areas where Mr. Fong's credibility and reliability are critical, and, as I have explained above, there are many reasons to be concerned about both Mr. Fong's credibility and his reliability.

**168**  Based on Mr. Fong's conduct in relation to the advance of the second "tranche" of the $400,000 loan, I do not accept his evidence that, if he had known about the SST lien and property taxes in March 2008, he would have given instructions not to make the advance. Thus, even if Chuck Lew's failure to discuss these aspects of the title specifically with Mr. Fong was a breach of the standard of care, it was of no consequence and caused no damage. Mr. Fong acknowledged that, in June, he knew about both the SST lien and the property taxes, and that a significant portion of the $250,000 was going to pay property taxes. Despite that, he still gave instructions to make the advance. When I test Mr. Fong's evidence in the crucible of reason (see ***Newton***, at para. 761), I find that his actual conduct in June is inconsistent with his hypothetical position in relation to the $150,000 advance.

**169**  It is also important to recall that the Fong Family needed to put its cash to work, earning interest above what a bank would pay. The loans to Rossland achieved that, and (until they went into default) provided the Fong Family with a monthly source of income. Mr. Fong did not identify any other possible investment he had in mind for the $150,000 in March 2008, or for the $250,000 in June. This is another reason why I am not prepared to accept Mr. Fong's evidence about what he would have done in March 2008 if only he had been advised of certain things by Chuck Lew.

**170**  Probably the Fong Family's most serious complaint is that Mr. Fong gave Chuck Lew firm instructions (and it was part of Chuck Lew's retainer) not to make the $150,000 advance unless the amounts owing to the prior chargeholders did not exceed $1.1 million, and that Chuck Lew breached his instructions because the actual amount owing was more (the Fong Family alleges it was approximately $1,343,211; in fact, as set out above, it was approximately $1,178,748).

**171**  However, in my opinion, the evidence does not support the Fong Family's complaint.

**172**  Based on the documentary evidence, on March 13, 2008, Chuck Lew made a specific request of Mr. Kletas to confirm the amounts of the charges already registered on the Thunderbird Property. Mr. Kletas provided the information in Ex. 105 and Ex. 106. Mr. Kletas's letter Ex. 105 uses the term "*inter alia*" in relation to the Nelsons' mortgages. According to Mr. Fong, he did not understand what that term meant. However, Mr. Kletas in fact provides the explanation in his letter: he says the mortgages cover both the Thunderbird Property and the Seagate Properties. Moreover, given Mr. Fong's background as a real estate agent, I do not find his assertion that he did not understand the Nelsons' mortgages were registered and secured against both the Thunderbird and the Seagate to be credible. Instead of relying on what was in Mr. Kletas's letter Ex. 105, Mr. Fong chose to accept what Mr. Grewal told him about the Nelsons' mortgages, and despite having the advice in Mr. Kletas's two letters (Ex. 105 and Ex. 106), Mr. Fong concluded that the prior charges registered on the Thunderbird Property did not exceed $1.1 million.

**173**  I find that Mr. Fong had been given accurate information about the mortgages on title, and made his own decision about advancing the $150,000, without asking Chuck Lew for further advice. He was asked to provide written instructions (Ex. 107) to Chuck Lew (via Ms. Tong) to release the $150,000 to Mr. Kletas, and he did so. I find that, in giving those instructions, Mr. Fong had satisfied himself as to the state of the title of the Thunderbird Property, so far as it was relevant to the mortgage securing the $150,000 advance. Mr. Fong had been provided with correct information about the mortgages that were registered on title -- and specifically about the Nelsons' mortgages -- by means of Ex. 105 and Ex. 106. He knew as well that there was not going to be any "new first mortgage" leaving the Fong Family mortgage in second place on the Thunderbird Property. Mr. Grewal (through Mr. Kletas) had confirmed that, if and when the balance of the $400,000 loan was advanced, the Fong Family would receive security over the Seagate Properties in addition to the Thunderbird Properties. I find that Mr. Fong knew -- or at least had the means to know -- that the charges registered against the Thunderbird Property exceeded $1.1 million, but, having made his own assessment of the equity in the Property, he concluded the security available was sufficient for purposes of advancing $150,000.

**174**  I find that Chuck Lew did not breach his retainer or act contrary to his instructions in delivering the funds representing the $150,000 advance to Mr. Kletas.

**175**  By June 2008, the Fong Family was being given security over both the Thunderbird Property and the Seagate Properties. In connection with the advance of $250,000, Mr. Fong negotiated a processing fee for himself and an additional fee to cover the exchange rate. His instructions to Chuck Lew (Ex. 41) do not mention any condition that prior mortgages on the Thunderbird are not to exceed $1.1 million. I find this is consistent with Mr. Fong's decision in March 2008 to make the initial advance on the $400,000 loan, although the prior charges exceeded $1.1 million. Although Mr. Fong had been provided with the correct information in March, he had drawn his own conclusions about the state of the Thunderbird Property title and the equity available to secure the Fong Family loan.

**176**  I find that the $250,000 advance completed on the usual undertakings, and that the security that the Fong Family expected, and that Mr. Fong had negotiated with Mr. Grewal, to receive for the $400,000 loan was delivered. While Chuck Lew and Russell Lew probably could have done a better job of reporting to their client, in my opinion, the evidence does not support the conclusion that their handling of matters in relation to the $400,000 loan fell below the standard expected of a reasonable competent solicitor, or that they acted in breach of the terms of their retainer.

**177**  Accordingly, I find that the Fong Family has failed to make out a claim in ***negligence*** or for breach of contract in relation to the $400,000 loan.

**The $235,000 Loan**

1. **Background**

**178**  In January 2009, Mr. Grewal and Mr. Fong discussed another loan. The Seagate Hotel had suffered quite extensive water damage from a burst pipe in the attic and the hotel required repairs and renovations. Mr. Fong understood from Mr. Grewal that Mr. Grewal had submitted an insurance claim. However, as Mr. Fong understood the situation, if Mr. Grewal had money available sooner rather than later, the necessary repairs could be done in time for Seagate Hotel to be open for business during its busy season later in the year. According to Mr. Fong, part of the discussion was that, when the insurance claim was paid, then the loan from the Fong Family would be repaid. (In the result, no insurance money was ever paid in relation to West One's claim.)

**179**  At the same time, Rossland had accepted an offer to sell the Thunderbird Property (including the Thunderbird Hotel). According to Mr. Fong, he heard about the prospect of a sale in December, 2008, and Mr. Grewal had given him a copy of the contract of purchase and sale in January, when Mr. Fong came by to pick up a mortgage cheque. According to the contract of purchase and sale, the purchaser was a church group (the Port Hardy Christian Fellowship Centre (the *Christian Fellowship Centre*)), the purchase price was $1.5 million, all cash, and the completion date was April 1, 2009. The contract provided that all liquor licences were to be kept by the seller (Rossland).

**180**  Mr. Fong's plan was to use some of the equity in the Fong Family's house on West King Edward to fund the loan Mr. Grewal was requesting. His plan is reflected in the fax note he sent to Ms. Tong on January 21, 2009 (Ex. 128). He asked Ms. Tong to ask either Chuck Lew or Russell Lew to prepare:

1. a first mortgage on King Edward with the Bank of Montreal for $250,000, with a 4% variable interest rate and a 3-year term;
2. a discharge of the existing mortgage on King Edward; and
3. a mortgage for $235,000 charging both the Thunderbird Property and the Seagate Properties, with interest at 11% and a 3-year term. The mortgage was to be a closed mortgage with a 3-month prepayment penalty.

His note advised that Mr. Grewal had agreed to pay the legal fees, and had also agreed to pay a fee of $10,000 to Cindy Fong. This was to be deducted from the gross loan amount of $235,000. Mr. Fong's note illustrates -- in the spread between the interest rate the Fong Family were paying to the Bank of Montreal and the interest rate the Family was collecting from Mr. Grewal's companies -- how he was generating income for the Fong Family.

**181**  The following day (January 22, 2009), Mr. Fong and Mr. Grewal (on behalf of Rossland and West One) signed a typed "Letter of Commitment" (Ex. 129), setting out the terms of their agreement. This document confirms that the total loan amount is $235,000, from which Cindy Fong is to be paid a "bonus" of $10,000. It also confirms that: the interest rate is 11%, the monthly interest payable is $2,155 and the mortgage is to be registered against both the Thunderbird Property and the Seagate Properties. A copy of Ex. 129 was also sent to Lewco, to Ms. Tong's attention.

**182**  These two documents (Ex. 128 and Ex. 129) provided the basic instructions to Lewco in relation to the proposed loan of $235,000.

**183**  Again, neither document mentions or suggests that, as part of the agreement between Mr. Fong and Mr. Grewal, Mr. Grewal had agreed to give a personal guarantee.

**184**  According to Mr. Fong, he arranged to have copies of the Land Title Office searches for the Thunderbird Property and the Seagate Properties sent to Lewco. In fact, Mr. Kletas (who was again acting for the borrowers) sent copies to Lewco, along with a draft Form B mortgage, under cover of his letter dated January 28, 2009 (Ex. 72). The marked-up copies of the Land Title Office searches from Lewco's file for this transaction show that the last charge registered against the Thunderbird Property and the Seagate Properties was the Fong Family mortgage and assignment of rents registered on June 5, 2008, under numbers FB176838 and FB176839. Thus, in terms of the titles to the Properties, nothing had changed since June 2008.

**185**  On January 28, 2009, Chuck Lew provided Mr. Kletas with his comments on the draft mortgage Mr. Kletas had prepared. Mr. Fong's signature appears on a copy (Ex. 131) of Chuck Lew's fax to Mr. Kletas, and I conclude that Mr. Fong probably received a copy of this communication. Mr. Kletas wrote back to Chuck Lew later that day, with a revised draft mortgage, directors' resolutions for the borrowers and an acknowledgement of receipt. He indicated that, if the documents were acceptable, he would arrange to have Mr. Grewal sign them the following day.

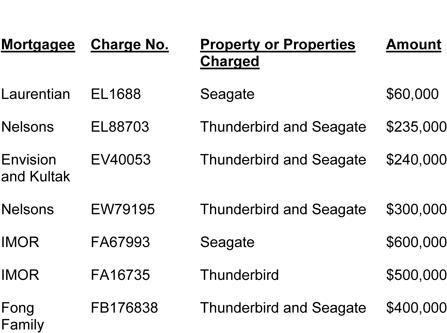
**186**  However, the documents drafted by Mr. Kletas were not yet acceptable. On January 29, 2009, Chuck Lew wrote to Mr. Kletas (Ex. 136) with some additional comments on the draft documents. He raised a point concerning box 11 on the Form B mortgage, where Chuck Lew suggested listing the prior charges. Mr. Kletas wrote back later that morning (Ex. 134), with further revised documents. In the revised draft Form B mortgage, the prior charges were now listed in a schedule. Chuck Lew made notes about the various charges on his copy of Mr. Kletas's fax.

**187**  Chuck Lew then sent a fax message to Mr. Fong (Ex. 45). He advised Mr. Fong that there were six mortgages registered against the Seagate Properties that would be ahead of the new Fong Family mortgage, and there were five mortgages registered against the Thunderbird Property that would be ahead of the new mortgage. Chuck Lew set out the chargeholder and the registration number for each charge in his fax. He advised Mr. Fong: "We do not have any knowledge as to the amounts owing on each mortgage." He asked Mr. Fong to acknowledge receipt of the fax by signing and faxing a copy back to Lewco.

**188**  According to Mr. Fong, he received Chuck Lew's fax late in the afternoon on January 30, 2009. He testified that he "totally almost collapsed," and was very upset. He said that he could not understand how Lewco could not know the amounts owing on these mortgages, since loans had been made in 2008 charging the Thunderbird Property and the Seagate Properties. He was also upset that Chuck Lew wanted him to sign and fax back a copy of Mr. Lew's fax communication. At trial, Mr. Fong was extremely critical of how Chuck Lew handled matters at this point, and during cross-examination, his eagerness to criticize Chuck Lew meant he had a difficult time focussing on the questions he was being asked.

**189**  Mr. Fong discussed the contents of Ex. 45 with Mr. Grewal. I find that, during those discussions, Mr. Grewal made handwritten annotations to a copy of the document. I find further that Mr. Fong and Mr. Grewal then both signed the annotated document (Ex. 46) and faxed it back to Lewco.

**190**  Exhibit 46, as annotated, discloses the following information with respect to mortgages that were ahead of the new Fong Family mortgage securing the $235,000 loan:



**191**  In the Notice of Civil Claim in the Fong Family Action, the plaintiffs allege that the amounts that Mr. Grewal represented as owing were "significantly lower" than the amounts actually owing, and that the defendants "knew or ought to have known that the amounts indicated by Grewal were false" by virtue of the March communications they had received from Mr. Kletas (Ex. 105 and Ex. 106). However, I find that the Fong Family has failed to prove these allegations. A comparison of the amounts on Ex. 46 with the amounts on Ex. 105 and Ex. 106 (and summarized above in relation to the $150,000 advance) shows that the amounts provided by Mr. Grewal in January 2009 were reasonably close to the amounts in Ex. 105 and Ex. 106. Of course, in March 2008, mortgages secured only against the Seagate Properties were not relevant, so they were not included. Based on the statement from Envision/Kultak provided under cover of Ex. 106, the amount owing on that mortgage was about $100,000 less than what Mr. Grewal stated in January 2009.

**192**  Both Mr. Fong and Mr. Grewal testified about their meeting on January 30, and how Mr. Grewal filled in information on Ex. 46. During his direct examination, Mr. Fong said he just "let Mr. Grewal do his work," implying that he paid little or no attention to what Mr. Grewal was writing on the document. Mr. Fong referred to his signature on the document as simply him witnessing Mr. Grewal's signature. But, in context, his evidence is a self-serving attempt to deflect responsibility and is not credible, since Chuck Lew had specifically requested he sign and fax back a copy of Ex. 45. During cross-examination, Mr. Fong refused to accept that the annotations that showed the Nelsons' mortgages as registered against both the Thunderbird Property and the Seagate Properties were correct (although in fact they were). Mr. Fong did not contact Chuck Lew or anyone at Lewco, either after receiving Ex. 45 or before faxing back Ex. 46 (signed by him and Mr. Grewal).

**193**  The final executed mortgage from Rossland and West One was sent to Lewco by Mr. Kletas on February 5, 2009, on Chuck Lew's undertaking not to register the mortgage until he had the mortgage proceeds in his trust account. This undertaking was subsequently modified by Mr. Kletas's letter dated February 9, 2009. The Form B mortgage was registered on February 9, 2009 and the balance of the mortgage proceeds (less, among other things, the $10,000 bonus to Cindy Fong) was sent to Mr. Kletas under cover of Chuck Lew's letter of February 9, 2009 (Ex. 139). In that letter, Mr. Lew placed Mr. Kletas on an undertaking to provide to Lewco, within a reasonable time, evidence of insurance coverage reflecting the mortgagees' interests. It is unclear whether Mr. Kletas was released from this undertaking. However, even if he was, the Fong Family did not suffer any damage as a result.

**194**  The mortgage and assignment of rents, securing the $235,000 loan, were registered on February 9, 2009, under numbers FB246473 and FB246474, respectively.

**195**  In addition to the $10,000 bonus, the Fong Family received monthly interest payments of $2,155 on this mortgage, until it went into default in March 2010.

1. **Discussion and analysis**

**196**  The Fong Family alleges that they reasonably expected the defendants to verify the amounts Mr. Grewal had written on Ex. 46, or, alternatively, place Mr. Kletas on undertakings not to release the net loan proceeds until verification of those amounts had been received.

**197**  The Fong Family also asserts that the defendants were negligent in that (among other things) they failed to: "bring the inaccuracies of Grewal's representations regarding the outstanding loan amounts" to the Fong Family's attention; prepare the loan documentation; verify the amounts owing to the creditors ranking ahead of the Fong Family's mortgage; verify whether property taxes and utilities were paid up to date (and the Fong Family asserts they were not); ensure that Mr. Grewal gave a personal guarantee of the loan; and place Mr. Kletas on appropriate undertakings (including that the amounts secured on the Thunderbird Property ahead of the Fong Family did not exceed $1.1 million) before releasing the loan proceeds.

**198**  In closing submissions, Mr. Henshall argued that, if only Chuck Lew had spoken out about the risks associated with making this loan, it was likely that all of the Fong Family members would have had second thoughts, and the loan would not have been made. In short, Mr. Henshall argues that, but for Chuck Lew's failure to speak out -- that is, his failure to comply with the standard and conduct of a reasonably competent solicitor -- the $235,000 loan would not have been made at all.

**199**  In my opinion, the Fong Family has failed to make out what it asserts.

**200**  Again, I am not persuaded that the step of verifying the amounts owing to mortgagees ahead of the Fong Family would have been taken by a reasonably competent solicitor in the circumstances. In any event, Chuck Lew in fact advised Mr. Fong that he did not know the amounts owing. Mr. Fong "totally almost collapsed" and became very upset. Instead of getting upset, it would have been a simple matter for Mr. Fong to respond to Mr. Lew: "Find out please," and make it part of what he was retaining Mr. Lew to do. Mr. Fong did not do that. Instead, he went to Mr. Grewal.

**201**  As I noted above, a comparison of the information on Ex. 46 with the information on Ex. 105 and Ex. 106 shows that Mr. Grewal's figures are reasonably accurate. With respect to property taxes and utilities, when the $250,000 advance was made in June 2008, steps were taken to confirm the amounts that were outstanding and ensure they were paid. The Fong Family did not tender evidence at trial showing the state of property taxes and utilities in January and February 2009, so the factual foundation for the complaints about the defendants' failures in this respect in relation to the $235,000 loan is missing.

**202**  I have discussed above, in relation to the $400,000 loan, the Fong Family's complaint about the lack of a personal guarantee from Mr. Grewal. My comments apply equally to the $235,000 loan.

**203**  I have also discussed above the Fong Family's complaint about Mr. Kletas, rather than Chuck Lew or Russell Lew, preparing the loan documents, and those comments also apply to the $235,000 loan. The communications exchanged between Chuck Lew and Mr. Kletas in relation to the $235,000 loan show that, although Mr. Kletas was drafting the documents, Chuck Lew provided his comments, which were duly incorporated.

**204**  There was a suggestion from time to time that Chuck Lew ought to have ensured that the $235,000 loan was advanced in draws, like a construction loan, since the purpose of the loan (according to Mr. Fong and Mr. Grewal) was to pay for renovations at the Seagate Hotel. I note that there is no specific allegation to this effect in the Notice of Civil Claim. But, in any event, I do not accept that a reasonably competent solicitor would have, in the circumstances, advised the client that this type of arrangement needed to be put in place. Mr. Fong testified that no one suggested to him that the $235,000 loan be made in draws. But he did not say what he would have done if he had been given that advice. I doubt that such advice would have made any difference. Moreover, making this loan in draws appears to be incompatible with the Fong Family's general objective in lending money to borrowers such as Rossland and West One, namely: to take advantage of higher interest rates chargeable to such borrowers to generate monthly interest income to support the Fong Family. Whether, if the loan was advanced in draws, the borrowers would have agreed to pay interest on the whole amount of the loan, is purely speculative.

**205**  From time to time, Mr. Fong suggested in his evidence that it was important to make sure money the Fong Family was lending for renovations at the Seagate Hotel actually went to renovations (and not other things, like property taxes). However, the proposition seems to me to be incompatible with the fee of $10,000 being paid to Cindy Fong on the $235,000 loan (thus taking money away from what would otherwise be available for renovations), and Mr. Fong's demonstrated lack of interest generally in details (a budget, e.g.) about the renovations.

**206**  With respect to the hypothetical advanced by Mr. Henshall in argument (that the loan would not have been made at all, if only Chuck Lew had warned his clients of the risks), I find that it is not supported by the evidence. Mr. Fong had been told about the state of the title to the Thunderbird Property and the Seagate Properties. He had been told where the Fong Family mortgages stood in relation to the other charges (that they were considerably down the line). He had been told about the amounts of the charges registered ahead of the Fong Family mortgages (and drawn his own conclusions). He had made his own assessment about the underlying value of the Thunderbird Property and the Seagate Properties, and I find he was not relying on any of the defendants to give him any advice or guidance in that respect, nor was that part of the defendants' retainer. I think it would be obvious to Mr. Fong that there were risks in lending money to Mr. Grewal's companies. The defendants had no obligation to warn Mr. Fong of business risks involved in making such loans: see ***Midland Mortgage***, at para. 13.

**207**  Accordingly, I find that, in relation to the loan of $235,000, the Fong Family has failed to prove a claim in ***negligence*** against the defendants, and has failed to prove that the defendants acted in breach of their retainer.

**Sale of the Thunderbird and the $200,000 Loan**

1. **Background**
2. **Sale of the Thunderbird Property**

**208**  As of April 2009, the Fong Family had made loans totalling $635,000 to Rossland and West One. As security, they had mortgages registered against both the Thunderbird Property (in sixth place and seventh place) and the Seagate Properties (in fifth and sixth place). Mr. Fong had been told (by Chuck Lew) about the state of the titles. Mr. Fong also knew that the Thunderbird Property (including the Hotel) was in the process of being sold.

**209**  According to Mr. Fong, he and Mr. Grewal had discussions around early April 2009 about a proposal from the Christian Fellowship Centre (the proposed purchaser of the Thunderbird Property) that Mr. Grewal was considering. The Christian Fellowship Centre had been intending to sell two properties (the Church Property and the House Property) to raise the cash required to close the purchase. However, it had been unable to do so. The Christian Fellowship Centre proposed that Mr. Grewal accept the Church Property and the House Property in trade, to make up the total purchase price for the Thunderbird Property. Based on that proposal, there would be about $950,000 in cash generated by the sale, but that would not be sufficient to pay out all of the charges registered against the Thunderbird Property.

**210**  According to Mr. Fong, Mr. Grewal came to him to discuss matters before Mr. Grewal had accepted the Christian Fellowship Centre's proposal, although Mr. Grewal did not recall this. However, I think Mr. Fong's evidence on this point is credible and, in the circumstances, makes sense. Mr. Grewal could not commit Rossland to the Christian Fellowship Centre's alternative proposal to take property in trade unless he had chargeholders (such as the Fong Family), with charges registered against the Thunderbird Property, on side.

**211**  According to Mr. Fong, at this time, Mr. Grewal presented his own proposal to Mr. Fong. Since, if Mr. Grewal agreed to accept the Church Property and the House Property in trade there would not be enough cash from the sale of the Thunderbird Property to pay off all of the charges, Mr. Grewal proposed that Mr. Fong agree to take alternative security in exchange for giving discharges of the two Fong Family mortgages on the Thunderbird Property. According to Mr. Fong, the alternative security Mr. Grewal offered was a third mortgage on the Church Property and a charge on the liquor licence that Rossland was keeping and that was not part of the Thunderbird Property sale. Mr. Fong described it as a licence for a beer and wine store, which was going to be moved from the Thunderbird Hotel to the Seagate Hotel. Mr. Fong understood that Mr. Grewal was asking his permission to accept the trade proposed by the Christian Fellowship Centre and for his agreement to accept alternative security for the Fong Family mortgages secured on the Thunderbird Property. Mr. Fong also understood that he could always have told Mr. Grewal that what he proposed was unacceptable.

**212**  Instead (and before seeking any legal advice), Mr. Fong accepted Mr. Grewal's proposal. He agreed that the two Fong Family mortgages registered against the Thunderbird Property would be discharged in exchange for other security. Mr. Fong asked Chuck Lew to handle the transaction.

**213**  On April 24, 2009, Mr. Kletas wrote to Chuck Lew (Ex. 47) about what their respective clients had discussed, and said:

Our mutual clients have met to deal with your clients providing a partial discharge of their two mortgages over the Thunderbird Hotel.

We confirm that your clients would continue to hold their mortgage over the Seagate Hotel. In addition, our clients are prepared to provide your clients with additional security, which includes:

1. granting them a third mortgage, over property located at 7170 Rupert Street, Port Hardy, BC [the Church Property]; and
2. a General Security Agreement over the liquor licence owned by Rossland Recreation Holdings Ltd. We confirm that this GSA would be subordinate in priority to the first mortgage holder, IMOR Capital Corp. already holding a GSA.

We ask that you please seek instructions from your clients to confirm that they are prepared in [sic] providing our clients with a discharge. Once we have received written confirmation from your offices, we will then proceed to prepare the necessary documentation for your client's execution.

**214**  Later that day, Chuck Lew sent an e-mail message to Mr. Kletas (Ex. 49), which said:

Our client has advised that he will grant partial discharges as requested. He is to receive in replacement a third mortgage over property located at 7170 Rupert Street [the Church Property] . . . .

**215**  Still later that day, Mr. Fong sent a fax note (Ex. 48) to Chuck Lew, which said:

David' lawyer will fax you the legal doucement [sic] for reviewing before we come to your office to sign.

Any question, please call me at [phone number].

**216**  On April 29, 2009, Mr. Kletas sent Chuck Lew two discharges of the mortgages on the Thunderbird Property (Ex. 143), for execution by the Fong Family.

**217**  There is no dispute that the Fong Family signed the mortgage discharges on May 5, 2009, and did so in front of Chuck Lew. According to Mr. Fong, he got a call from Chuck Lew on May 5 to come to Chuck Lew's office to sign the documents. As Mr. Fong recalled, he asked Mr. Lew whether it was okay to sign the documents and Mr. Lew said yes. According to Mr. Fong, Mr. Lew never asked him whether he was in agreement with any particular arrangements, and he never discussed security over a liquor licence with either Chuck Lew or Russell Lew. According to Mr. Fong, he told Cindy Fong that the Fong Family was going to receive equal value on other property in exchange for the discharges, and told his mother that they had to rely on Chuck Lew to do the paperwork properly.

**218**  According to Mr. Fong, when he signed the discharges, he thought that the Fong Family were getting a third mortgage on the Church Property and a general security agreement on the liquor licence for a beer and wine store that (according to Mr. Grewal) was being moved from the Thunderbird Hotel to the Seagate Hotel. Mr. Fong testified that, if he had known at the time that the Fong Family were not getting a security interest in the liquor licence, he would not have signed the discharges (and presumably Cindy Fong and his mother would not have signed the discharges either), because he had to have equity to replace the security represented by the mortgages on the Thunderbird Property. Mr. Fong valued the Church Property at between $400,000 and $450,000. According to Mr. Fong, he was told that there would be two other mortgages, totalling about $100,000, ahead of the Fong Family on the Church Property.

**219**  On May 5, 2009, Chuck Lew wrote to Mr. Kletas (Ex. 52), enclosing copies of the two discharges signed by the Fong Family, and said:

The discharges are sent on the understanding that:

1. They are only to be used in the event of the completion of the sale of the Thunderbird Hotel, and
2. your client will grant the substitute security as provided in your letter of April 24, 2009 to this office.

**220**  Chuck Lew testified that, even though he said "understanding" rather than "undertaking," he expected Mr. Kletas to comply.

**221**  According to the "Authorization and Direction to Pay" (Ex. 203) signed by Mr. Grewal in connection with the completion of the sale of the Thunderbird Property (stated to be May 1, 2009), the IMOR mortgage registered against the Thunderbird Property was paid out in full, and partial payments were made on one of the mortgages in favour of the Nelsons (it was never clarified in the evidence which one) and the mortgage in favour of Envision/Kultak. A payment was also made on account of IMOR's mortgage on the Seagate Properties. Nothing was paid to the Fong Family.

**222**  As of the completion of the sale of the Thunderbird Property, the Fong Family had not received any substitute security, in exchange for the discharges. However, the Fong Family continued to hold mortgages on the Seagate Properties as security for the $635,000 in loans to Mr. Grewal's companies.

1. **The $200,000 Loan**

**223**  In June 2009, Mr. Grewal and Mr. Fong discussed a further loan. According to Mr. Fong, Mr. Grewal told him that he might need another $300,000 to complete the renovations on a beer and wine store at the Seagate Hotel. Mr. Fong offered to lend the money, which he was planning to raise through a mortgage on property owned by the Fong Family in Vancouver. Mr. Fong told Mr. Grewal that if he was unable to raise the whole amount, the loan could not be $300,000.

**224**  In due course, Mr. Grewal prepared a commitment letter dated June 23, 2009 (Ex. 53), which was signed by all parties. Ex. 53 reflects that Mr. Fong and Cindy Fong are the lenders, Rossland and Mr. Grewal are the borrowers, and that the security to be given is to be a first charge on both the Church Property and the House Property. Mr. Fong described the House Property as a bungalow that was rented for about $750 a month. He said that he valued it at about $150,000.

**225**  According to Mr. Fong, shortly after Ex. 53 was signed, he learned that he could not raise the full amount of the proposed loan. However, he had $200,000 available, and that was acceptable to Mr. Grewal.

**226**  Mr. Fong sent a copy of Ex. 53 to Chuck Lew, as Mr. Lew's initial instructions in connection with the preparation of the loan documents. Mr. Fong had not contacted anyone at Lewco to discuss what he was doing. Of course, the loan amount had been changed from $300,000 to $200,000, and, as I note below, the security was also changed.

**227**  During Chuck Lew's cross-examination by plaintiffs' counsel, it was put to him that nowhere in Ex. 53 was there a reference to Mr. Grewal being a guarantor or covenantor of the mortgage, and that Mr. Lew, on his own initiative and as a matter of prudent practice (and as part of his retainer), asked that Mr. Grewal be made a covenantor. Mr. Lew agreed with both propositions. However, Mr. Lew's evidence illustrated both his tendency simply to go along with propositions that were put to him and his generally poor recollection of events. In fact (as was clarified during Chuck Lew's examination by Mr. Dives, and as can be seen from a review of Ex. 53), the commitment letter treats Mr. Grewal as a borrower and covenantor on the loan. Therefore, Chuck Lew did not act on his own initiative. Rather, these were the instructions that Mr. Fong provided to Mr. Lew about the agreement he had made with Mr. Grewal.

**228**  On June 29, 2009, Chuck Lew received title searches for both the Church Property and the House Property from Mr. Kletas, and made some notes on the copies. He believed that, where he had noted "OK," he had received the "okay" or confirmation from Mr. Fong about the charges.

**229**  The search for the Church Property (Ex. 68) shows an "*inter alia*" mortgage in first position registered on May 8, 2009 (around the time of the closing of the Thunderbird Property sale) under no. CA1107840 in favour of Sandiland Law Corporation (*Sandiland*). There is also a mortgage in second position registered on May 11, 2009 in favour of the Nelsons and stated to be an extension of the charge registered under no. EW79195. Chuck Lew noted "OK" beside both of these charges. Finally, there is an SST lien registered on June 5, 2009.

**230**  The search for the House Property (Ex. 69) shows the *inter alia* mortgage in favour of Sandiland in first position and the SST lien. Chuck Lew noted "OK" beside the mortgage.

**231**  On July 9, 2009, Mr. Kletas wrote to Chuck Lew (Ex. 145) regarding "Extension of Mortgage Agreements for the two mortgages in favour" of the Fong Family "based on the releases that your clients had provided with respect to the Thunderbird Hotel." The extension agreements extended the two Fong Family mortgages (and associated assignments of rent) numbers FB176838 and FB246473 (originally registered against the Thunderbird Property and the Seagate Properties) to the Church Property. This substitute security was described in Mr. Kletas's April 24 letter (Ex. 47), in connection with the sale of the Thunderbird Property and the discharge of the Fong Family's two mortgages registered against that Property. In his July 9 letter, Mr. Kletas says:

We confirm that the two-above extension agreements would be registered prior to the registration of the new mortgage being granted by Michael Kwok and Cindy Fong in the amount of $200,000.00, which our client has already executed and we have provided you a copy of same.

Mr. Kletas did not mention the other item described in his April 24 letter: the general security agreement over Rossland's liquor licence.

**232**  However, Rossland's and Mr. Grewal's execution of the mortgage securing the $200,000 loan was premature. For example, Chuck Lew had not yet provided his comments on the contents of the draft mortgage document, and the matter of the priorities of the charges had not yet been settled.

**233**  Mr. Kletas sent a letter (Ex. 149) to Chuck Lew by fax the morning of July 13, 2009, which read in part:

Further to our telephone conversation on Friday morning [July 10, 2009], we confirm that we have had an opportunity to review the Mortgage with our client. Our client has instructed us that he is prepared to offer the following priorities to your clients as it relates to the Mortgage:

1. [the House Property] -- your clients would be granted a first mortgage on this Property. Sandilands Law Corporation would grant a priority agreement in favour of your clients with respect to this property. The House [Property] has an assessed value of $138,700.00.
2. [the Church Property] -- your clients would be granted a third mortgage on this property, following the mortgages registered in favour of Sandilands Law Corporation and Kim and Sandra Nelson. The property has an assessed value of $678,000.00.

The previous mortgages that your clients have granted to our client (FB176838 and FB246473) would be registered on the Church by way of the extension agreements previously delivered to you. These two mortgages would follow after registration of the Mortgage. . . .

**234**  Of course, the Fong Family mortgages numbered FB176838 and FB246473 had been discharged from the Thunderbird Property when it was sold. As of July 13, the extension agreements, extending those mortgages to the Church Property, had not yet been signed or registered.

**235**  The copy of Ex. 149 in evidence has a handwritten note dated July 13, 2009 from Mr. Fong on p. 2, which reads:

Dear Chuck,

I have read these doucements [sic]. please go ahead to finish and completion the mortgage. Thank you for your attention!

**236**  Chuck Lew then sent a fax message (Ex. 147) to Mr. Kletas with comments on the contents of the draft mortgage securing the $200,000 loan and some other matters. For example, he noted that the commitment letter provided for Mr. Grewal to guarantee the loan, and that the mortgage needed to be modified accordingly. He said that "our client should have insurance coverage showing his interest on both" the Church Property and the House Property. He asked for a solicitor's opinion from Mr. Kletas regarding the enforceability of the mortgage, and said that title insurance "must be in place." He also required an undertaking from Mr. Kletas to clear the SST lien from title and confirmation that property taxes were paid up to date. Chuck Lew said that the priority agreements "will need to be in place" prior to funding, and that he required "confirmation in writing from our client as to the security."

**237**  Mr. Fong denied receiving a copy of this fax message. He said that Chuck Lew never informed him of the SST lien or about property taxes. He was asked during his examination-in-chief whether, if he had known about them, they would have affected his decision to make the loan. He said yes, because if money was going to pay the lien and property taxes, there would not be enough to build the beer and wine store at the Seagate Hotel.

**238**  Mr. Kletas wrote back to Chuck Lew later that afternoon (Ex. 148), in response to Mr. Lew's fax. Mr. Kletas had made the amendments Mr. Lew requested to the mortgage. He enclosed a draft corporate opinion for Rossland and a copy of resolutions for Rossland, as well as an acknowledgement of receipt of the express terms of the mortgage. He gave an undertaking to pay the amount of the SST lien, on receipt of the mortgage proceeds, and agreed to provide confirmation that property taxes were up-to-date. Mr. Kletas also advised he would be requesting insurance coverage and ordering title insurance.

**239**  The mortgage and assignment of rents, securing the $200,000 loan, were registered on July 14, 2009 under numbers CA1184716 and CA 1184717, respectively. The prior encumbrances permitted were the Sandiland mortgage and the Nelsons' mortgage, both registered against the Church Property. Chuck Lew sent the net proceeds ($197,000) to Mr. Kletas in trust.

**240**  The state of title certificates (Ex. 154) confirmed that, as of July 30, 2009, the Fong Family mortgage was registered in third position on the Church Property, and in first position on the House Property, and that the SST lien was no longer registered on the titles. As of July 30, 2009, the extension agreements, extending mortgages FB176838 and FB246473 (and the associated assignments of rent) had not been registered against title to the Church Property. Indeed, there was no evidence that they were ever registered.

**241**  The Fong Family received monthly payments under the $200,000 mortgage of $1,666.66 beginning August 14, 2009, until the mortgage went into default in February 2010.

**242**  Mr. Fong was asked during his examination in chief whether he would have advanced the $200,000 loan if he had known that the extension agreements had not been registered against the Church Property. He said he would not have done so. However, I do not believe his evidence. He received a copy of Ex. 149, initialled the first page and wrote instructions to Chuck Lew on the second page. That letter informs him that the extension agreements have not been registered against the Church Property, but would be registered after the mortgage securing the $200,000 loan was registered. Thus, I find that he knew that the extension agreements had not been registered when he gave his instructions to Chuck Lew to complete the $200,000 loan transaction, and he also knew that the extension agreements were not going to be registered until after registration of the mortgage securing the $200,000 loan. Moreover, since the only issue was which Fong Family mortgage was going to come first on the Church Property (the extension agreements or the mortgage securing the $200,000 loan), his evidence does not make sense in the circumstances. The registration of the extension agreements was never a condition of the $200,000 loan being advanced.

1. **Discussion and analysis**

**243**  I will first discuss the $200,000 loan, and then turn to matters arising from the sale of the Thunderbird Property.

**244**  I find that the Fong Family have failed to prove that the terms of the "Third Loan Agreement" alleged in para. 66 of the Notice of Civil Claim were in fact the terms on which the Family agreed to make the $200,000 loan. There was no mortgage registered against the House Property in favour of the Nelsons (as alleged), and there was never any agreement that the Fong Family mortgage would require priority over a mortgage in favour of the Nelsons on the House Property (as also alleged). The borrowers were not Rossland and West One (as alleged). Rather, the borrowers were Rossland and Mr. Grewal. There was no agreement that the Fong Family mortgage would be registered in first position on the Church Property (as alleged). Rather, once the amount of the loan was reduced to $200,000, the Fong Family mortgage was to be registered in third position on the Church Property, after mortgages in favour of Sandiland and the Nelsons. Mr. Fong confirmed his instructions in writing in that regard to Chuck Lew. It was not a term of the agreement in relation to the $200,000 loan that extension agreements, extending the mortgages formerly registered against the Thunderbird Property, be registered. That was a separate arrangement.

**245**  The Fong Family alleges that the defendants were negligent by (among other things): failing to confirm registration of priority agreements by Sandiland and the Nelsons on the House Property; allowing Mr. Kletas to prepare the loan documentation; failing to prepare the loan documentation as instructed by the Fong Family; and failing to place Mr. Kletas on appropriate undertakings.

**246**  Among the undertakings the Fong Family alleges the defendants should have required from Mr. Kletas was an undertaking not to release the loan proceeds to his client before ensuring that "the principal amount of the loan advanced and secured by the first mortgagee on the Rossland Property did not exceed 1.1 million dollars." The term "Rossland Property," although used a number of times in the Notice of Civil Claim, is not defined in the Fong Family's pleadings. It appears to be intended to be a reference to the Thunderbird Property. However, by the time the $200,000 loan was being negotiated and advanced, the Thunderbird Property had been sold, so a complaint about a failure to put Mr. Kletas on an undertaking in relation to it is meaningless.

**247**  I find that the various other matters that the Fong Family alleges should have been the subject of undertakings, but for the defendants' ***negligence***, were attended to as part of completion of the $200,000 loan transaction. Mr. Fong had been informed of the state of the titles. The Fong Family mortgage securing the $200,000 loan was duly registered on both the Church Property and the House Property. The priority agreement, giving the Fong Family mortgage priority over the Sandiland mortgage on the House Property was duly registered. Mr. Kletas undertook to pay the SST lien registered on the Church Property and did so. He attended to confirmation of payment of property taxes and arranged for insurance and title insurance. Even if there was something to criticize in relation to the order in which things were done, what ought to have been done was done. Moreover, the manner and order in which things were done did not cause any damage to the Fong Family.

**248**  The Fong Family also complains that the defendants failed to give them proper legal advice in relation to this loan. For example, the Fong Family complains that the defendants failed to advise it "of the risks associated with . . . the nature of an SST lien . . . and, in particular, how [the Provincial Crown's] rights could affect the Plaintiffs' ability to realize on their security." But this was not the first time an SST lien was registered on a title when the Fong Family was taking mortgage security. There was an SST lien registered on title to the Thunderbird Property in 2008. Mr. Fong knew what an SST lien was. The Fong Family has failed to show what advice ought to have been given (consistent with the obligation of a reasonably competent solicitor) that would have made any difference in the circumstances.

**249**  Mr. Fong testified that if he had been told that there were outstanding property taxes and about the SST lien, it would have affected his decision to make the $200,000 loan, because if taxes were delinquent and needed to be paid, then Mr. Grewal would not have enough money to build the beer and wine store at the Seagate Hotel. Again, Mr. Fong's credibility is critical when considering his hypothetical position.

**250**  Mr. Fong's basic point is not unreasonable: if Mr. Grewal needed a certain amount of money to build a beer and wine store, then, if he had to spend some of that money elsewhere, construction of the beer and wine store could be at risk. Both Mr. Fong and Mr. Grewal recognized the importance of a beer and wine store for the success of the Seagate Hotel's business, which was already suffering because of the damage caused by the burst pipe at the beginning of the year. However, Mr. Fong showed a remarkable lack of curiosity about what it was actually going to cost West One to build the beer and wine store. There is little sign that he ever pressed Mr. Grewal for details or a budget or a timeline for completion. These are business issues, not legal issues. Moreover, Mr. Fong never identified any other potential source of investment for the $200,000 that was loaned to Rossland, that would generate the regular income that the Fong Family needed.

**251**  In those circumstances, I do not believe Mr. Fong's evidence that, if he had known about property taxes and the SST lien, he would not have made the $200,000 loan to Rossland in July 2009.

**252**  I find that the Fong Family has failed to prove a claim in ***negligence*** in respect of the loan of $200,000, and the Fong Family have also failed to prove that the defendants breached the terms of their retainer in relation to that loan.

**253**  I turn then to the security the Fong Family were to receive in exchange for giving discharges of the Family's two mortgages registered against the Thunderbird Property.

**254**  There is no doubt that, on the sale of the Thunderbird Property, extensions of the Fong Family's two mortgages were to have been registered on the Church Property. Mr. Fong testified that he understood the Fong Family extensions were intended to be registered in third position. In the result, the Fong Family mortgage securing the $200,000 loan was registered in third position. In effect, the Fong Family took priority for the $200,000 loan over itself.

**255**  There is also no doubt that the extensions were never registered against the Church Property. Neither Chuck Lew nor Russell Lew provided any satisfactory explanation of why this was not done. In my opinion, the conduct was careless. It seems improbable that, when Chuck Lew did his analysis of the titles to the Church Property and the House Property at the beginning of September 2009, in connection with the IMOR refinancing (and which I deal with in the next section), he would have forgotten all about the existence of the extension agreements, since they were under discussion with Mr. Kletas in mid-July. However, neither Chuck Lew nor Mr. Fong mentioned them, so it is possible neither of them placed much importance on them. The loans were, after all, still secured on the Seagate Properties.

**256**  However, did the defendants' carelessness in not registering the extension agreements cause any damage to the Fong Family? In my opinion, the answer must be no. The extension agreements were not going to be registered in any higher position than the Fong Family mortgage securing the $200,000 loan, which was in third position on the Church Property. When foreclosure proceedings were taken against Rossland and West One in 2010, the Fong Family did not recover anything as a result of having a mortgage in third position on the Church Property. The Fong Family would not have been in any better position if, instead of the mortgage securing the $200,000 loan in third position, it was an extension agreement. The circumstances here are distinguishable from those in ***Low v. Albas***, where the client's interests were prejudiced by the failure to register the new mortgage security.

**257**  I find, however, that the failure to register the extension agreements was a breach of the defendants' retainer.

**258**  It is well-established that a plaintiff who has failed to prove that he or she suffered any damages from a breach of contract will nevertheless be entitled to an award for nominal damages: see ***Newton***, at para. 847. The Fong Family, is, accordingly, entitled to an award of nominal damages resulting from the defendants' breach of contract. Given the nature of the breach, I consider that nominal damages in the sum of $1,000 are appropriate.

**259**  The other item of security that was mentioned in Mr. Kletas's April 24, 2009 letter (Ex. 47) was a general security agreement over a liquor licence owned by Rossland, subordinate to IMOR, who already had a general security agreement. In his evidence at trial, Mr. Fong was very focussed on this piece of security, perhaps even more than the extensions of the mortgages to the Church Property. He described this security as security on the licence for the beer and wine store that (he understood) was being moved from the Thunderbird Hotel to the Seagate Hotel. As I noted above, Mr. Fong testified that he would not have agreed to give discharges of the Fong Family mortgages registered against the Thunderbird Property if he had known he was not going to get security on the beer and wine store licence.

**260**  No general security agreement over a beer and wine store licence was ever prepared. The licence that Rossland held for the Thunderbird Hotel was cancelled on the sale of the Hotel. It was not something that could simply be moved to a new location (with a different owner). Despite thorough examination-in-chief and cross-examination of both Mr. Fong and Mr. Grewal, how and why the licenced ended up being cancelled remained unclear. The documentary evidence does not take me very far. Chuck Lew is of little help because he does not remember.

**261**  The proposition advanced by the Fong Family is that the defendants were negligent in delivering the mortgage discharges (allowing the sale of the Thunderbird Property to complete), without getting the replacement security -- in particular, the general security agreement over the liquor licence -- in exchange. The Fong Family says that, at the very least, as a result of Chuck Lew's failure to give the advice they were entitled to concerning the replacement security offered, they were deprived of the opportunity to negotiate for either cash or better replacement security before delivering discharges of their mortgages on the Thunderbird Property.

**262**  There are some problems with this proposition however. One is that Mr. Fong came to Chuck Lew after he made his arrangement with Mr. Grewal. Another is that there is no reliable evidence about what the alternative, hypothetical, negotiations might have looked like, or where they might have ended up.

**263**  The defendants offer a different view of the evidence (such as it is) and a different explanation of what probably happened.

**264**  The defendants say (and, in my opinion, the evidence supports) that, in matters relating to general security agreements and liquor licences, Chuck Lew would ask for Russell Lew's assistance, and, while Russell Lew does not have any memory of a discussion with Chuck Lew around this time about these issues, he understood that registering security over a liquor licence was not possible. The defendants say that, in any event, in 2009 Mr. Fong was aware of the discretion of the Liquor Control Board regarding licences and that there could be no guarantee that the liquor licence could be transferred successfully from the Thunderbird Hotel to the Seagate Hotel, regardless of any security. In my opinion, there is evidence to support these propositions as well. In addition, whatever value there might be in security over a liquor licence, the Fong Family was going to be behind IMOR.

**265**  In Mr. Dives's submission, based on the evidence, the most sensible answer to the question about what happened is that, rather than everyone (especially Chuck Lew) dropping the ball, everyone recognized that it was meaningless to offer a general security agreement over a liquor licence because, practically, it could not be given. A general security agreement from Rossland over its assets (other than land) could have been obtained, but, once the Thunderbird Hotel was sold, it would not have achieved what Mr. Fong said he was after. Moreover, if the liquor licence was moved to the Seagate Hotel from the Thunderbird Hotel, it would enhance the value of the Seagate, over which the Fong Family already had security. Thus, since it likely was recognized that the concept of a general security agreement over the liquor licence was meaningless, the reasonable inference to draw is that the idea was dropped. This leaves the extension of the mortgages to the Church Property as the real consideration for the discharges.

**266**  I have concluded that the defendants' explanation is the more probable: that those involved recognized it was meaningless to offer a general security agreement over a liquor licence and that, before the discharges were delivered, the idea of including a general security agreement as consideration for them was dropped.

**267**  I am not prepared to rely on either Mr. Fong's or Mr. Grewal's memory about these events. I do not accept Mr. Fong's assertion that Chuck Lew made a careless error in his e-mail Ex. 49, by not mentioning the general security agreement over the liquor licence, and that Mr. Kletas then took advantage of the error in subsequent dealings with Chuck Lew. Both Mr. Fong and Mr. Grewal (who is still a judgment debtor of the Fong Family) have a strong motive to blame Chuck Lew.

**268**  I turn then to the documentary evidence. The last time the general security agreement over the liquor licence is mentioned is in Mr. Kletas's April 24, 2009 letter, Ex. 47. Chuck Lew responded later that day by e-mail (Ex. 49) and mentioned only the third mortgage over the Church Property. I infer the reason is, not that Chuck Lew was careless and forgetful, but that the idea of the general security agreement over the liquor licence had been discussed with Mr. Fong and dropped. Although I do not place a great deal of weight on this, the general security agreement is not mentioned in Mr. Fong's April 24 note to Chuck Lew (Ex. 48) either. There is no question that Chuck Lew's letter Ex. 52, delivering the discharges and referring back to Ex. 47, could have been clearer. However, I find that its contents are not inconsistent with the inference that, on April 24, 2009, the idea of the Fong Family taking security over a Rossland liquor licence was dropped as meaningless.

**269**  In response to the Fong Family's argument based on a loss of opportunity to negotiate better terms in exchange for the mortgage discharges on the Thunderbird Property, Mr. Dives argues that Mr. Fong's evidence should not be believed, and, further, there is no evidence about what the Fong Family would have done instead. I agree. In my opinion, the hypothetical scenario posited by Mr. Henshall in his closing submissions is not supported by the evidence.

**270**  Accordingly, I find that, in relation to the sale of the Thunderbird Property, the Fong Family has failed to prove a claim in ***negligence*** against the defendants. However, I find that the defendants breached their retainer agreement with the Fong Family by failing to register the mortgage extensions against the Church Property. The Fong Family is entitled to nominal damages of $1,000 for breach of contract.

**The IMOR Refinancing**

1. **Background**

**271**  After the $200,000 loan was advanced, Mr. Grewal concluded that he needed more money to fund renovations at the Seagate Hotel. Part of his plan was to borrow from IMOR, but IMOR was going to require priority (for the new loan of $260,000) over existing chargeholders on the Church Property and the House Property. As far as Mr. Grewal was concerned, the new IMOR loan was to be a short-term loan. According to Mr. Grewal, he also planned to sell the Church Property to generate additional funds. Once the renovations at the Seagate Hotel were done, he thought he could then refinance and pay off everyone (including the Fong Family).

**272**  On August 21, 2009, Mr. Kletas sent a letter to Chuck Lew (Ex. 165) in which Mr. Kletas advised that Rossland had arranged for new financing secured by the Church Property and the House Property, and that, as part of the conditions of financing, IMOR required Mr. Fong and Cindy Fong to grant priority to IMOR over their mortgage CA1184716 (and the assignment of rents).

**273**  During cross-examination, Mr. Fong was quite insistent that he did not receive a copy of Mr. Kletas's August 21 letter until August 31, 2009, although he testified at trial that on August 21, Chuck Lew telephoned him about signing a priority agreement. This was inconsistent with discovery evidence put to him during cross-examination. On discovery, Mr. Fong had testified that he got a fax from Chuck Lew on August 21 and immediately telephoned Mr. Lew. In any event, at trial, Mr. Fong insisted that he and Mr. Grewal had not had any discussions about Mr. Grewal's plans and had not come to any agreement. I think it unlikely that Mr. Fong and Mr. Grewal had not had any discussions, although they may not have reached an agreement.

**274**  On August 31, 2009, Mr. Kletas again wrote to Chuck Lew (Ex. 166) about the Church Property and the House Property, further to his August 21 letter. He said that he had been advised by his client that its Winnipeg solicitors were preparing documentation to extend Mr. Fong's and Cindy Fong's mortgage over the Church Property and the House Property to property (a Howard Johnson Hotel) in Winnipeg. In his examination-in-chief, Mr. Fong denied receiving a copy of Mr. Kletas's letter, and he continued to deny having any discussions with Mr. Grewal. However, during cross-examination, Mr. Fong admitted that he had in fact received a copy of Mr. Kletas's letter.

**275**  Despite Mr. Fong's assertion that he and Mr. Grewal were not talking to one another, from the documentary record it appears that Mr. Grewal had in fact offered Mr. Fong some substitute security -- over the Howard Johnson Hotel property in Winnipeg -- if Mr. Fong would agree to give priority to IMOR on the Church Property and the House Property. Indeed, Mr. Fong confirmed during his examination-in-chief that he and Mr. Grewal had had such discussions. However, according to Mr. Fong, as of August 31, 2009, he was still considering whether he wanted to agree to what he was being asked to do.

**276**  On September 1, 2009, Mr. Fong faxed a handwritten note to Russell Lew, asking him to "check the existing mortgages" on the Seagate Properties, the Church Property and the House Property. He asked Russell Lew to fax him the information. Mr. Fong explained that he sent the fax to Russell Lew because Chuck Lew was not available, and making a decision about whether to give priority to IMOR was becoming more urgent. I conclude from this that Mr. Fong was being pressed by Mr. Grewal to have the priority agreement signed and delivered to IMOR.

**277**  Chuck Lew did the analysis of the mortgages on the various properties, and prepared a detailed spreadsheet (Ex. 156). On September 2, 2009, Chuck Lew sent an e-mail message to Mr. Kletas (part of Ex. 58) which said:

In order for our client to make an informed decision, please advise the approximate amounts owing on all mortgages in priority to our clients' mortgage(s).

**278**  However, in response (Ex. 59), Mr. Kletas resisted this request and said:

This will take some time to do.

I believe your clients already were provided this information when they initially funded their various loans, and may result in a delay in our client's funding.

We confirm that the priority agreements relate to the church and house on Rupert Street and do not affect the other loans that your clients have.

Please let me know when we may expect the priority agreements.

**279**  Mr. Fong then went directly to Mr. Grewal, who provided some information about the amounts owing on the charges registered on the Seagate Properties.

**280**  Later on September 2, 2009, Mr. Fong sent a fax note to Ms. Tong (Ex. 61). He wanted her to ask Chuck Lew to

talk to Mr. Kletas Re the new mortgage that the First $30,000 paid off the existing 2nd mortgage #CA1108413 with Kim Evan Nelson and the mortgages [sic] of Sandilands Law Corp is postponed.

In addition, he writes "\*Also some legal doucement [sic] from Winnipeg."

**281**  I conclude from the fact that Mr. Fong identified a specific charge by number in his fax to Ms. Tong that he had probably received a copy of Chuck Lew's spreadsheet, which included that information. (This particular charge is an extension of the Nelsons' mortgage originally registered under no. EW79195, and was registered on the Church Property on May 11, 2009.)

**282**  However, as of September 2, 2009, Mr. Fong was also continuing to negotiate with Mr. Grewal concerning additional security, now for the $235,000 loan. On September 2, 2009, he sent a fax note (Ex. 158) to Mr. Grewal, asking Mr. Grewal to ask his lawyer to prepare collateral security for the $235,000 loan "because this is collateral security on Beer & Wine Store and pub of Rossland Recreation Holding." Mr. Fong wanted this extended to the Winnipeg property as well, and, according to Mr. Fong, Mr. Grewal said "no problem." Mr. Fong's fax note is on a page from a mortgage extension, apparently registered in Manitoba, representing collateral security for the $200,000 loan to Rossland and Mr. Grewal. The page is signed by Mr. Grewal on behalf of "Airliner Motor Hotel (1972) Ltd." and dated August 31, 2009. I conclude that Mr. Grewal had in fact arranged for an extension of the Fong Family mortgage securing the $200,000 loan to be registered against the Winnipeg property, as he and Mr. Fong had been discussing. This extension was the original consideration Mr. Grewal had offered in exchange for Mr. Fong agreeing to give IMOR priority over the Fong Family mortgage registered against the Church Property and the House Property. Mr. Fong confirmed during his evidence-in-chief that, by September 2, 2009, he knew the mortgage extension had been registered in Winnipeg. In those circumstances, it is not surprising that Mr. Grewal was becoming impatient about the priority agreement (which would give IMOR priority for its new loan over the mortgages on the Church Property and House Property), and communicating this to Chuck Lew through Mr. Kletas.

**283**  On September 3, 2009, Mr. Kletas sent another letter to Chuck Lew (Ex. 63). The letter begins:

It is our understanding that our clients have been in communication with respect to the priority agreements.

**284**  This statement was true. Mr. Fong and Mr. Grewal had indeed been in communication. Mr. Fong had been successful in securing Mr. Grewal's agreement to give security over the Winnipeg property for the $200,000 loan in exchange for giving IMOR priority over the Fongs' mortgage on the Church and House Properties. A mortgage had been registered in Manitoba to that effect. In addition, they were discussing Mr. Fong's wish to have security for the $235,000 loan extended to the Winnipeg property.

**285**  Mr. Kletas's letter continues:

We confirm that our client has agreed to provide your clients with an extension of their mortgage that was registered against the Seagate Hotel in the amount of $235,000 on February 9, 2009 (Registration Nos. FB246473 and FB246474) over a hotel property located at 1740 Ellice Avenue, Winnipeg, Manitoba.

Our client is currently in Winnipeg and will be instructing his counsel to prepare the necessary documentation to extend the above-referenced mortgage.

We understand that your clients will be attending your offices to sign the priority agreements and associated documents that we had forwarded to you. . . .

**286**  Mr. Fong testified that he made his decision to grant priority to IMOR on September 3, 2009. On September 3, Chuck Lew sent a fax message to Mr. Kletas (Ex. 64), which said:

Michael and Cindy have signed the priority agreement.

Would you confirm the status after the IMOR mortgage is filed will be:

On Lot A [the Church Property] -- IMOR, First mortgage, Michael and Cindy, Second and Sandilands, third. The Nelson mortgage is discharged.

On Lot 14 [the House Property] IMOR First mortgage, Michael and Cindy, Second and Sandilands third.

If you can confirm the above, you can pick the documents up.

The priorities set out in Chuck Lew's message were based on the instructions he had received from Mr. Fong.

**287**  Mr. Kletas wrote back on September 4, 2009 (Ex. 66). He confirmed that the priorities listed for the House Property were correct. However, the priorities listed for the Church Property were not correct. He advised that, after registration of the IMOR mortgage, the priorities of charges on the Church Property would be: IMOR (first position); Sandiland (second position); and Michael and Cindy Fong (third position). Mr. Kletas also advised that the Nelsons' mortgage would be discharged on the registration of the IMOR mortgage. Mr. Kletas said that if Chuck Lew's clients were in agreement with the priorities in his letter, Mr. Kletas would arrange to pick up the executed priority agreements.

**288**  However, Mr. Fong was not satisfied with the priorities on the Church Property. On September 8, 2009, he sent a fax note to Chuck Lew (Ex. 161), asking him to check with Mr. Kletas about the balance outstanding on the mortgage to Sandiland, which Mr. Fong understood was $20,000. According to Chuck Lew's notes, he was informed by Mr. Kletas that the balance owing to Sandiland was $70,000 and that Sandiland would not postpone. Chuck Lew relayed this information to Mr. Fong. However, Mr. Fong told Mr. Lew to go ahead and release the documents because he had been told by Mr. Grewal that he would pay down the amount owing to Sandilands to $20,000. Mr. Lew asked Mr. Fong to fax him confirmation of his instructions, which Mr. Fong did on September 8, 2009 (Ex. 159). Mr. Lew then released the documents to Mr. Kletas.

**289**  In November 2009, Mr. Grewal had secured refinancing from IMOR and another lender for the Winnipeg property. The refinancing required existing chargeholders, including Mr. Fong and Cindy Fong, to grant priority to IMOR and the other lender. On November 10, 2009, Chuck Lew received a fax (Ex. 70) from Mr. Grewal with a document titled "Postponement of Registration -- the Real Property Act" attached. He had not received any instructions from Mr. Fong and did not know why Mr. Grewal was sending him the document. Chuck Lew and Russell Lew signed as witnesses for the signatures of Mr. Fong and Cindy Fong on "Postponement of Registration" documents, dated November 12, 2009 and November 13, 2009. Chuck Lew's memory of events around this time was recorded in a written communication (Ex. 167, p. 2) that he prepared in March 2010, to respond to an inquiry from Mr. Fong's Winnipeg lawyer (Mr. Soronow). Mr. Lew's communication said in relevant part:

With respect to the Postponement of the Imor Capital Mortgage, our office's only involvement was in witnessing both Michael's and Cindy's signature to the postponement. They both attended our offices on the 12th day of November 2009 in quite a haste. I duly witnessed their signatures and Michael took the postponement with him. We did not have any instructions to ensure any priorities. In fact, I remarked to Michael that his security was little or thin.

The same is true of the postponement of November 13 in favour of Bankers Mortgage which was witnessed by Russell Lew of this office.

**290**  At trial, during his examination by Mr. Dives, Chuck Lew testified that he was doing his best to make sure that what he was saying to Mr. Soronow was accurate at the time he was saying it. Plaintiffs' counsel did not cross-examine Mr. Lew on the document or what it describes. Russell Lew was not cross-examined about the events on November 13, 2009.

**291**  On the other hand, Mr. Fong testified that he had a telephone discussion with Chuck Lew on November 12, 2009. First he had spoken to Mr. Grewal, who explained to him what was going on, and, according to Mr. Fong, he told Mr. Grewal he would have to check with his lawyer whether it was okay to sign the document. According to Mr. Fong, when he spoke to Chuck Lew, he asked Mr. Lew whether he had received the postponement document, and Mr. Lew said he had. According to Mr. Fong, he asked Mr. Lew whether it was okay to sign the document and Mr. Lew told him it was. Mr. Fong said he then arranged an appointment to meet with Mr. Lew to sign. According to Mr. Fong, Chuck Lew did not give any explanation about what the document related to. Mr. Fong said further that he got a phone call from Mr. Grewal, and was told that the documents signed on November 12, 2009 were unacceptable. According to Mr. Fong, he and Cindy Fong then signed new copies on November 13, 2009, in front of Russell Lew. He said that Russell Lew did not say anything to them, and just took their signatures.

**292**  I do not believe Mr. Fong's evidence to the effect that he received advice from Chuck Lew about the postponement documents. Rather, I conclude that Chuck Lew's version of events, as recorded in his note for Mr. Soronow, is the more likely.

1. **Discussion and analysis**

**293**  I will deal first with events in August and September 2009.

**294**  The Fong Family alleges that it agreed to execute a priority agreement in favour of IMOR in return for Mr. Grewal's agreement to provide mortgage extensions by way of security over the Winnipeg property for both the $200,000 loan and the $235,000 loan. The Fong Family alleges that the mortgage in respect of the $200,000 loan was to be in third position on the Winnipeg property, and the mortgage in respect of the $235,000 loan was to be in fourth position. The Fong Family alleges further that Chuck Lew and Russell Lew reviewed all the documents relating to the mortgages over the Winnipeg property, gave legal advice and "notarized their signatures" on those documents.

**295**  However, I find that the consideration for the priority agreement, giving IMOR priority over the Fong Family's $200,000 mortgage secured against the Church Property and the House Property, was an extension (by way of a mortgage on the Winnipeg property) of the $200,000 mortgage only. The extension of the $235,000 mortgage to the Winnipeg property was something that occurred to Mr. Fong later, after he and Mr. Grewal had made their agreement concerning the priority for the IMOR refinancing. Mr. Fong's handwritten instructions to Lewco (Ex. 60 and Ex. 61) say nothing about an extension of the $235,000 mortgage to the Winnipeg property. In the communications prior to the release of the signed postponement agreement, Mr. Fong is focussed on the priorities of charges on the Church Property and the House Property. There is no mention of an extension of the $235,000 mortgage to the Winnipeg property.

**296**  In closing submissions, Mr. Henshall argued that, in connection with the grant of priority to IMOR in September 2009, a reasonably prudent solicitor would have reviewed and advised Mr. Fong and Cindy Fong of the unfavourable terms of the new IMOR mortgage (e.g., that the term was only six months at an interest rate of 15%, increasing to 30% at the end of the term). He argued that, if the Fong Family (Mr. Fong in particular) had been properly advised by Chuck Lew, they would not have agreed to give priority to IMOR. However, Mr. Fong was never asked about this. The argument assumes a hypothetical which, in my opinion, is not supported in the evidence.

**297**  In my opinion, there is no credible or reliable evidence that either Chuck Lew or Russell Lew were ever retained to deal with or give advice concerning priorities of charges on the Winnipeg property, or ever retained to give legal advice about matters relating to Manitoba law. I find that in fact they were not so retained.

**298**  As he had done in the past, Mr. Fong negotiated the arrangements directly with Mr. Grewal. As is apparent from the documentary record, Mr. Fong was concerned about the charges registered against the Church Property and the House Property, and the priority of those charges in relation to the Fong Family's $200,000 mortgage. I find that he probably had the benefit of the spreadsheet analysis done by Chuck Lew (Ex. 156), which clearly showed the charges registered (as of September 1, 2009) against the Seagate Properties, the Church Property and the House Property. Prior to Chuck Lew's release of the signed postponement agreement on September 8, 2009, Mr. Fong had been duly informed about the priorities of the charges on the Church Property and the House Property, once IMOR's new mortgage was registered, and had discussed the information with Chuck Lew. He was concerned about the Sandiland mortgage registered against the Church Property, however, he accepted Mr. Grewal's advice that Mr. Grewal was going to make arrangements to pay down what was owing to Sandilands to $20,000. Mr. Fong then (at Chuck Lew's request) confirmed his instructions in writing, to release the signed priority agreement.

**299**  I find that, in relation to the IMOR refinancing in September 2009, Chuck Lew was retained to advise Mr. Fong about the state of the title of the Church Property and the House Property, and not to release the signed postponement agreement, giving IMOR priority over the $200,000 mortgage, until Mr. Fong was satisfied with the priority of the charges and gave him instructions to release the document. I find that Chuck Lew acted in accordance with his instructions and his retainer.

**300**  With respect to events in November 2009, I do not consider Mr. Fong's evidence to be reliable. I very much doubt that, in 2013 and 2014, he had any real recollection of what had taken place in November 2009, and, at best, was speculating and reconstructing based on what he could see in documents, and drawing conclusions based on his generally bad opinion about the legal work done by Chuck Lew and (to a lesser extent) Russell Lew. For the reasons I have explained above, I give Cindy Fong's evidence little weight. I find that what Chuck Lew wrote in March 2010 is probably an accurate account of what took place when Mr. Fong and Cindy Fong attended at Lewco to sign documents on November 12 and 13, 2009. I find that neither Chuck Lew nor Russell Lew were retained to give any legal advice. Rather, they were asked only to witness signatures on the documents, and their role was limited to doing so. While it would have been prudent for Chuck Lew and Russell Lew to note on the documents that they were witnessing signatures only, and not giving any advice, a failure to do this is not evidence of ***negligence***. Based on Chuck Lew's evidence, he in fact observed to Mr. Fong that his security on the Winnipeg property was "little or thin."

**301**  The Winnipeg property was sold in foreclosure proceedings, although the evidence and details about what exactly happened are sparse. In any event, based on the evidence (such as it is), there was not enough realized to pay out the first mortgage, and the subsequent chargeholders (including the Fong Family) recovered nothing. However, even if the defendants' conduct in relation to the IMOR refinancing could be criticized, I find that the Fong Family have failed to show that any failure on the part of the defendants in relation to the IMOR refinancing caused them any loss.

**302**  Accordingly, I find that, in relation to the IMOR refinancing, the Fong Family has failed to prove a claim in ***negligence*** and has failed to prove that the defendants breached their retainer.

**Summary and Disposition**

**303**  In summary:

1. the 672 Action is dismissed;
2. in the Fong Family Action, the Fong Family are entitled to recover $1,000 in damages for the defendants' breach of their retainer in relation to the registration against the Church Property of the extensions of Fong Family mortgages FB176838 and FB246473. Otherwise, the claims are dismissed.

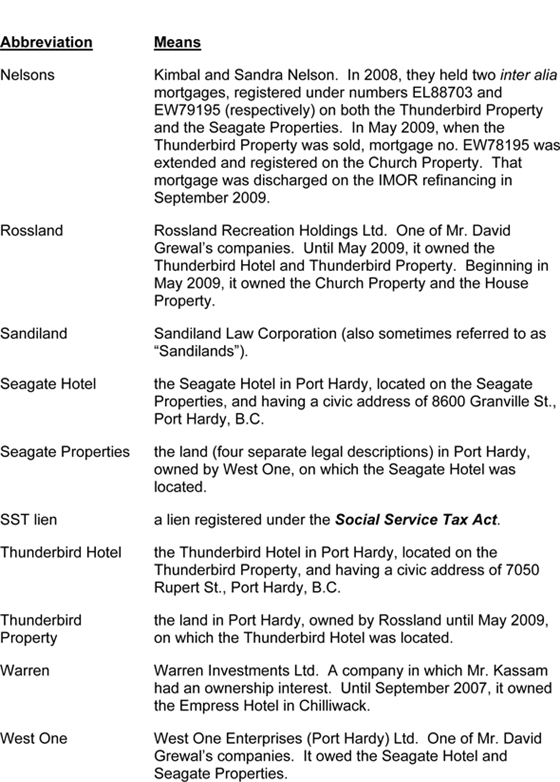
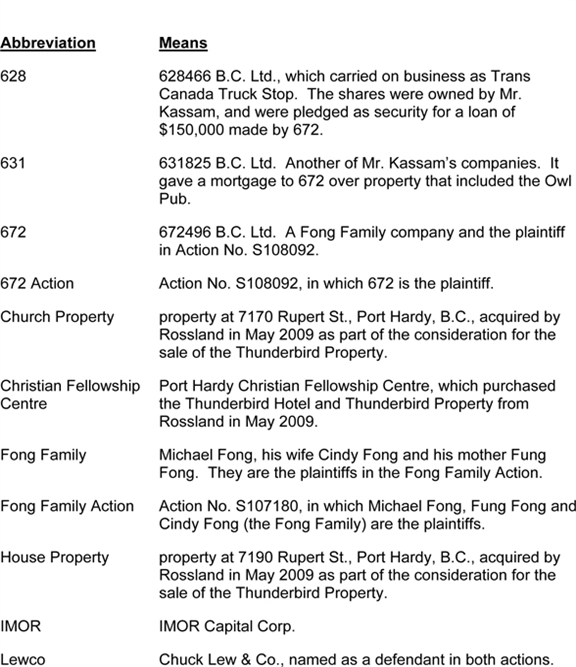
**304**  If the parties are unable to agree on costs and wish to make submissions concerning them, they may do so by taking steps, within 30 days of this judgment, to arrange a hearing date convenient to counsel and the court.

E.J. ADAIR J

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**Appendix "A" -- Glossary**

The first use of a term that appears in the glossary will be in italics and underlined (for example *Fong Family*, in para. 1).



**End of Document**

[***Globalnet Management Solutions Inc. v. Aviva Insurance Co. of Canada, [2017] B.C.J. No. 1763***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PG6-3J91-DXPM-S4R6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.B. Blok J.

Heard: June 29-30, July 2-3, September

2-30, October 1-2, 2015; January 5-6,

2016.

Judgment: September 6, 2017.

Docket: S097300

Registry: Vancouver

**[2017] B.C.J. No. 1763** | 2017 BCSC 1580 | 283 A.C.W.S. (3d) 89 | 77 C.L.R. (4th) 173 | 2017 CarswellBC 2438

Between Globalnet Management Solutions Inc., Shirley Newman and Betty Dahl, in their capacities as Trustees of the Pleasantville Trust and Ross Brennan and Leona Brennan, in their capacities as trustees of the Pacific Blue Global Trust, Plaintiffs, and Aviva Insurance Company of Canada, Cornerstone CBS Building Solutions Ltd., Linwood Homes Ltd. and National Home Warranty Group Inc., Defendants, and Keith Ohlhauser, Bayview Engineering Ltd. and Robin Chapman, Third Parties

(338 paras.)

**Case Summary**

**Contracts — Breach of contract — Action by property owners for damages for breach of contract and *negligence* dismissed — Globalnet contracted with defendant builders for construction of recreational home, and transferred completed home to trusts — Plaintiffs noted signs of water ingress and damage, damage to retaining walls and discovered retaining walls encroached on neighbouring property — Design of house was deficient and house designer, builder's parent company, failed to meet standard of care — Design of retaining walls was substandard — Liability for encroachment not established — Globalnet was not obligated to pay for repairs and it suffered no loss.**

**Contracts — Remedies — Damages — Action by property owners for damages for breach of contract and *negligence* dismissed — Globalnet contracted with defendant builders for construction of recreational home, and transferred completed home to trusts — Plaintiffs noted signs of water ingress and damage, damage to retaining walls and discovered retaining walls encroached on neighbouring property — Design of house was deficient and house designer, builder's parent company, failed to meet standard of care — Design of retaining walls was substandard — Liability for encroachment not established — Globalnet not obligated to pay for repairs and it suffered no loss.**

**Construction law — Contracts — Breach — By contractor — Remedies — Action by property owners for damages for breach of contract and *negligence* dismissed — Globalnet contracted with defendant builders for construction of recreational home, and transferred completed home to trusts — Plaintiffs noted signs of water ingress and damage, damage to retaining walls and discovered retaining walls encroached on neighbouring property — Design of house was deficient and house designer, builder's parent company, failed to meet standard of care — Design of retaining walls was substandard — Liability for encroachment not established — Globalnet not obligated to pay for repairs and it suffered no loss.**

**Construction law — Liability — Of contractors and subcontractors — Duty to owner — Claim — Concurrent liability in contract and tort — Grounds — Breach of contract — *Negligence* — Damages — Action by property owners for damages for breach of contract and *negligence* dismissed — Globalnet contracted with defendant builders for construction of recreational home, and transferred completed home to trusts — Plaintiffs noted signs of water ingress and damage, damage to retaining walls and discovered retaining walls encroached on neighbouring property — Design of house was deficient and house designer, builder's parent company, failed to meet standard of care — Design of retaining walls was substandard — Liability for encroachment not established — Globalnet not obligated to pay for repairs and it suffered no loss.**

**Tort law — *Negligence* -- duty and standard of care — Action by property owners for damages for breach of contract and *negligence* dismissed — Globalnet contracted with defendant builders for construction of recreational home, and transferred completed home to trusts — Plaintiffs noted signs of water ingress and damage, damage to retaining walls and discovered retaining walls encroached on neighbouring property — Design of house was deficient and house designer, builder's parent company, failed to meet standard of care — Design of retaining walls was substandard — Liability for encroachment not established — Globalnet not obligated to pay for repairs and it suffered no loss.**

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| --- |
| Action by the property owner, Globalnet Management Solutions for ***negligence*** and breach of contract. In April 2005, Globalnet contracted with Cornerstone CBS Building Solutions for the construction of a recreational home at a cost of $614,727. Changes were made to the scope of work, which included the construction of a second kitchen, retaining walls and a basement for $96,000. The design of the home was provided by Linwood, the parent company of Cornerstone. Starting in December 2007, one of the home owners noticed water ingress and damage to the home. Repairs were made at a cost of $87,000. Less than a year later, signs of damage were also observed on the retaining walls that formed the sides of the driveway leading to the basement garage. The retaining walls were replaced with walls of a different design at a cost of $520,000. During the replacement of the retaining walls, it was discovered that they encroached substantially on a neighbouring property. They obtained an easement over the property at a cost of $36,000. The plaintiffs claimed that the roof was not suitable for the location due to the amount of snowfall. They also claimed that the design of the retaining walls was substandard, which led to their failure, and that they were not constructed with the required setback resulting in them encroaching on the neighbours' property. The defendants argued that the home was not specifically designed for the plaintiffs and they made no representations about the suitability of the design for the area, the engineer who designed the retaining walls was not an employee of Cornerstone and that they were not under any obligation to perform surveys or otherwise ensure that the structures were properly situated. The defendants also argued that the property was transferred to trusts in 2008 and Globalnet, which paid for the repairs, did so as a volunteer and could not recover and that the trusts suffered no loss.  HELD: Action dismissed.  While the plaintiff was told that the design to be used was a site-specific design that would take into account issues and conditions specific to the location where the house was to be built, the entire agreement clause in the contract meant that this representation could not be used as a basis for the breach of contract claim. The engineer who designed the retaining walls did so as an employee. The leaks were caused by ice dams from melting snow which accumulated between the dormer roofs which were placed too closely together. As a result, the design was deficient. There was a relationship of proximity between Linwood and Globalnet such that Linwood owed Globalnet a duty of care. In designing the house, Linwood failed to meet the required standard of care. The repair work carried out on the roof was not excessive. However, there was a betterment due to the installation of whirlybird vents, rain gutters and downspouts. As a result, the actual cost of repair was $84,287. The retaining walls failed because the footings were improperly designed, the backfill used behind the retaining walls was not suitable and neither the engineer nor the contractor questioned the suitability of the backfill, the contractor did not question the design of the retaining walls and various other factors. Linwood, as the employer of the engineer who designed the retaining walls, was liable for ***negligence*** for the substandard design of the retaining walls. The cost of repairing the retaining walls was reasonable, but included unrelated items which should be deducted. As a result, the cost of repairing the retaining walls was $435,887. The plaintiffs had not established that either Cornerstone or Linwood were under an obligation to survey the property. Accordingly, the plaintiffs had not established liability for the encroachment. The retaining walls posed a substantial danger to the health and safety of the occupants of the house. However, since Globalnet paid all of the repair and related expenses, the trustees had suffered no loss. Globalnet was under no obligation to pay those expenses as it no longer owned the property and there was no other obligation on it to do so. Globalnet itself suffered no loss because it was paid market value on the sale of the property. Consequently, the monies expended by Globalnet were not recoverable. |

**Counsel**

Counsel for the Plaintiffs: M. Morgan, L. Bevan.

Counsel for the Defendants Cornerstone and Linwood: S. Lesiuk, R. Moore.

**Reasons for Judgment**

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| **M.B. BLOK J.** |

**I. Introduction**

**1**  In April 2005 Globalnet Management Solutions Inc. ("Globalnet") contracted with Cornerstone CBS Building Solutions Ltd. ("Cornerstone") for the construction of a recreational home on a property located at East Barriere Lake. The home was a Linwood home, that is to say, a home design created by Linwood Homes Ltd. ("Linwood"). Linwood is the parent company of Cornerstone.

**2**  The home was intended as a recreational home to be shared by the principals of Globalnet, Glenn Kirkpatrick and Shawn Dahl, and their families.

**3**  Starting in December 2007, Mr. Kirkpatrick noticed water ingress and damage in the home. An architect was retained to investigate the cause and to provide recommendations for repairs. Repairs were subsequently carried out at a cost of about $87,000.

**4**  Starting around the fall of 2008 signs of damage were observed in two large retaining walls that form the sides of a driveway leading to the basement garage of the home. These walls, which were about 100 feet long, ten inches thick and nine feet high at maximum, were cracking and deflecting inward. Engineers were retained. Ultimately, the decision was made to replace those retaining walls with walls of a different design. The plaintiffs claim sums totalling about $520,000 for that work.

**5**  During the time the retaining walls were being replaced the plaintiffs discovered that the footings of one of the retaining walls encroached substantially on a neighbouring property. They subsequently obtained the agreement of the neighbouring owner to grant an easement in the plaintiffs' favour. The easement and related expenses cost approximately $36,000.

**6**  The plaintiffs say Cornerstone and Linwood agreed to provide, and Linwood did provide, a site-specific design for the home. In the case of the roof, the design was to be suitable for the area including, the plaintiffs say, for the amount of snowfall typical for the area.

**7**  The retaining walls were designed by an engineer, Keith Ohlhauser. The plaintiffs say Mr. Ohlhauser was an employee of Linwood. The defendants say he was not an employee of Linwood but was an independent consultant.

**8**  The plaintiffs also allege that: (1) Cornerstone and Linwood were responsible for obtaining all necessary surveys and permits in order to carry out the work on the property, and (2) Cornerstone did in fact retain a surveyor to prepare a survey of the property prior to construction. On this basis the plaintiffs submit that Cornerstone and Linwood were responsible for surveying the property to ensure that proper setbacks were in place and there were no encroachments on neighbouring property.

**9**  The plaintiffs say that the roof design was unsuitable for the subject location because the configuration of the dormers allowed for undue accumulations of snow, leading to a phenomenon known as "ice damming". They also say that the design of the retaining walls was substandard and led to their failure. Finally, they say that Cornerstone and/or Linwood failed to design and construct one of the retaining walls (and its footings) with the required setback, which resulted in the structure not only failing to have the correct setback but in fact situating a substantial portion of it on the neighbouring property.

**10**  The plaintiffs bring their claim against Cornerstone in both contract and ***negligence***, and against Linwood in ***negligence***.

**11**  In brief, the defendants say: (1) the home design was an "off the shelf" design and they made no representations about the suitability of that design for the East Barriere Lake area; (2) Mr. Ohlhauser was not an employee of theirs and instead he provided his services as an independent contractor; and (3) the defendants were not under any obligation to perform any surveys or otherwise ensure that the structures constructed were properly situated.

**12**  The defendants have various other objections to the plaintiffs' claims. They note that in late 2008 Globalnet conveyed title to the property to the trustees named in the style of cause (hereafter, the "Trustees" and the "Trusts"). These are family trusts associated with the two principals of Globalnet. Globalnet paid for the subsequent repairs but, the defendants say, did so as a volunteer, and so cannot recover these amounts. Similarly, since these expenses have been paid for by Globalnet as a volunteer, the Trustees and the Trusts have suffered no loss.

**13**  The plaintiffs respond to that argument by asserting that Globalnet and the Trusts are part of a "single economic unit" and for that reason they may still recover the repair expenses incurred despite the transfer of title.

**II. Procedural History**

**14**  This matter has had a busy and difficult procedural history.

**15**  This action was commenced in October 2009. In July 2010 the defendants brought third party proceedings against those parties that are still named in the style of cause. Those proceedings, I was told, were settled. In 2011 the plaintiffs settled their claims against the home warranty defendants (Aviva Insurance and National Home Warranty Group Inc.) for $200,000. The action against those defendants was discontinued on September 12, 2011.

**16**  After that settlement the plaintiffs amended their pleadings to incorporate the fact of settlement and to confirm that they waive their claim against Cornerstone and Linwood to the extent of the settlement amount.

**17**  Accordingly, despite the various parties still named in the style of cause, the only parties that remain in the action are Globalnet and the Trustees, as plaintiffs, and Cornerstone and Linwood, as defendants.

**18**  A ten-day trial was scheduled for March 2011 but it was adjourned by order dated February 21, 2011.

**19**  In January 2012 the plaintiffs applied for judgment by way of summary trial. In reasons indexed as [*2012 BCSC 488*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62HX-00000-00&context=), Willcock J. (as he then was) dismissed the application with leave granted to the plaintiffs to re-apply following examinations for discovery. He noted certain deficiencies in the plaintiffs' evidence but said these might be remedied through examinations for discovery and other evidence, including expert evidence.

**20**  In January 2013 the parties scheduled a 15-day trial that was set to commence on January 12, 2015. In November 2013 the case was assigned to Saunders J. for judicial management. In October 2014 the case was re-assigned to me for judicial management. A number of judicial management conferences (JMCs) ensued.

**21**  At a judicial management conference on November 26, 2014 the defendants questioned whether the upcoming January 2015 trial could proceed given that there were certain matters then outstanding, and in particular, documents in the possession of Dave Ewert, the contractor who both built the house and carried out the repairs. Mr. Ewert subsequently produced three boxes of documents.

**22**  At a further JMC on December 10, 2014 counsel agreed that the matter could be resolved by way of summary trial. Counsel were directed to agree on dates for the summary trial, the cross-examination of experts and the exchange of summary trial materials. Counsel subsequently agreed on dates and the January 2015 trial was adjourned.

**23**  Unfortunately, the parties vastly underestimated the time needed to complete the summary trial. The result of that inaccurate estimate was the hearing of this matter in four sessions totalling 10 days over a six-month period.

**III. Evidentiary Objections**

**24**  The first days of the summary trial were taken up by objections to various reports and affidavits. On the first day of the hearing I ruled that two late-delivered affidavits proffered by the defendants would be admitted because the plaintiffs had been able to garner a responding affidavit (the affidavit of Keith Ohlhauser) and so they had not been prejudiced. On second day of the hearing I ruled that several other late-delivered affidavits of the defendants would not be admitted.

**25**  The defendants later renewed their argument that Mr. Ohlhauser's affidavit ought not to be admitted. My note is that I deferred a ruling on admissibility of that affidavit at that time and so I deal with this later in these reasons.

**26**  The defendants also objected to the admissibility of various paragraphs (36 in total) in the affidavits of Glenn Kirkpatrick and Dave Ewert on the basis that the assertions were either hearsay or opinion evidence. Again, I deferred my ruling on these objections. Having now looked at these in some detail, I conclude that most of the objections are without merit. Some statements are based on information received from others but are nonetheless important to the chronology or to explain how or why events evolved, and so to that extent are not being used for a hearsay purpose. Some are discussions with the defendants' representatives and so are important and relevant for various reasons, including contractual context, admissions arguably made and representations generally. Some are hearsay as presented but are verified or addressed elsewhere by the first-hand evidence of other witnesses, experts in particular. Some are objections on matters of insignificance or objections on matters not in issue between the parties.

**27**  There are, however, two objections of substance. These concern the following:

1. the assessments by National Home Warranty of May 6, 2008 and November 10, 2008 (Kirkpatrick affidavit #1, paras. 15 and 19); and
2. the Ohlhauser report of October 14, 2009 (Kirkpatrick affidavit #1, para. 28).

**28**  As to those matters just listed, the documents in question are not admissible for the truth of their contents, though they are admissible insofar as they provide or explain the chronology of events.

**IV. Evidence**

**29**  The evidence in this matter was led through affidavits, although there was some *viva voce* evidence. The experts were cross-examined by deposition.

**A. Glenn Kirkpatrick**

**30**  Mr. Kirkpatrick is a principal of the corporate plaintiff, which was formerly known as Globalnet Management Solutions Ltd. but is now called Waterfront Innovations Inc. I will continue to refer to it as Globalnet in these reasons.

**31**  Mr. Kirkpatrick deposed that the East Barriere Lake property was purchased by Globalnet in January 2005 for the purpose of constructing a home on the property. In March 2005 Globalnet entered into a contract with Cornerstone for the construction of a 3,500 square foot two-storey home for the sum of $614,727. A "scope of work" document formed part of that contract. The contract provided for the construction in accordance with the floor plan and general specifications "similar to" a "Westminster" model of home.

**32**  I pause momentarily in my outline of Mr. Kirkpatrick's evidence to discuss the contract. The construction contract between Globalnet and Cornerstone shows a date of March 30, 2005, though the signatures are dated April 23, 2005. There is an attached document entitled "Scope of Work" which references a number of specific aspects of work and arrives at the figure of $614,727.

**33**  The "Scope of Work" document also includes a list of "items not included in the scope of work". The items listed include "driveway and retaining walls for the garage", "structural engineering" and "surveyors".

**34**  There were later modifications to the scope of work which were documented by way of change orders. These changes included the construction of a second kitchen and the construction of retaining walls (including engineering) and a ten-foot basement. The price reflected in the latter change order was about $96,000.

**35**  Mr. Kirkpatrick deposed that he was at all times aware that Cornerstone was going to subcontract the design of the home to its parent company, Linwood. He came to this understanding through discussion with Gary Schofield of Cornerstone. Mr. Kirkpatrick said:

One of the home designs offered to me by Linwood for the Property was the "Modified New [sic] Westminster" home design. Globalnet chose the "Modified New [*sic*] Westminster" design from the designs made available by Linwood. At no time did Linwood ever advise Globalnet that the "Modified New [*sic*] Westminster" home design was inappropriate or inadequate for a home in the Barriere Lake region of British Columbia, which can experience significant snowfall accumulation in the winter seasons.

**36**  In a later affidavit he added:

In [my earlier affidavit] I refer to my understanding that Cornerstone was going to subcontract the design of the Home to its parent company, Linwood. More specifically, Gary Schofield of Cornerstone explained this arrangement to me and referred me to Linwood's website to review.

Mr. Schofield explained to me that Linwood was the designer and we could pick up one of Linwood's designs and they would help us figure out what we wanted, and that Linwood had a construction arm, Cornerstone, that would build the Home. Based on my conversations with Mr. Schofield it was my understanding that Cornerstone and Linwood were a niche market ? they built recreational homes in various areas and had designs they could work from and modify to suit the areas in which the property would be built.

Several times during the design process, both Linwood and Cornerstone made recommendations based on the characteristics of the Barriere Lake Region. For example, when I attended Linwood's offices and ultimately chose the "Modified New [*sic*] Westminster" home design, Linwood told me that we had to take off the porches that were in the original design because the porches could not take the snow loads in the Barriere Lake Region.

Mr. Schofield also told me that we would have to put a metal roof on the Home because of snow loads in the area and that rock needed to be placed around the Home because it was in such a mountainous region.

**37**  The Linwood website referred to in the above extract includes the following statements:

Linwood gives you more. We provide site specific design, premium materials and practical construction options for clients all over the world. ...

We include the development of a home design that is specific to your building site and give you high quality construction blueprints. ...

The design process includes planning ahead for site issues as well as meeting the owner's requirements for visual appeal, flexibility and best use of land. Linwood's type of site specific design is generally not available on the market. ...

**38**  One page of the Linwood website is headed "Site Specific Design". On that page there are the following statements:

Linwood design experts work with you to develop the basic design concept and then draft preliminary plans which consider site specific issues including the placement of the home on the property. ...

The process of generating a site specific design is critical to the success of any custom building project. It considers all the complex variables involved so that the home can be built cost effectively while minimizing costly changes during construction.

Using off the shelf designs will usually not allow you to build your home efficiently on your property unless you have a level building site with no engineering or geo-technical issues.

Linwood site specific design considers the following variables:

1. Site & structural engineering
2. Zoning / Architectural guidelines / Access / Setbacks
3. Placement of septic field / Well
4. Orientation of the building
5. Best construction practices, etc.

We offer over 300 existing designs in various collections that can be customized for your building site or we can create a unique design especially for you. Our sophisticated design software allows changes to be made easily to preliminary plans.

**39**  Mr. Kirkpatrick said that construction of the home was completed in 2006.

*Damage is First Noticed*

**40**  Mr. Kirkpatrick said he noticed water damage in the home starting in late 2007. He saw that water was coming in through the east "dormitory" (perhaps meaning "dormer") of the roof, then later learned that water was also coming in through the ceiling above the second kitchen, which is located below the south west "dormitory". In late December 2007 he noticed a large crack in the wall in a bedroom above the second kitchen.

**41**  Mr. Kirkpatrick said that in January 2008 he contacted Peter Segaric, an employee of Cornerstone, who told him that the water ingress was due to the design of the roof, which when used in snowy climates causes snow to build up and penetrate the building envelope, a phenomenon known as "ice damming".

**42**  On March 31, 2008 Mr. Kirkpatrick wrote to Mr. Segaric, informing him that there was clearly a problem with the roof and that he expected "matters to be addressed promptly and professionally".

**43**  In the spring of 2008 Mr. Kirkpatrick also noticed large cracks in the retaining walls that run alongside the driveway down to the foundation of the home.

**44**  In March 2008 Mr. Kirkpatrick initiated a claim with the National Home Warranty Program, and an inspector from that program attended at the property a month or two later. In a letter dated May 6, 2008, titled "Technical Assessment Report", the claims adjuster rejected the roof claim on the basis that the issue was a design issue and not a defect in construction. In the case of the retaining walls, the claim was denied because it was considered to be "excessive settling", which was covered for only one year (which by then had passed) and not a structural issue.

**45**  For this evidence I am mindful that these assertions are both opinion and hearsay and thus are inadmissible in substance, but this response is nonetheless a relevant part of the chronology of events.

**46**  As noted earlier, Globalnet's claim against the warranty providers was later settled.

**47**  Mr. Kirkpatrick's counsel arranged for an inspection by Morrison Hershfield Limited ("MHL"), an engineering and architectural firm. The inspection took place on July 25, 2008. A representative of Cornerstone attended, as did Keith Ohlhauser, the structural engineer who designed the retaining walls. Pierre Gallant, an architect, attended on behalf of MHL.

**48**  Mr. Gallant prepared a brief report dated August 21, 2008. In that report he said that he agreed with previous opinions that the water ingress was being caused by ice dams from melting snow which accumulates between the dormer roofs. He made recommendations for repairs.

**49**  As to the retaining walls, Mr. Gallant emphasized that he was not a structural or geotechnical engineer and could only comment based on his experience. Mr. Gallant said, in his experience, the amount of deflection of the walls was not unusual, although he recommended that they be monitored over the coming year.

**50**  Mr. Gallant's report was sent to Cornerstone's counsel. They replied that Cornerstone did not wish to be involved in the proposed work. They suggested Globalnet contact Dave Ewert of Tyand Builders directly to see if he would do the work for them. Mr. Ewert was the contractor who built the house for Cornerstone.

**51**  Globalnet then engaged MHL to prepare a formal plan for the roof repairs. This repair plan was provided to Mr. Kirkpatrick in September 2008. Globalnet subsequently retained Tyand Builders to carry out the work, and the work was done in late 2008 and early 2009. A representative of MHL attended at the site on January 22, 2009 to assess the work done to that point.

**52**  The total cost of these repairs, including professional fees, was $87,097.05.

**53**  Mr. Kirkpatrick deposed that there were no further problems with water leaks after those repairs were done.

*Retaining Walls*

**54**  Mr. Kirkpatrick said by September 2009 he noticed further movement in the walls. He then engaged in correspondence with Mr. Ohlhauser, who Mr. Kirkpatrick says was Linwood's engineer. Mr. Ohlhauser attended at the site on October 9, 2009, and on October 14, 2009 he forwarded a report to Mr. Kirkpatrick. In that report Mr. Ohlhauser recommended that the existing backfill be removed down to the footings, to a distance three or four feet away from the wall, and that drain rock be installed in its stead.

**55**  Excavation of the backfill, or some of it at least, took place in late 2009. Mr. Kirkpatrick retained: (1) Golder Associates, geotechnical engineers, to assess the backfill that had been used originally; and (2) MHL, to assess the retaining walls and make recommendations to address the retaining wall problem.

**56**  Golder Associates prepared a report dated August 3, 2010, addressing the possible causes of the wall failure and geotechnical recommendations for the remedial work. The Golder engineers commented on the wall loads and the quality of the backfill and drainage, noting that the type of soil apparently used as backfill had low permeability and relatively high susceptibility to frost heave. Based on their observations at the scene the engineers expected the walls would not be able to sustain anticipated soil loads due to the continuous cracks present in the walls. The engineers said repairs together with proper drainage and backfill might be possible, subject to the opinion of a structural engineer, and they discussed two repair possibilities (a tie-back system and a counterfort system) as well as the complete replacement of the walls.

**57**  In or around the summer of 2010 MHL told Mr. Kirkpatrick that, in their opinion, the retaining walls had failed entirely. They recommended that the existing walls be demolished and removed and new walls be constructed using a different design. Mr. Kirkpatrick sought a second opinion from another structural engineer, Andrew Watson of Watson Engineering Ltd. Mr. Watson agreed that the existing walls should be demolished and replaced with new walls and backfill. On September 22, 2010 he produced an engineering design for the new walls.

**58**  Mr. Ewert of Tyand Builders was retained to carry out the retaining wall work according to Mr. Watson's specifications. The demolition of the old walls and the construction of the new ones took nearly a year. To avoid further delays, Tyand Builders continued to work through the winter. This required the use of heaters to keep the area clear of snow and to allow concrete to set. Work was completed in August 2011. The total cost of this work, together with associated professional fees, was $521,887.

*The Encroachment*

**59**  On October 5, 2005, Alexander McNairn of Cornerstone forwarded to Mr. Kirkpatrick a site survey of the property. Mr. Kirkpatrick asserts that the defendants were responsible for obtaining all necessary surveys and points to this survey as evidence of that.

**60**  In February 2011, during the demolition of the retaining walls, an inspector with the Thompson-Nicola Regional District attended at the site to conduct an inspection relating to the issuance of a building permit. The inspector advised that the footings of the retaining walls encroached on the neighbouring property. This caused a delay in issuing the building permit. Surveyors were engaged and a survey plan prepared. That survey confirmed that the footings encroached on the neighbouring property. At the point of greatest encroachment the footings were located 3.6 metres inside the neighbouring property.

**61**  The neighbours agreed to grant an easement that allowed the new retaining wall to be constructed in the same location as the former retaining wall. Globalnet also agreed to perform landscaping work on the neighbouring property, including the planting of 38 cedar trees along the property line, as well as the neighbours' associated legal expenses. Globalnet paid $36,766.16 for all of these things.

*Transfer of Title*

**62**  On November 25, 2008, Globalnet sold the property to two family trusts, the Pleasantville Trust and the Pacific Blue Global Trust. Originally, Mr. Kirkpatrick was a trustee and beneficiary of the Pacific Blue Global Trust and a trustee of the Pleasantville Trust, but he resigned as a trustee of both trusts on May 15, 2009 and also ceased to be a beneficiary of the Pacific Blue Global Trust. Mr. Kirkpatrick's wife and children are the remaining beneficiaries of the Pacific Blue Global Trust.

**63**  Mr. Kirkpatrick deposed that he was authorized to act on behalf of the Trustees to organize and oversee all aspects of the investigation and remediation of the defects in the property. He said:

At all material times I was authorized by the Trustees of the Pleasantville Trust and the Pacific Blue Global Trust to act on their behalf. Specifically, I was authorized by them to organize and oversee all aspects of the investigation into and remediation of the defects in the Property.

**B. Dave Ewert**

*Affidavit Evidence*

**64**  Mr. Ewert is a general contractor and is the principal of his business, Tyand Builders, a proprietorship. He deposed that he specializes in the construction of higher-end homes in the Interior region of B.C. He is a member of the "Linwood Independent Home Builders Alliance".

**65**  In 2005, Mr. Ewert's firm was retained by Cornerstone to act as the contractor for the construction of a home according to a Linwood "Modified Westminster" home design. Construction of the home began in approximately April 2005 and completed by about March 2006.

**66**  In late 2008 Mr. Ewert was contacted by Mr. Kirkpatrick to carry out repairs to the house. His firm then carried out repair work on the roof of the home in accordance with the recommendations provided by MHL. He issued seven invoices to Mr. Kirkpatrick for the work done. These invoices total $85,454.51.

**67**  In late 2009 Mr. Kirkpatrick retained him to excavate the backfill and remove the handrails around the retaining walls of the house. He billed Mr. Kirkpatrick $8,360.62 for this work.

**68**  Around August 2009 Mr. Kirkpatrick retained him to demolish the existing retaining walls and rebuild new ones in accordance with drawings and specifications prepared by Watson Engineering Ltd. For that work he issued eight invoices to Mr. Kirkpatrick. The charges relating to the retaining walls total $485,347.56.

**69**  Mr. Ewert also did the landscaping work and planting of 38 trees on the neighbouring property. He said the trees cost $585.20.

*Cross-Examination*

**70**  Mr. Ewert was cross-examined on his affidavit, in court, pursuant to an order made on June 22, 2015.

**71**  In cross-examination Mr. Ewert said:

1. the "Linwood Independent Home Builders Alliance" is a group of contractors who build homes for Linwood;
2. he was engaged by Mr. Kirkpatrick to do the repair work on a cost-plus basis. All of the roof repair work was done in accordance with the MHL plans, although he also added insulation to some ceiling areas, as the original insulation contractor had left some "voids";
3. he also installed some "whirlybird" vents because he considered it appropriate to do so;
4. he prepared all the invoices himself;
5. rain gutters and downspouts were not part of the repairs to the roof, but were added at a cost of $2,310;
6. some items were new. These included a set of stairs, handrails for those stairs, a power pole, and lock boxes and gates. In re-examination he estimated $36,000 for the cost of the stairs;
7. there was extra expense involved in cold weather work on the retaining walls, including heaters and water lines that were used to heat the work site. This involved heater rental, plumbing work for the lines, snow removal, the use of hoarding, blankets and tarpaulins to protect the work, as well as additional labour; and
8. he performed work in cold weather because Mr. Kirkpatrick instructed him to do so.

**C. Yvonne Darcel**

**72**  Ms. Darcel is the senior group vice-president and chief financial officer of Linwood. She is also the chief financial officer of Cornerstone. She is a certified professional accountant.

**73**  Mr. Darcel deposed that Linwood is "a designer and provider of material packages for use in the construction of homes to lock-up". Linwood does not build homes either from those packages or from other materials. She described the typical process this way:

Linwood normally works with its customers to develop a home design starting with either a design from its plan books or a fresh custom design for customers. When the design has been finalized it determines a price to provide the lock-up material package based on the approved plans. At this point, Linwood generally enters into a contract with the customer, following which construction drawings are generated, a list of materials is prepared, and materials are shipped.

**74**  Ms. Darcel said Linwood does not construct the homes itself, and it did not do so in this particular case. She added that Linwood had no involvement in the construction of the subject house and Linwood did not enter into a contract with any of the plaintiffs for the design of the house.

**75**  Cornerstone is a wholly-owned subsidiary of Linwood. On her examination for discovery Ms. Darcel said that Cornerstone ceased operating in 2011, which explains Ms. Darcel's use of the past tense in the following extract from her affidavit:

Cornerstone was a different and distinct business from Linwood. Cornerstone was in the business of building homes. Cornerstone was not in the business of building homes for Linwood and operated independently from Linwood. In a very few isolated instances Cornerstone constructed homes for Linwood customers.

**76**  Cornerstone had a licensing agreement with Linwood which allowed Cornerstone to use Linwood designs for a fee. Cornerstone paid a fee to Linwood for the plans for the subject home. Cornerstone later requested some design changes. Linwood made the changes and billed Cornerstone for that work.

**77**  Ms. Darcel deposed that Keith Ohlhauser was an employee of Linwood from 2005 to 2008. He was Linwood's quantity survey manager and he also performed structural reviews of Linwood's construction drawings. He had his own business, Millennium Engineering, but there was no relationship between Linwood and Millennium Engineering.

**78**  Ms. Darcel said neither Mr. Ohlhauser nor Millennium Engineering did any engineering work for Linwood for the home. Further, Linwood did not design the retaining walls and it was not involved in obtaining any surveys.

**79**  Ms. Darcel said that Linwood sold seven "Westminster" model home designs prior to the subject home, two of which were constructed in Adams Lake and Merritt, B.C., where snowfall amounts are similar to those at Barriere, B.C. Westminster model homes were also constructed in Northern Ontario, where snowfall amounts exceed those in Barriere. Linwood received no complaints about roof design or water ingress in respect of any of those homes.

**D. Cindy Steinmann**

**80**  Ms. Steinmann is the controller of Cornerstone. She deposed that one of her duties includes managing and maintaining business records.

**81**  One of those records is an invoice dated June 30, 2005 from Millennium Engineering to Cornerstone for a project described as "Dahl Retaining Wall". The subject project was frequently referred to in Cornerstone's records as "Dahl".

**E. Keith Ohlhauser**

*Evidentiary Objection*

**82**  As noted earlier, at the outset of the hearing of this summary trial there were various objections made to the admission of certain reports, affidavits and parts of affidavits. One of those objections was a defence objection to the admission of an affidavit sworn by Keith Ohlhauser on June 26, 2015. I ruled then that this affidavit would be admitted.

**83**  The defendants renewed their objection to the admission of the Ohlhauser affidavit on different grounds, now saying that it is not proper reply or rebuttal evidence and should instead have been submitted as part of the plaintiffs' case in chief. They say the admission of his evidence would be unfair to the defendants as they will not have an opportunity to answer it.

**84**  More specifically, the defendants assert that the plaintiffs demonstrated they intended to elicit evidence in chief from Mr. Ohlhauser yet chose instead to do so by way of reply. They point to the fact that the plaintiffs ordered a transcript of Mr. Ohlhauser's discovery transcript (from 2011) in June 2015, a day before they received the defendants responding materials. They also note that plaintiff's counsel and Mr. Ohlhauser's counsel communicated about the plaintiffs issuing a subpoena for Mr. Ohlhauser's attendance at trial.

**85**  The defendants submit that the plaintiff has offended the rule against a party splitting its case. As a further objection, the defendants submit that the evidence of Mr. Ohlhauser is not relevant to any issue that is pleaded in the case and, specifically, has not pleaded that Linwood was responsible for the design of the retaining walls.

**86**  In reply, beginning with the last point, the plaintiffs point to the defendants' amended response to civil claim, which says:

1. In answer to the allegations in paragraphs 18, 19 and 20 of the Amended Notice of Civil Claim, Linwood says that at no time did it provide any design, plans or specifications for retaining walls for the Home. The design of the retaining walls was prepared by Keith Ohlhauser, a consulting engineer. Linwood did not have any involvement with the design of the retaining walls.

**87**  I am satisfied that this answers the defendants' objection that is based on the pleadings because the proposed evidence is relevant to an issue pleaded in the case.

**88**  The plaintiffs submit that the Ohlhauser affidavit responds to the defence affidavits sworn by Yvonne Darcel and Cindy Steinman. The Darcel affidavit was sworn May 20, 2015, but delivered only on June 19, 2015, just two weeks prior to the commencement of the summary trial. In that affidavit Ms. Darcel says "Keith Ohlhauser did not do any engineering work for Linwood for the Home". Ms. Steinman, Cornerstone's controller, appended to her affidavit an invoice from Millennium to Cornerstone that referenced the retaining wall. This document had been produced by the defendants only after the conventional trial had been adjourned, and the subsequently defendants resisted all attempts to conduct any discovery on that invoice until it was too late to do so.

**89**  The plaintiffs note that they might have been able to subpoena Mr. Ohlhauser in order to compel him to attend a conventional trial, but had no power to do so for a summary trial.

**90**  I am satisfied that the Ohlhauser affidavit ought to be admitted. I consider that it responds to the affidavits of Ms. Darcel and Ms. Steinmann and does not offend the rule against case-splitting. I also find that the prejudice to the plaintiffs should the affidavit not be admitted outweighs considerably the prejudice to the defendants in admitting it. In coming to that conclusion I note the defendants' submission that much of the evidence in the Ohlhauser affidavit was already canvassed in examinations for discovery of the defendants' representatives, particularly Ms. Darcel, and so the defendants were well aware that there was a live issue here and that Ms. Darcel might have to address the issue in an affidavit, as she subsequently did. She has said her piece and the evidence of Mr. Ohlhauser has been led in reply. I see little or no substantive prejudice to the defendants arising from that sequence of events.

*Mr. Ohlhauser's Evidence*

**91**  Mr. Ohlhauser is a professional engineer. He prepared the drawings for the retaining walls that were built on the property. He gave evidence by way of an affidavit sworn June 26, 2015.

**92**  Mr. Ohlhauser deposed that he was employed by Linwood from June 1, 2005 to May 30, 2008. His title was Engineering and Quantity Survey Manager. His terms of employment with Linwood were set out in a letter from Yvonne Darcel, vice president of Linwood, dated May 6, 2005. His employment income was paid to him personally by Linwood and recorded in T4 slips issued by Linwood. At the end of his employment in 2008 Linwood issued a Record of Employment.

**93**  Mr. Ohlhauser described his duties as follows:

As part of my employment duties I performed engineering work (among other work) and I issued Schedule B-1s, B-2s and C-Bs on projects, including projects built by Cornerstone. I reported to and took instruction from Yvonne Darcel at Linwood, among others, while I was employed at Linwood. I did not do any other engineering work from June 1, 2005 to May 30, 2008 other than as an employee of Linwood.

**94**  Mr. Ohlhauser deposed that a year prior to his employment with Linwood he incorporated a company called Millennium Engineering Services ("Millennium"). I pause here to note that other evidence indicates that Millennium is a sole proprietorship, but nothing turns on the distinction. In any event, Mr. Ohlhauser deposed that he said he did not do any engineering work on behalf of or through Millennium after he started working for Linwood, and Millennium did not receive any payment from Linwood or Cornerstone for engineering work. He said:

Ms. Darcel told me that Linwood needed to show the building inspector [on the Barriere Lake project] proof of insurance for the design of the wall. Linwood did not have insurance for engineering work. At that time, I maintained professional insurance in the name of Millennium. Ms. Darcel asked me to issue the designs for the retaining walls on behalf of Millennium for insurance purposes on the project, and I did.

**95**  Mr. Ohlhauser said that Linwood paid the premiums for his professional insurance during the time he was employed by Linwood.

**96**  Mr. Ohlhauser described his involvement in the subject property as follows:

In June 2005, shortly after I began working at Linwood, Yvonne Darcel told me Cornerstone was building a house in East Barriere, and that construction was already started on the project. She told me that an engineer was already engaged for the framing of the house, but that they needed a retaining wall designed for the garage entranceway. ...

I attended the home that is the subject of this litigation in June 2005 to review the work already completed by the framer working on the property. The main foundation wall had already been poured, and the main floor framing was going up. The retaining wall footings had already been poured and reinforced, and forms for the outer side of each retaining wall were in place. Drain tile had not been installed. I noted that the framework was unsatisfactory at that time. I told the framer that the formwork was incorrect and that we would have to try and fix it somehow. After that visit, I prepared a design to fix the retaining walls. My designs are noted in two drawings, both dated June 14, 2005. ... I created these sketches pursuant to my instruction from Ms. Darcel to review the retaining walls, in the course of my employment duties at Linwood.

**V. Plaintiffs' Expert Evidence**

**A. Bruce Bosdet - Geotechnical Engineer**

**97**  Mr. Bosdet, of Golder Associates Ltd., is a geotechnical engineer. He has more than 30 years' experience in geotechnical engineering investigation, including investigations into the causes of building distress, as well as foundation design. He prepared a report dated October 28, 2010.

**98**  Mr. Bosdet attended at the site in June 2010. He noted various signs of failure in the retaining walls, including evidence of movement or tilt of the walls away from the backfill side and longitudinal tension cracks along the walls. Soil samples taken of the excavated backfill were tested and showed that they were susceptible to, and had a high potential for, frost heave. He noted that the backfill was native soil and not a drainage mixture.

**99**  He commented on the backfill as follows:

Based on my site observations, I am of the opinion that the backfill of both walls was exposed to considerable water infiltration due to general site grading which directed surface runoff to accumulate by the walls.

...

If the wall backfill, now removed, consisted of the silty native soils as herein assessed, it is assessed that the soil would have had a moderate permeability and high capillarity, and would therefore permit infiltration of water but tend to drain poorly, retaining moisture over a long period of time.

...

In my professional opinion, the wall backfill and drainage systems were insufficient to protect the wall from frost loading, and that frost-induced lateral loads on the wall could potentially equal or exceed a passive pressure loading condition.

**100**  As for wall mitigation options, Mr. Bosdet said:

Based on our field observation, it is anticipated that the wall is damaged to such a degree that the walls cannot sustain the anticipated soil loading due to continuous cracks at the back of the walls at the driveway elevation. However, it might still be possible to incorporate the existing wall within a mitigation option involving tieback anchors or a counterfort system if the wall above the crack at the driveway floor level has sufficient structural integrity. The structural integrity of the concrete wall above the crack would need to be assessed by a structural engineer. ...

Mitigation option concepts involving tieback and counterfort systems are described below. It should be noted however, that it may prove more cost effective simply to remove the existing walls and install a new cantilever wall system based on good design with insulation, free-draining backfill and a good drainage system.

**101**  Mr. Bosdet was cross-examined by defence counsel by way of video deposition. In that cross-examination he said:

1. Golder Associates engineers offered three options for repair or replacement, but they were never asked to, and generally would not, make that sort of decision. It would be up to a structural or civil engineer to cost it and decide which is the best way to do it; and
2. the house had no outfall from the downspouts, and so he recommended that as an improvement because it is good geotechnical practice to get water away. His recollection was that the downspouts either went to splash pads or just to the ground

**B. Pierre Gallant - Architect**

**102**  Mr. Gallant is an architect with MHL. He has been responsible for the investigation of numerous building envelope failures in various regions. He has also designed numerous single family homes in cold climates with high snow precipitation. Mr. Gallant prepared a report dated December 1, 2014.

**103**  In his report Mr. Gallant said he was retained in early 2008 to provide an expert opinion on the cause of the water leaks at the subject home. He attended at the site in July 2008 and prepared a report dated August 21, 2008.

**104**  Mr. Gallant noted that the roof has no attic, and so the main roof and dormer roofs are directly over cathedral ceilings and "conditioned living space" below.

**105**  Mr. Gallant said:

As designed and built, the configuration of the dormers in close proximity to each other causes snow entrapment and build-up during the winter months. Insufficient space between the dormers interferes with the ability of the roof to shed snow during high snow load conditions. As such, the snow load from the main sloped roof is directed down onto the lower dormer roof areas, channels between the dormer walls, and becomes trapped between the dormers. During a heavy snowfall, snow accumulates between the dormer roofs and between the dormer sidewalls. Over time, snow in direct contact with the sidewall wood cladding will saturate the wood and migrate behind the cladding. The building paper behind the wood cladding functions as a moisture retarder, not a water shedding surface. A moisture retarder is intended to resist incidental moisture and does not perform as a waterproofing membrane.

Compounding the problem is ice-damming at the eaves. When the outside temperature falls below freezing, water freezes at the un-insulated eaves and creates a dam which leads to a back-up of water. At the [subject site] ice-damming caused water to seep under the metal roof panels at lap joints and seams and at interfaced with dormer walls. ... These vulnerable areas provided a direct path for water ingress into the building.

...

The primary deficiency with the roof is the design (both the configuration of the dormers and the interface details) and the construction of the dormers, which are inappropriate for the local winter climate. ... As a result, the roof design at the [subject site] was not an appropriate design for the Barriere Lake region. Given the dormer configuration, a strategy to control ice-damming should have been incorporated into the design of the roof and dormers.

...

Given the nature of [the] deficiencies and damages, the roof repair work performed [at the subject site] is the appropriate response.

**106**  Mr. Gallant also said:

1. a prudent and reasonable designer would not have designed a roof with dormers in close proximity in a heavy snow load climate. However, when doing so, a designer would have designed appropriate detailing around the dormers to anticipate ice dams and their resulting risk of leaks;
2. the design provided by Linwood did not meet the standards of a reasonably prudent designer for a home to be built in the Barriere Lake region because it did not adequately design the dormer to roof interface details;
3. a prudent and reasonable builder needs to be familiar with the climate where a project is built, and familiar with the configuration and detailing required to resist local climatic loads. At the [subject site] a prudent builder would anticipate the risk of snow accumulation and resulting ice-damming caused by the roof configuration, and either contact the designer for further instruction, or detail the roof-to-dormers intersections to accommodate the risk of ice-damming and resulting leaks by extending the waterproofing;
4. the construction of the roof did not meet the standards of a reasonably prudent home builder for a roof in the Barriere Lake region. Roof construction, in any climate, in his experience, is expected to prevent moisture ingress into finished space. Accordingly, roofing practices vary depending on the climate. A home builder should be familiar with what roofing practices are suitable for the climate at a given location. A reasonable and prudent home builder follows the design drawings and specifications, however, must always apply his/her own knowledge and experience to supplement the design. A reasonable and prudent home builder would have known to improve the interface details at the dormers to reduce risks of leaks from ice-damming.

**107**  Mr. Gallant was cross-examined by defence counsel by way of video deposition. Mr. Gallant said the following (among other things), in that cross-examination:

1. cathedral ceilings, as well as the use of darker roofing material, can be factors in ice damming because these may contribute to snow melt, which subsequently freezes;
2. one of the assumptions he made was that the level of roof insulation was adequate and that air leakage through the ceilings was minimal;
3. he would not have used snow fences to alleviate the problem as it is very unlikely this would be effective;
4. heating cables would likely have solved the problem, but he did not calculate the costs associated with that potential solution;
5. in his report of August 21, 2008 he recommended the removal of the metal roofing, certain further roofing work, and then the metal roofing reinstalled. It was his understanding that the work actually done went beyond that, but he said reusing the existing metal panels can be tricky;
6. additional venting would not have assisted in resolving the problem significantly, if at all, although it would be good general practice. There is, however, a school of thought that venting is not required if the house has rafters that are packed with insulation;
7. reframing the dormers complete with structural components would be a costlier option;
8. while the Linwood drawings generally accord with established procedures they have key details missing given the snow load in the area; and
9. closely-spaced dormers ought to be avoided in a heavy snow area unless there are specific provisions in place, including ice damming protection.

**C. Subrata Chakrabarti ? Structural Engineer**

**108**  Mr. Chakrabarti is a structural engineer with MHL. He prepared a report dated May 14, 2013.

**109**  Mr. Chakrabarti commented on the design drawings for the retaining walls that were prepared by Mr. Ohlhauser. Two drawings were prepared by Mr. Ohlhauser, one a revision of the other. Mr. Chakrabarti said:

The original design as described above is flawed because the reinforcement was shown on the exterior face of the wall. The reinforcement should have been placed at the interior face which would develop tensile stresses under the lateral loading from the retained soil. The additional bars were placed at the interior face to rectify the flawed design. However, the reinforcing bars should have been provided for the full height of the wall.

**110**  Mr. Chakrabarti then reviewed the observations of the retaining wall made by Golder Associates in 2010. Mr. Chakrabarti noted:

The wall cracked horizontally above the mid-height, at the back of the wall, where the vertical steel was terminated, because the unreinforced wall did not have the capacity to resist the lateral forces impressed upon it.

...

Since the cracks occurred at the level of the driveway slab, the additional reinforcement shown on the [Ohlhauser] drawings were likely not used.

**111**  Mr. Chakrabarti concluded as follows:

In summary, the wall failed because the wall was not adequately designed for the loads impressed upon it and due to poor construction of drainage behind the wall.

The walls were inadequately designed and had experienced significant damage. I concur with the [Golder Associates] report that the walls should be replaced with properly designed new walls with free-draining backfill and a suitable drainage system.

**112**  Mr. Chakrabarti elaborated on his conclusions, as follows:

1. it appears no geotechnical advice was sought. Without that advice it is likely that the horizontal pressures were not estimated correctly for the type of backfill used behind the wall;
2. the original engineer did not specify the type of backfill to be used;
3. the reinforcing steel was initially shown on the wrong side of the walls;
4. the footing reinforcement was not defined and was shown at the bottom of the footing slab, "again at the wrong place"; and
5. additional reinforcement was provided at the back face of the walls, where it is actually required, but the bars were specified only to mid-height, leaving the upper half of the wall weak and unreinforced. The cracks appeared in the very area where the reinforcing bars terminated.

**113**  Mr. Chakrabarti commented on the standard of care, saying that a reasonably prudent engineer would have:

1. consulted with a professional geotechnical engineer for design and construction recommendations based on on-site testing of soil, and would have conveyed those recommendations to the contractor; and
2. provided adequate full height vertical reinforcing bars and horizontal bars at the back of the wall, adequate reinforcing bars in the footing at the right depth, specifications for free draining backfill behind the wall, adequate weep holes through the wall and detailed instructions for installing the drain tile.

**114**  Mr. Chakrabarti concluded as follows:

The design of the Retaining Wall did not meet the expectations or the standards of a reasonably prudent engineer and the one page construction drawing lacked the necessary information required for construction. The drawings were incomplete...

**115**  Mr. Chakrabarti said the walls also failed because of deficiencies in the original construction, which he detailed as follows:

1. the drain tiles were installed poorly;
2. the weep holes were not placed properly;
3. the contractor used native soil for backfill without questioning its suitability;
4. the contractor did not question the reinforcing details. An experienced contractor should have known that the top half of the wall would be weak without the vertical bars running to the top of the wall; and
5. the contractor installed the footing reinforcement at the wrong depth without questioning the design.

**116**  Mr. Chakrabarti also commented on the repair options:

1. *Jacking back the existing wall as a façade and constructing a new wall against its rear face, and dowelling into the existing wall and foundation:*

Mr. Chakrabarti acknowledged this as a possible solution but said it would likely cost more than building a new wall. It would also involve extensive and costly crack repair to the existing wall.

1. *Constructing counterfort or "wing" walls behind and connecting to existing walls:*

Mr. Chakrabarti said this was a complicated solution for several reasons and, in his opinion, was not a viable solution.

1. *Replacing the backfill zone with low-strength concrete to act as a gravity retention structure:*

Mr. Chakrabarti acknowledged this as a possible solution but additional geotechnical advice would be needed and, as with option (a), it would involve extensive and costly crack repair to the existing wall.

1. *Applying tension straps to reinforce the back sides of the walls*:

Mr. Chakrabarti said this was a possible solution but noted it required the services of specialized engineers and contractors. Extensive crack repair would still be needed.

**117**  Having considered various alternatives, Mr. Chakrabarti concluded that the most direct and economical solution was to construct new walls of proper design.

**118**  In cross-examination Mr. Chakrabarti said:

1. he did not know if the walls had actually been constructed according to the design;
2. the second Ohlhauser drawing showed weep holes. The photographs of the walls did not show any weep holes. If weep holes were specified but not built then that would be a construction error;
3. even if the drainage behind the wall had been effective enough to take out all of the water behind the walls it is still hard to say whether the walls would have worked. He could only say it would have had a better chance of surviving;
4. his observation that the drain tile was installed poorly was based on other reports. This was both a construction and inspection issue;
5. there are two issues behind the failure: (1) the loads, and (2) the wall design and detail. The load was higher than the capacity of the wall. He could not say that design alone was the problem;
6. a tie-back solution was possible, but one side would have encroached on the neighbour's property; and
7. he did not do a detailed costing of other options. He examined them only as "high-level ideas" for options. He conceded that without actual designs and cost estimations he could not say which option would cost more, including his own recommendation that a new wall be built.

**VI. Defendants' Expert Evidence**

**A. Lynn Trott - Civil Engineer**

**119**  Mr. Trott is an engineer who has been engaged in the design, construction and repair of single-family homes and structures for 30 years.

**120**  Mr. Trott provided two opinions, both dated February 16, 2012. One was on the roof issue and the other dealt with the retaining walls.

*The Roof Issue*

**121**  Mr. Trott noted, first of all, that there was no independent verification of the claims of water damage. In particular, Mr. Trott noted the National Home Warranty inspector did not remove drywall in the home to locate evidence of water ingress. He said he could therefore only assume that there was water ingress as claimed.

**122**  Mr. Trott said the proper approach for roof repairs would have been to remove the roof and roof felt around the dormers, together with the siding and building paper "forming the offending side of the dormer". Once all relevant cover has been exposed then a shield or membrane product can be installed and then, ideally, some of the materials can be re-used. He estimated the cost of repairs using this method would be between $3,500 and $9,000.

**123**  Mr. Trott said in his experience a localized leak in a house has never required that the entire roof cover be removed and replaced. He said it was better and safer to study the roof leaks and devise a remedy that requires the least invasive method of repair.

*The Retaining Walls*

**124**  Mr. Trott prepared a report dated February 16, 2012 concerning the retaining walls. In his report he said he interviewed both Karen Savage, a geotechnical engineer, and Robert Wills, a structural engineer, and provided a cost estimate for the work they recommended. The essential method of repair involved the removal of backfill from the south wall, a re-plumb and repair of the wall using high-pressure non-shrinking grout, and replacing the removed backfill with a non-shrinkable fill. He described non-shrinkable fill as essentially a very weak concrete or soil cement.

**125**  Mr. Trott estimated the cost of repairs to the wall, using this method, at $45,269, plus taxes.

**126**  Mr. Trott said he saw no reason to review the north retaining wall as there were no signs of displacement and "the wall was thought to be stable". He acknowledged that it would be reasonable to assume backfill and drainage issues would be common to both walls, and if so the cost to repair would be identical to that for the other retaining wall.

*Cross-examination*

**127**  In cross-examination Mr. Trott said:

1. Linwood Homes has been a client of his since about 1984. He has an email address at Linwood ([Mr. Trott] @linwoodhomes.com) and uses their offices for his work there, which is four days a week. His duties include checking all of their plans for structural capacity, handling all of the customer complaint part of Linwood's business and looking after some of the Linwood draftspersons and all of the Linwood quantity surveyors;
2. on behalf of Linwood he also found and retained two other experts;
3. he did not keep any records with respect to the reports he prepared and never kept a file. He did not did not have a file for this matter because he never generated any records;
4. on the roof issue, he provided an opinion as a result of a telephone request made by Linwood. The question posed was, "If the roof leaked around a dormer what would you recommend be done about it and what would it cost?";
5. he was told to assume that it was a localized leak in one location, that location being a junction between the main roof and a dormer;
6. he had no idea what area was actually affected and did no investigation of that issue;
7. when he prepared his reports he did not rely on any documents;
8. he was unaware that roof repairs had been done at the subject house and was therefore unaware what had been done;
9. he has been to the home five times, but never inside it;
10. he was not asked for his opinion about the cause of the water damage;
11. he did not specify the labour costs associated with his roof recommendations because:

... There's a range depending on the complexity of the problem. So there is no way to predict what that roof would have cost. I didn't examine it carefully enough. There is no way I would have attached specific hourly labour cost to this roof, because I didn't do an examination of what actually would have to be done within the ranges that I've described in the report.

1. he attended at the property prior to any corrective action being taken with the retaining walls;
2. he noted that the retaining wall was out of plumb and had significant cracking;
3. he was not sure if he had read the report of Ms. Savage prior to preparing his own report. He had no designs, no detail and no scope of work; it was not as formal as that and was probably just based on conversations he had with Ms. Savage and Mr. Wills. For his report he was simply asked to answer a hypothetical question: "If a non-shrinkable fill would work how much would it cost?";
4. other than the non-shrinkable fill he did not know what other remedies Ms. Savage proposed;
5. he did not know how much fill had to be excavated behind the retaining wall, although in re-examination he said he had been to the site and had some idea of the amount; and
6. his cost estimate for repairing the cracks in the wall were based on the assumption that Mr. Ohlhauser's original design was sufficient. If it was not sufficient, then "none of that [the repairs discussed] would have worked".

**B. Robert Wills - Structural Engineer**

**128**  Mr. Wills is a structural engineer with 30 years' experience. He prepared three reports, which bear the dates December 15, 2010, February 28, 2011 and November 28, 2014.

*Report of December 15, 2010*

**129**  Mr. Wills attended at the site on October 6 and 7, 2010, at which time the existing walls were being demolished. He noted that both walls had been constructed in accordance with the Ohlhauser drawing.

**130**  Mr. Wills saw the problem as being a drainage problem. He said "typical retaining walls are designed for minimal wall pressure from free draining material placed against the wall." He noted that while the Ohlhauser drawing called for: (1) weep holes; and (2) drain rock to be placed around the drain tile at the base, "it may have been assumed that the native backfill would also be free draining", though "this was not clearly specified on the retaining wall drawing".

**131**  Mr. Wills said the native backfill was *not* free draining, weep holes "were not placed in reserve", and the PVC drain pipe used at the base was "tightly wrapped in geotextile fabric to the point of *limited* effectiveness" [emphasis in original].

**132**  Mr. Wills noted that the property receives considerable run-off of water from a hill on the east side towards the lake, which is on the west side of the property. He also noted that portions of the gutter system of the house directed water to the west side of the house, with one downspout situated directly behind the retaining wall.

**133**  Mr. Wills concluded as follows:

In summary, the retaining wall performed as designed for standard applied loads for drained soil conditions. The wall also performed well, far behind its design, for an overload condition associated with wet and freezing soil behind the wall stem.

**134**  Mr. Wills said tension straps could be used to reinforce the wall against future overload conditions, although the wall would remain out of plumb by up to 1.5 inches.

**135**  As for the roof, Mr. Wills noted that a lower porch roof impedes the roof snow between dormers from sliding away. He said "undoubtedly, this is a potentially difficult condition for trapped snow". He did not agree with the MHL recommendation to the extent it seemed to suggest a completely different system, but said:

I cannot argue with the merits of a limited amount of continuous membrane localized around the dormers and the adjoining roof *if* ice damming is occurring around the dormers and *if* meltwater is backing up onto the roof sheathing and penetrating an improper sidelap in the roof sheathing.

[Emphasis in original.]

*Report of February 28, 2011*

**136**  Mr. Wills attended at the subject property on February 22, 2011, at which time new retaining walls were being constructed. He noted that replacement of the walls was the owner's decision and indicated he and Ms. Savage did not support that decision. He also noted that there were some elements of betterment, notably the incorporation of a "return wall", an extended footing base and a new stairway.

**137**  As for the roof, Mr. Wills repeated much of what he wrote in his earlier report. He noted that he disagreed with the MHL conclusion that dormer soffits were a source of water ingress into the house.

*Report of November 28, 2014*

**138**  In this report Mr. Wills commented on the necessity of the repair work that was done. He said:

1. the roof repair work that was done was not necessary because there were no problems with the metal roofing assembly or valley drains between roof dormers and the main roof. Two areas of "hypothesized potential leaks" were adequately addressed by installing snow guards to prevent snow sliding. Any other leaking would have been a construction workmanship issue. Similar designs in similar buildings constructed throughout Canada to not experience [these] issues";
2. roof replacement was not required because the source of water was "extremely localized" at one side of specific small dormers. Only some minor repair work was required to open up affected drywall areas and locate specific sources of either condensation moisture or exterior snow melt leakage;
3. to the extent that moisture was seen dripping from pot lights, this was caused by failing to use air barriers and insulation around the lights;
4. removal and replacement of the original retaining walls was not the most direct, economical solution. Jacking the top portions of the walls back to vertical and reinforcing the top of the back of the highest portions was possible, using fibre-reinforced plastics or buttress walls.

**139**  Mr. Wills was cross-examined in similar fashion as the other experts, but I did not see anything of note in it. In re-examination at that same session Mr. Wills said the design of this house is such that it should not leak and "all flashings and sidings shall work to deflect any snow that could cause leakage if there were a rapid melt". He added:

I believe the drawings for these dormers were sufficient and had cladding sufficient to deflect snow and not cause ice damming and leakage.

**140**  Mr. Wills speculated that the water observed in this case arose from condensation, or perhaps condensation

... in conjunction with something else that was noticed. Again, I don't have any specific knowledge of what the exact issue was on the specific dormers other than to note that they are typical and often perform very well.

**C. Karen Savage - Geotechnical Engineer**

**141**  Ms. Savage is a consulting geotechnical engineer with 26 years' experience in that field. She authored two reports, one dated January 11, 2011 and the other dated November 28, 2014.

**142**  In Ms. Savage's report of January 11, 2011 she reported to Linwood on a site visit she had made. She noted that much of the retaining walls had been removed by this point. She said "drainage provided behind the retaining wall was poor", and specifically referred to the backfill used, the drain pipe being wrapped in woven filter fabric and only a minimal amount of clear gravel overtop. The backfill material drained poorly and was frost susceptible. As to the use of filter fabric around the drain pipe, "in our experience, when filter fabric is used to wrap drain pipe, it often clogs, resulting in compromised function of the drainage".

**143**  Ms. Savage concluded as follows:

In conclusion, based on our assessment, we envision that the subject movement was most likely due to combined effects of frost heave and excess lateral pressures on the wall resulting from using backfill which was not free-draining and possibly not well-compacted.

**144**  Ms. Savage added, however, "we cannot comment on the contribution of structural-related deficiencies".

**145**  Ms. Savage said she believed less drastic remedial options existed than demolition and replacement of the walls. She gave some possible alternatives, noting that this was provided "structural design aspects could be accommodated". In cross-examination she explained that, at that point, she did not know whether the existing wall could support those options.

**146**  In her report of November 28, 2014 Ms. Savage examined various solutions for the remediation of the original retaining walls. She concluded that "other, more cost effective options would have been suitable but that these were not fully explored". Ms. Savage added:

I believe that the existing wall and footing had value and could have been kept with a new reinforced concrete wall element attached to its rear side, or with the existing backfill replaced with lean concrete. It is envisaged that these options would *not* have required demolition of the existing structure as well as construction of a new foundation.

[Emphasis in original.]

**147**  In cross-examination Ms. Savage said:

1. she agreed she was not qualified to give an opinion on deficiencies in the structural design of the wall or installation of the reinforcing steel; and
2. she did not recall doing any calculations of what the cost would be for each option, and no results of any calculations or any round numbers were set out in her report.

**VII. Plaintiffs' Reply Expert Evidence**

*Mr. Gallant*

**148**  In his report of February 11, 2011 Mr. Gallant commented on several defence reports, most notably the report of Mr. Wills dated December 15, 2010. Mr. Gallant provided responses to many of the assertions of Mr. Wills. These are quite technical and so I will not review them all here. Suffice it to say that Mr. Gallant provided a photograph and accompanying explanation demonstrating the specific problem with the design of the dormer roofs and noting the snow accumulation and ice damming problem. Mr. Gallant also said that condensation was not the problem, as Mr. Wills speculated, because no evidence of condensation-related problems was observed.

*Mr. Chakrabarti*

**149**  Mr. Chakrabarti commented on the report of Mr. Wills dated December 15, 2010. He noted that Mr. Wills' main observations, that is, cracks in the wall at the mid-point, reinforcing steel not extending beyond mid-point and problems with backfill and drainage, all confirmed that the wall was not designed for the anticipated loads.

**150**  Mr. Chakrabarti also commented on the report of Ms. Savage dated January 11, 2011. In his view, Ms. Savage's observations about drainage and loads merely "explain why the wall failed".

**VIII. Other Evidence**

**151**  The plaintiffs presented evidence by way of read-ins from the examinations for discovery of Ms. Darcel, as a representative of Linwood, and William Mascott, as a representative of Cornerstone.

**152**  I will not summarize all of these read-ins but the more salient evidence is as follows:

*Ms. Darcel:*

1. no design plan is complete as is because it is based on flat ground and does not include crawl spaces, or basements, or anything attached to them. Every plan needs to have some work done on it because every house needs some kind of foundation;
2. Linwood provided its customers with site-specific design, although that was a trademarked terminology. This meant they tried to make the best use of the site "once we were given a site plan from the owners";
3. she did not believe that Linwood marketed "site specific design" on its website prior to 2007, although the following statements were true as of 2005:

Linwood's design experts work with you to develop the basic design concept then draft preliminary plans which consider site-specific issues including the placement of the home on the property.

Using off-the-shelf designs will usually not allow you to build your home efficiently on your property unless you have a level building site with no engineering or technical issues.

1. Linwood's final construction plans for this home included basement and foundation plans. Those plans indicate it is a modified Westminster model, which meant the Westminster model was used as a base for the design and modifications to that design were drafted by Linwood.

*William Mascott*

**153**  Mr. Mascott is the president of Cornerstone. He is also the president of Linwood. The following are the essential points from Mr. Mascott's examination for discovery:

1. Cornerstone did not have any engineers or designers on its payroll. There was engineering to be done for the retaining walls but Cornerstone was not going to do engineering work in-house; and
2. Cornerstone did not prepare any plans for the subject home.

**IX. Positions of the Parties**

**A. Plaintiffs**

**154**  The plaintiffs describe this as a simple construction deficiency case. They say Linwood designed, and Cornerstone built, a recreational home for the plaintiffs. There were defects in both the design and construction of the roof and the retaining walls of the home, the plaintiffs took reasonable steps in addressing these defects and they incurred substantial costs in doing so.

**B. Defendants**

**155**  The submissions of the defendants were extensive, indeed exhaustive, consisting of 580 paragraphs and numerous additional sub-paragraphs over 167 pages. The issues raised ranged from the weighty to the trivial. For that reason I will not attempt to summarize them other than in the most general terms. For the same reason I will confine my reasons to the issues of substance.

**156**  The defendants made detailed submissions on alleged flaws in the plaintiffs' pleadings, the admissibility of numerous aspects of the plaintiffs' evidence, the foundation (or lack thereof) for the plaintiffs' experts' reports, the credibility of the plaintiffs' witnesses and the alleged failure of proof of various facts. They also provided a paragraph-by-paragraph rebuttal to virtually every statement in the plaintiffs' written submissions.

**157**  More substantively, the defendants argue that: (1) the contract between Globalnet and Cornerstone contains an "entire agreement" clause that ousts any alleged representations, particularly about site-specific design; (2) the plaintiffs have not shown the roof leaks arose from a design problem; (3) Mr. Ohlhauser did not provide engineering work for the retaining wall design as an employee of Linwood; (4) the retaining walls failed not because of improper design but because the builder used improper fill and did not provide proper drainage; (5) it was not necessary to re-roof the house to remedy the problems with leaks; (6) it was not necessary to demolish the retaining walls and rebuild walls of another design as other, cheaper, options were available; (7) neither Cornerstone nor Linwood were responsible for surveying the property, and in any event no actual encroachment was proven; (8) the claimed losses amount to pure economic loss and are not recoverable; and (9) the transfer of title from Globalnet to the Trustees means that Globalnet suffered no loss, having paid for repairs as a volunteer, and the Trustees suffered no loss because Globalnet bore the costs.

**X. Suitability for Summary Trial**

**158**  As noted earlier, counsel agreed that this matter could be dealt with by summary trial and, ultimately, adjourned a conventional trial on the basis that the matter would instead proceed by summary trial. What had formerly been a 15-day conventional trial turned out, in the end, to be a 10-day summary trial, which did considerable violence to the term "summary".

**159**  Implicit in counsel's agreement that this matter should be resolved by way of summary trial was a common understanding that the matter was *suitable* for disposition by summary trial. However, I note that in their final submissions the defendants now say the matter is suitable for summary trial only if judgment goes in their favour and not if judgment goes against them. Given their earlier position and the enormous effort, by all parties, that subsequently went into preparing for the summary trial, this was neither a welcome nor helpful submission.

**160**  Although this has been a very challenging case with a number of complex issues, I consider that I am able to find the facts necessary to resolve the issues.

**XI. Discussion**

**A. General**

**161**  It is common ground that in April 2005 Cornerstone entered into a contract with Globalnet for the construction of a home on Globalnet's property at East Barriere Lake.

**162**  Clause 3 of the contract addresses the essential obligation to build a house to a particular standard of workmanship and according to a certain design:

1. Construction

The Builder agrees to provide a dwelling house on the Lands built to applicable building code/by law standards in effect at the date of this Agreement and to the standards of workmanship required by established industry practice. The Builder also agrees to supply all the materials and perform all the work for the construction in accordance with:

1. A floor plan and general specifications similar to Model No. Westminster ...

**163**  The "Westminster" design was one of Linwood's standard designs.

**164**  An attached document entitled "Scope of Work" provided further detail concerning the work to be done under the contract. That document expressly excluded from the scope of work: (1) the driveway and retaining walls to the garage; and (2) engineering. These items, however, were added to the contract work through a later change order dated September 16, 2005.

**165**  Globalnet asserts that the design was to have been a "site specific" design. This assertion is hotly contested by the defendants. They rely on the evidence generally, and on what they argue are the weaknesses in the plaintiffs' evidence on that point, but in particular they rely on the "entire agreement" clause in the contract:

This Agreement shall constitute the entire Agreement between the Builder and the Purchasers and there is no representation warranty [*sic*], collateral agreement or condition affecting this Agreement other than as expressed in writing in this Agreement.

**166**  I deal first with the evidence.

**167**  Mr. Kirkpatrick's evidence is that his dealings were primarily with a Cornerstone employee, Gary Schofield. Mr. Schofield told him that Linwood was Cornerstone's parent company and it was Linwood that would provide the design. He understood from his discussions that Linwood would provide a "site specific" design, something that is referred to on Linwood's website. He noted, for example, that when he attended the Linwood office and ultimately chose the "Westminster" model, Linwood told him the porches would have to be deleted from the design due to the snow loads in the East Barriere Lake area. Mr. Kirkpatrick also said Mr. Schofield told him other modifications would have to be made to allow for local conditions, including the installation of a metal roof, again due to snow loads.

**168**  The defendants point to Ms. Darcel's evidence that the Linwood website referenced by Mr. Kirkpatrick came into being only in 2007. They also say Mr. Schofield was a Cornerstone employee, not a Linwood employee, though they did not provide any evidence on that point.

**169**  Mr. Kirkpatrick did not say that he came to understand that the Linwood design was a "site specific" design as a result of reading the Linwood webpages. He merely attached copies of the pages as an exhibit, evidently to show that their content is consistent with what he was told. Mr. Darcel confirmed that Linwood provides site specific designs, although she had a narrower definition of what that meant. She confirmed that Linwood's designs are *not* strictly "off the shelf" designs and almost all standard designs have to be modified for each location. Although she noted the webpages referenced by Mr. Kirkpatrick were from 2007, she nonetheless confirmed that relevant aspects of its content were also true in 2005, including the fact that Linwood's design experts work with the customer "to develop the basic design concept then draft preliminary plans which consider site-specific issues including the placement of the home on the property".

**170**  Importantly, however, the defendants did not adduce any evidence from Mr. Schofield, nor did they say that Mr. Schofield's evidence was unavailable for some reason. I agree with the plaintiffs that Mr. Kirkpatrick's evidence of the matters represented to him by Mr. Schofield essentially stand uncontradicted.

**171**  The evidence concerning Mr. Schofield's actual employer or his relationship with Linwood is surprisingly vague. In submissions, the plaintiffs said Mr. Schofield held employment with both Cornerstone and Linwood; in other words, that he was an employee who was common to both companies. I have, however, been unable to identify any evidence to this effect. Similarly, although the defendants submit Mr. Schofield was an employee of Cornerstone, they offered no evidence of that either (relying instead on *Mr. Kirkpatrick's* evidence that Mr. Schofield was a Cornerstone employee) and yet they are presumably in the best position to provide evidence on the issue. Oddly enough, it is only Mr. Kirkpatrick who says Mr. Schofield was an employee of Cornerstone. Although Ms. Darcel deposed that Cornerstone and Linwood were distinct businesses, she is surprisingly unforthcoming about Mr. Schofield, not even mentioning him in her affidavit. Further, she does not explain why Mr. Schofield's name appears as the "sales rep" on the first page of Linwood's final construction plans for the subject home.

**172**  This absence of evidence on this issue seems very telling. Given the discussions as outlined by Mr. Kirkpatrick, the close relationship between Cornerstone and Linwood, the representations made by Mr. Schofield about the nature of Linwood's design process and the admission by Ms. Darcel that Linwood's design process did, in fact, take into account site-specific issues, I conclude that Mr. Kirkpatrick's evidence on this point should be accepted. I therefore find that Mr. Kirkpatrick was told the Linwood design that was to be used by Cornerstone in the construction of the house was a site-specific design that was to take into account issues and conditions specific to the location where the house was to be built.

**173**  I agree with the defendants that the "entire agreement" clause means that the representations about site-specific design cannot be used as a basis for the breach of contract claim against Cornerstone. It has no bearing, however, on the ***negligence*** claims against Linwood.

**B. Mr. Ohlhauser's Relationship with Linwood**

**174**  This is an issue because the defendants argue that Mr. Ohlhauser provided engineering services for the retaining wall as a consulting engineer, through his own firm, and not as an employee of Linwood.

**175**  Both Mr. Ohlhauser and Ms. Darcel agree that Mr. Ohlhauser was employed by Linwood from 2005 to 2008 and that his duties included structural engineering services. Mr. Ohlhauser said all employment income was paid to him personally by Linwood and Linwood issued T4 slips to him personally and issued a record of employment to him when his employment ended. He said that although he had formed his own business (Millennium Engineering Services) by 2005, during the time he was employed by Linwood he did not do any work through Millennium and any engineering work he did was done as an employee of Linwood.

**176**  The defendants' evidence on this point consists of: (1) Ms. Darcel's assertion that Mr. Ohlhauser "did not do any engineering work for Linwood for the home"; and (2) a document, attached to the affidavit of Ms. Steinmann, which appears to be an invoice from Millennium to Cornerstone for the engineering work on the retaining walls. The defendants also point to the retaining wall drawings prepared by Mr. Ohlhauser, which have "Millennium Engineering Services" printed on them.

**177**  Mr. Ohlhauser provided an explanation for the latter. He said Ms. Darcel told him the building inspector for the subject property needed proof of insurance for the retaining wall engineering work. Linwood did not have insurance for engineering work and, at that time, he maintained his professional insurance in the name of Millennium. Mr. Ohlhauser said Ms. Darcel asked him to issue the designs for the retaining walls on behalf of Millennium for insurance purposes on the project.

**178**  The evidence concerning the invoice from Millennium to Cornerstone is somewhat enigmatic. Ms. Steinmann simply appends the document without any explanation. Ms. Steinmann does not say that the invoice was actually paid, which is a telling omission given that this has been an issue between the parties from the outset of the case and that Ms. Steinmann, as Cornerstone's controller, would reasonably be presumed to have this information available to her. Also, the invoice does not have anything on its face that indicates it was paid. Ms. Steinmann also appends a document entitled "job cost report" for the project showing the Millennium invoice as one entry, but she does not indicate whether the "job cost report" is anything other than a device for internal cost tracking purposes.

**179**  The plaintiffs point out that these documents were not produced by the defendants until December 2014, with no explanation for the delay in disclosure, and they subsequently resisted the plaintiffs' requests for further discovery on them.

**180**  I agree with the submission of the defendants that Ms. Darcel's credibility on this point did not hold up well in light of her examination for discovery evidence. At that examination, conducted in 2012, Ms. Darcel admitted that she had no knowledge of who prepared the retaining wall drawings, yet in her 2015 affidavit she asserted positively and unequivocally that neither Mr. Ohlhauser nor Millennium did any engineering work for Linwood for the home. Another aspect that did not reflect well on Ms. Darcel's credibility was the assertion in her affidavit that Mr. Ohlhauser was hired as the quantity survey manager at Linwood, whereas the actual letter she wrote to Mr. Ohlhauser at the outset of his employment confirmed that his position was *engineering* and quantity survey manager.

**181**  I agree as well that the scenario posited by the defendants is not very likely. I would have to accept that Linwood hired Mr. Ohlhauser to provide, among other things, in-house engineering services as a staff engineer, but that Linwood also allowed him to do engineering work on a Linwood-designed home and to bill for it separately. Such an arrangement is possible, I suppose, but had such an arrangement been in place I would have expected it to have been spelled out in the employment engagement letter and also expressly deposed to by Ms. Darcel or another Linwood representative. Neither was done here.

**182**  I conclude that I am able to find the facts necessary to decide this issue. Ms. Darcel's assertions are very general in nature and stand in contrast to the very specific evidence of Mr. Ohlhauser. Her assertions do not stand up well in light of her admission she had no knowledge who prepared the retaining wall drawings. Finally, it seems to me to be telling that important information relevant to the issue, information within the knowledge of only Ms. Darcel and Ms. Steinman ? was the Millennium invoice ever actually paid? ? has been left out.

**183**  For these reasons I accept Mr. Ohlhauser's evidence that the engineering work he did relating to the retaining walls was done as an employee of Linwood.

**C. The Roof**

*The Cause of the Water Ingress*

**184**  On this issue, the main point of contention between the parties was whether the plaintiffs had established a factual basis for the plaintiff's expert, Mr. Gallant, to opine on the cause of the leaks.

**185**  As noted earlier, the defendants objected to the admissibility of numerous paragraphs, documents and reports in Mr. Kirkpatrick's affidavits. Many of these form the basis for their current submission that there is no factual foundation for Mr. Gallant's report.

**186**  I discussed these objections in a general way earlier in these reasons. In this specific context the defendants note, for example, that Mr. Kirkpatrick appended to his affidavit various photographs of the house, including photographs of ice damming, and was not the actual photographer who took the pictures. They also note that one of the events of leaking water was reported to Mr. Kirkpatrick and so his account of that event is inadmissible hearsay.

**187**  Ultimately, however, what must be remembered is that Mr. Gallant's report is opinion evidence. To the extent that underlying facts are not proven, that goes to the probative value, or weight, of the opinion and it does not render the opinion inadmissible. I am, however, satisfied that there is a factual foundation for Mr. Gallant's opinions. Mr. Kirkpatrick deposed that he first noticed leaks in late 2007. Photographs were taken of the snow accumulation and water ingress damage. The photographs may not have been taken by Mr. Kirkpatrick personally but there is no suggestion that they are anything other than photographs of the subject house. Mr. Kirkpatrick noticed some damage himself and other leaks were reported to him. That information was provided to Mr. Gallant and subsequently Mr. Gallant attended at the site on July 25, 2008 and made observations of his own. In particular, Mr. Gallant noted staining in the vicinity of the dormers and, specifically, in the vicinity of three or four dormers, as he recalled, "directly related to where I would expect ice damming to be".

**188**  Accordingly, I am satisfied that Mr. Gallant's report is based on admissible evidence including, importantly, his own observations of the house, made while he visited the site.

**189**  The defendants' expert evidence on this point comes from Lynn Trott and Robert Wills.

**190**  Mr. Trott's evidence is highly problematic. His association with Linwood is so close that he is essentially an employee of that company in all but name. His lack of independence was obvious given that he is economically dependent on Linwood and closely aligned with Linwood in other respects. As to the specific issue concerning the cause of the water leaks, he conceded that he was not asked for his opinion on that issue. He said he was told to assume that it was a localized leak in one location only. He also said he had no idea what area was actually affected and he did no investigation of the issue. His lack of independence, together with his answers on cross-examination (more fully summarized earlier), satisfy me that his opinion ought to be accorded no weight.

**191**  The other defence expert, Mr. Wills, agreed that the roof configuration was "undoubtedly... a potentially difficult condition for trapped snow", although he referenced a porch roof and not the space between dormers. He concluded, however, that "any possible leakage" was through "improperly installed base flashings and not through wood siding laps". He disagreed that water was being driven up into the soffits. He speculated about condensation or window leakage being the cause, and recommended monitoring for five years to see if these were the sources of the incoming water.

**192**  In reply, Mr. Gallant said metal flashings alone will not prevent leaks as all metal flashings leak at their joints. Metal expands and contracts and so metal flashings will leak at seams and termination points. Mr. Gallant said Mr. Wills' recommendations addressed a proper strategy for ordinary rain water but not for water associated with ice damming. Here, he said, the configuration of the dormers traps "a vast amount of snow" and so waterproofing had to extend up the dormer walls to prevent leaks.

**193**  I found Mr. Gallant's evidence much more convincing than that of Mr. Wills. I also found Mr. Gallant's experience in building envelopes and building envelope failures was much greater than that of Mr. Wills. In his curriculum vitae Mr. Wills did not list any building envelope experience at all, a matter which stood in contrast with Mr. Gallant's considerable experience in that area.

**194**  Mr. Wills did not observe the evidence of leaks, as Mr. Gallant did, because the roof was already repaired at the time of his attendance. He did not ascertain or confirm the likely source of the water leaks and instead said that an investigation ought to have been done to confirm the source of the water as it might have been from such other sources as internal condensation or leaks from windows. He conceded he did not have "any specific knowledge of what the exact issue was on the specific dormers". Importantly, he did not address, or adequately address, the significant amount of snow that the pre-repair photographs show accumulates between the dormers.

**195**  I am satisfied that Mr. Gallant made adequate investigations and observations in order to ascertain the source of the leaks. Because of that, and for all of the reasons just expressed, I find Mr. Gallant's opinion evidence to be preferable to that of Mr. Wills.

**196**  The defendants note that one of Mr. Gallant's assumptions was that the level of roof insulation was adequate. The defendants point to the evidence of the contractor, Mr. Ewert, who when carrying out the roof repairs noticed that insulation in the roof areas was not cut properly, leaving voids, such that, in his view, "there was a major issue with heat loss". I pause to note that while the defendants were very quick to object to any statement in the plaintiffs' affidavits that had even a hint of opinion about them, they saw no difficulty (or inconsistency) in relying on this statement of Mr. Ewert.

**197**  In any event, based on the evidence ? and opinion ? of Mr. Ewert the defendants submit that Mr. Gallant's assumption that the insulation was adequate means that his report ought to be rejected.

**198**  This might well have been an important point, but I observe that the defendants did not put this issue to Mr. Gallant in cross-examination in any direct or fair way. It arose only in the context of a question about the roof colour:

Q: Now, the roof on this building was a dark brown colour; correct?

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

Q: And based on what you've just said that could be a factor contributing to ice damming?

A: That is a key cause of ice damming. It is snow melting typically because of sunlight sometimes exacerbated by heat loss throughout the home. Cathedral ceilings are more prone to that because there is not a temperature difference between the attic and the exterior air. But essentially that is what causes it. Primarily sun, but also heat loss from the home.

Q: So in your opinion the dark colour of the roof caused ice damming?

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | No, it's a contributing factor. |  |

**199**  If the defendants felt that Mr. Gallant's factual assumption about insulation was so fundamental to his opinion that the failure of that assumption should result in the rejection of his report then they were bound to put that to him, and to put it to him in a much more direct way than by asking about roof colour. They did not do that. In light of the failure of the defendants to put this issue to Mr. Gallant in cross-examination I am unable to accede to their submission that his report be rejected.

**200**  It is nonetheless clear that heat loss can be a factor in ice damming and, given Mr. Ewert's evidence about insulation, I conclude it was a factor here. It does not mean, however, that the configuration of the dormers is irrelevant. Mr. Gallant's evidence is that the leaks occurred because excess snow accumulating between the dormers melted and then froze, creating ice dams that crept up the water-vulnerable dormer walls. Radiant heat from the sun on the roof or heat lost from inside the home might be the cause of the melting as would, presumably, any outside temperatures above freezing. It was a combination of factors that created ice-damming on the roof, two of which were the close configuration of the dormers and the failure to waterproof sufficiently in the areas where snow would be expected to, and did, congregate.

**201**  In short, I accept Mr. Gallant's opinion as to the cause of the leaks.

*Standard of Care*

**202**  Mr. Gallant said:

1. a prudent and reasonable designer would not have designed a roof with dormers in close proximity in a heavy snow load climate. However, when doing so, a designer would have designed appropriate detailing around the dormers to anticipate ice dams and their resulting risk of leaks;
2. the design provided by Linwood did not meet the standards of a reasonably prudent designer for a home to be built in the Barriere Lake region because it did not adequately design the dormer to roof interface details;
3. a prudent and reasonable builder needs to be familiar with the climate where a project is built, and familiar with the configuration and detailing required to resist local climatic loads. For the subject site a prudent builder would anticipate the risk of snow accumulation and resulting ice-damming caused by the roof configuration, and either contact the designer for further instruction, or detail the roof-to-dormers intersections to accommodate the risk of ice-damming and resulting leaks by extending the waterproofing;
4. the construction of the roof did not meet the standards of a reasonably prudent home builder for a roof in the Barriere Lake region. Roof construction, in any climate, is expected to prevent moisture ingress into finished space. Accordingly, roofing practices vary depending on the climate. A home builder should be familiar with what roofing practices are suitable for the climate at a given location. A reasonable and prudent home builder follows the design drawings and specifications, however, must always apply his/her own knowledge and experience to supplement the design. A reasonable and prudent home builder would have known to improve the interface details at the dormers to reduce risks of leaks from ice-damming.

**203**  This opinion evidence was not addressed by the defence experts. Mr. Trott did not address standard of care. It was addressed indirectly by Mr. Wills only insofar as he had differing views on the cause of the leaks. He also suggested that there was no inherent problem with having dormers close together, stating that "dormers that are properly waterproofed at exterior walls do not leak", an observation that appears to be entirely consistent with Mr. Gallant's opinion insofar as Mr. Gallant's recommended "fix" did not involve the removal or alteration of the dormer structures but instead recommended additional waterproofing to deal with the problem of ice damming created by the close configuration of the dormers.

**204**  The building contract required Cornerstone to build "to the standards of workmanship required by established industry practice". Mr. Gallant's opinion evidence, which I accept, satisfies me that Cornerstone failed to perform to that standard. In particular, Cornerstone failed to take steps to address the risk of snow accumulation caused by the close proximity of the dormers, either by requesting an augmentation of the design or by taking steps on its own initiative to extend the waterproofing in vulnerable areas. Cornerstone breached the contract in that respect. Those same breaches also constituted ***negligence*** on Cornerstone's part.

**205**  I turn now to the ***negligence*** claim against Linwood. The evidence satisfies me that Linwood's designs were not "off the shelf" designs but instead were "site specific" designs, as Ms. Darcel admitted. While there was some disagreement about what that meant, the evidence satisfies me that, at the least, it meant the design took into account local weather conditions, as evidenced by Linwood's recommendations to install a metal roof and to delete certain porches from the standard design, both due to the snow loads in the area.

**206**  I am satisfied that there was a relationship of proximity between Linwood and Globalnet such that Linwood owed Globalnet a duty of care in the design of the house. Based on Mr. Gallant's opinion, which I accept, Linwood did not meet the standard of care in several important respects, as detailed earlier.

**207**  Accordingly, I am satisfied that the plaintiffs' claim in ***negligence*** has been made out against Linwood for the deficiencies in its roof design and detailing, and against Cornerstone, both in ***negligence*** and breach of contract, for its failure to improve the interface details at the dormers.

*Duty to Warn*

**208**  There was very little said about this claim. The plaintiffs dealt with it only in their reply submissions. They said Linwood had an obligation to warn Mr. Kirkpatrick about the risks associated with closely-spaced dormers in high snow load conditions.

**209**  I am not satisfied this claim has been established. There were risks associated with closely-spaced dormers, but as Mr. Gallant noted, those risks could be addressed by additional protective steps. I am not satisfied that the close configuration of the dormers, in and of themselves, carried with them a duty to warn.

*The Roof Repairs*

**210**  Following his inspection of the home in July 2008 Mr. Gallant made recommendations for the repair of the roof. He said:

... I recommend that sections of the metal roofs and valleys be removed, sheathing be installed, self adhering water proofing membrane be installed positively lapped with the roofing underlayment paper and valley flashing, and metal roofing reinstalled.

**211**  At that time Mr. Gallant also noted that, following completion of the roof repairs, repairs should be also carried out to the damaged interior gypsum board under the dormers.

**212**  As noted earlier, Globalnet subsequently engaged Mr. Gallant's firm (MHL) to prepare a formal plan for the roof repairs, that plan was provided in September 2008 and Globalnet subsequently retained Mr. Ewert to carry out the work. Mr. Ewert confirmed that he carried out the work in accordance with MHL's recommendations. A representative of MHL attended at the site at one point to assess the work done to date.

**213**  The defendants argue that it was not necessary to essentially re-roof the entire house. They also submit that there is an element of betterment in the repairs.

**214**  The plaintiffs respond by saying that the defendants' argument essentially amounts to a submission about what the plaintiffs' damages *ought* to have been, not what they actually were, as part of an argument that the plaintiffs have failed to mitigate damages. The plaintiffs submit that their obligation is to act reasonably, which they say they have done by engaging experts to advise them and by following their experts' recommendations.

**215**  The plaintiffs also note that the defendants were given the opportunity to assist in the evaluation and remediation of the problems with the roof and retaining walls but the defendants declined to participate in any way.

**216**  Both Mr. Trott and Mr. Wills said that the extensive repairs undertaken on the recommendation of MHL were not needed. Both Mr. Trott and Mr. Wills suggested some very limited interventions.

**217**  Mr. Trott recommended some limited removal of the roof cover and placement of a water shield or membrane in the exposed areas. He felt the area involved could be as small as 75 sq. ft. and as great as 250 sq. ft. He thought the cost of this would range between $3,500 and $9,000.

**218**  Mr. Wills also viewed the repair work done to the roof as being excessive. He too said the opening up of the existing roof was not necessary and should instead have been confined to the very few areas that seemed to be the source of the leaks.

**219**  For the reasons expressed earlier, I am not able to accord Mr. Trott's opinion any weight. He is, as I said, an employee of Linwood in all but name. His connection to Linwood is too close to have any confidence in his independence. His report is also based on the assumption that there are a few minor leaks in the roof of unidentified cause and origin (in fact, in cross-examination he said he was told to assume that it was a localized leak in just one location), which is not what Mr. Gallant found and which I have accepted. Mr. Trott's estimated repair costs are not substantiated in any way other than through general statements that they are based on "three other projects in thirty years" and "relying on labour and material costs generally in place at the relevant period of time". This is superficial in the extreme. I conclude I cannot place any weight on Mr. Trott's opinion on what should have been done by way of roof repairs.

**220**  Mr. Wills similarly opines that the extensive roof repairs carried out were not warranted. He notes that only two locations, each two feet long, were "hypothesized" as potential leaks. He appears to conclude that only ten square feet of dormer walls was "confirmed as leaking due to poor workmanship". In further answer to the question whether the more extensive repairs were necessary he said:

No, only minor repair work was required to open up affected drywall areas and locate the specific source of interior condensation moisture or exterior snow melt leakage where specified air barriers may have been breached through poor workmanship.

**221**  Mr. Gallant noted that there was no evidence of condensation or window leakage at the house. He reaffirmed that ice damming was the cause.

**222**  Mr. Wills' opinion is based on a premise about the cause of the leaks that I have rejected. For that reason I am unable to accept his opinion that the repair work that was carried out was excessive.

**223**  I turn now to betterment. I agree that there was betterment due to the installation of: (1) additional venting (the "whirlybird" vents); and (2) rain gutters and downspouts. The cost of the latter was $2,310. The cost of the former was not specified. I conclude that $500 would be a reasonable sum for the latter, based on the material cost (about $140) and an allowance for labour, freight, etc. Accordingly, I conclude that the actual cost to repair is $84,287.05 ($87,097.05 - $2,810.00).

**D. The Retaining Walls**

*The Cause of the Problem*

**224**  I have considered the reports of the various experts at some length. This close scrutiny reveals that, in contrast to every other issue in this case, there was not a great deal of direct disagreement on the cause of the failure.

**225**  Both of the geotechnical engineers, Mr. Bosdet (for the plaintiffs) and Ms. Savage (for the defendants), agree that the backfill used behind the retaining walls was not suitable because it drained poorly and was susceptible to frost. Neither commented on the structural aspects of the retaining walls.

**226**  Mr. Wills, the defendants' structural engineer, also saw the problem as a drainage and backfill problem, though it is telling that he did not comment on the adequacy of the Ohlhauser design. He merely said the wall "performed as designed" without actually commenting on the design itself. He also confirmed from his personal inspection that the walls had been constructed in accordance with the Ohlhauser design.

**227**  Mr. Chakrabarti, the plaintiffs' structural engineer, said the Ohlhauser design was flawed in several respects: (1) the reinforcing steel did not go full height, only half-height (which is where the wall cracked); (2) the reinforcing steel was shown in the drawings on the wrong side of the wall; (3) the footing reinforcement was specified at the wrong location; and (4) the design engineer (Mr. Ohlhauser) did not specify the type of backfill to be used, as he should have.

**228**  On that latter point Mr. Wills said much the same thing:

Although it may have been assumed that the native backfill would also be free draining, this was not clearly specified on the retaining wall drawing.

**229**  Mr. Chakrabarti's opinion was not contradicted by any defence expert. The defendants presented various reasons why his opinion ought not to be accepted, but I find no merit in any of those arguments.

**230**  The experts raised other factors. Mr. Chakrabarti said weep holes were apparently not placed in the walls and, based on other reports he had seen, the drain tile was installed poorly. Mr. Wills also mentioned the absence of weep holes. Both Mr. Wills and Ms. Savage criticized the wrapping of the PVC drain pipe in filter fabric. In his cross-examination Mr. Bosdet added that it would be good practice to install outfalls for the downspouts in order to get water away from the walls, though he did not suggest this was itself the cause of the failure.

**231**  No expert identifies any one problem, to the exclusion of the others, as being the cause of the retaining wall failure. Mr. Chakrabarti concluded that the wall failed because of deficiencies in design *and* due to deficiencies in construction. In these circumstances it is fair to conclude that the failure of the walls was caused by a combination of the causes identified by the experts. Accordingly, I am satisfied that the retaining walls failed because: (1) the walls and footings were not designed properly; (2) the engineer failed to specify properly-draining backfill; (3) the contractor failed to question the suitability of the native soil as backfill; (4) the contractor failed to question the fact that the reinforcing steel did not go to the full height of the walls or that the reinforcing steel for the footings was at the wrong depth; and (5) there were likely other contributing factors, including the omission or misplacement of weep holes, the possibly inadequate drainage pipe construction and the wrapping of the drain pipe in filter fabric.

***Negligence*** *and Breach of Contract*

**232**  Mr. Chakrabarti addressed the standard of care of both the engineer who designed the retaining walls (Mr. Ohlhauser) and the contractor, finding that the former failed to meet the standard of a reasonably prudent engineer and the latter failed to meet the standard of a prudent and experienced contractor. This opinion was not challenged through any opposing report.

**233**  Accordingly, I conclude that Linwood, as Mr. Ohlhauser's employer, is liable in ***negligence*** for the substandard design of the retaining walls, and Cornerstone is liable for breach of contract for the substandard work of its contractor.

*The Solution to the Problem*

**234**  This was the primary issue between the experts.

**235**  Mr. Chakrabarti considered the various options and concluded that the most direct and economical solution was to construct new walls of proper design. Mr. Wills said the removal and replacement of the original retaining walls was not the most direct, economical solution. Instead, he said it was possible to jack the top portions of the walls back to vertical and then reinforce the highest portions using fibre-reinforced plastics or buttress walls.

**236**  The geotechnical experts also weighed in. Ms. Savage said "other, more cost effective options would have been suitable", although she did not cost out any of the options. She also added the caveat that her suggestions were contingent on structural aspects being accommodated, a logical limitation given that she is not a structural engineer. Mr. Bosdet said much the same thing. He too mentioned possible mitigation options (tiebacks or a counterfort system) but, in similar fashion to Ms. Savage, he said the structural integrity of the existing concrete wall would have to be assessed by a structural engineer. Mr. Bosdet noted, however, that complete replacement might prove more cost-effective.

**237**  Only one of the engineers (Mr. Trott) costed out any of the alternatives. Mr. Trott said the situation could have been remedied for about $45,000 per wall, plus taxes. The "fix" on which this estimate was based was the replacement of the backfill with non-shrinkable fill and the jacking of the walls back to vertical. In providing this cost estimate Mr. Trott purported to rely on Ms. Savage's recommendation, but her recommendation was contingent upon input from a structural engineer and the defendants' own structural engineer, Mr. Wills, did not endorse this method. Instead, Mr. Wills said that portions of the walls would have to be reinforced by tension straps or buttress walls. Those measures are not dealt with in Mr. Trott's estimate.

**238**  For the reasons given earlier I am unable to accord Mr. Trott's views any weight. I also find Mr. Trott's estimate of little use given that he did not provide an estimate for the work as actually recommended by Mr. Wills. He also conceded in cross-examination that his estimate was based on the assumption that Mr. Ohlhauser's original wall design was sufficient.

**239**  I also note that the evidence shows that an *accurate* cost analysis would require that proper designs be prepared for each option, a substantial task in itself, in order to provide a proper and defined basis for an accurate estimate. Perhaps understandably, this was not done by any of the engineers, including Mr. Trott.

**240**  For all of those reasons I do not accept Mr. Trott's estimate of the cost of a possible wall repair option.

**241**  I observe as well, as Mr. Chakrabarti noted, other mitigation options would have involved the realignment of the existing walls in some fashion (by jacking, for example) and this in itself would cause damage to the walls. The extent of that damage and the cost to repair it seems to be something of an unknown factor. Mr. Chakrabarti said that fixing this damage would be expensive. Other methods therefore involved some risk.

**242**  The reasonableness of the plaintiffs' actions is also a factor here. Mr. Kirkpatrick deposed that in the summer of 2010 MHL told him their opinion was that the retaining walls had failed entirely. He said MHL recommended that the existing walls be demolished and removed and new walls be constructed using a different design. Mr. Kirkpatrick sought a second opinion from another structural engineer, Andrew Watson of Watson Engineering Ltd. Mr. Kirkpatrick deposed that Mr. Watson agreed that the existing walls should be demolished and replaced with new walls and backfill.

**243**  The defendants dispute that these opinions were sought or given. They say the plaintiffs have provided no corroboration of Mr. Kirkpatrick's evidence. I note, however, that by the same token the defendants have not shown Mr. Kirkpatrick's statements to be false or otherwise incorrect. On that point I note the defendants had the opportunity to test Mr. Kirkpatrick's evidence by examining him for discovery and to test the evidence of the plaintiffs' experts (Mr. Bosdet, Mr. Gallant and Mr. Chakrabarti) through cross-examination by deposition.

**244**  Resort to the relevant discovery transcript shows that Mr. Kirkpatrick was asked about a string of emails between himself and Mr. Watson. That email string confirms that in August 2010 Mr. Watson expressed the preliminary view that "there is a significant issue" with the wall and that "it will probably be a couple more weeks before I can prepare a more formal assessment and report backed by appropriate engineering calculations". This is confirmatory of Mr. Kirkpatrick's evidence that he sought Mr. Watson's opinion, and Mr. Watson's email suggests one was going to be given. The defendants complain that they have never seen a report from Mr. Watson but they did not say there was, in fact, a written report or refer to any request they might have made that it be produced. This was a matter for discovery. Possibly there was no written report. In any event, nothing has been referred to on this summary trial that demonstrates Mr. Kirkpatrick's evidence was incorrect, and the limited evidence referred to is confirmatory of his evidence.

**245**  The defendants also assert that the plaintiffs obtained a contrary opinion from Golder Associates in June 2005. They say Pavol Oblozinsky of Golder Associates told Mr. Kirkpatrick that "the most feasible solution was installation of counterforts and backfill not susceptible to frost". The defendants had reproduced Mr. Oblozinky's email in full earlier in their written submissions but this particular assertion is a misstatement of the evidence.

**246**  A review of the actual email shows that Mr. Oblozinsky, a geotechnical engineer with Golder Associates, conveyed to Mr. Kirkpatrick what he described as his "preliminary comments on the wall". He said:

Both walls are damaged *but I cannot comment on structural integrity of walls*. If walls are properly reinforced they probably could be repaired.

...

*If* walls are reinforced then probably the most feasible solution is to construct concrete counterforts ...

[Emphasis added.]

**247**  Clearly, Mr. Oblozinsky's comments were not only preliminary, they were also contingent on further investigation, in particular as to structural integrity of the walls.

**248**  The defendants were invited to be part of the solution but they declined to be involved. In these circumstances, their objections to the plaintiffs' retaining wall remedial measures give the impression of an armchair quarterback analyzing a game that has already been played and saying how he would have done better.

**249**  I conclude that the measures that Globalnet took to ascertain the correct approach to address the problem with the retaining walls were reasonable in all the circumstances. I find as a fact that not only did they seek expert advice about remedial measures, they also obtained a second opinion from a structural engineer. The uncontradicted evidence is that both opinions were consistent in saying that the existing walls had to come down.

**250**  Other remedial options involved an element of risk and their likely cost is unknown. So even if I had concluded that other options *might* have been less expensive there is no basis on which I could reasonably conclude what that lesser cost might have been.

*Excessive Costs & Betterment*

**251**  The defendants submit that the costs of repairing the retaining walls are excessive, both in general and in a variety of specific respects. They point out that the claimed sum of $521,887 is vastly out of line with the contract amount of about $90,000 for the building of the original walls. They also say that the cost of repairs includes items not related to the repairs as well as cost items associated with doing much of the work in winter conditions. They say the unrelated items include the repair of a spa, the installation of a satellite dish, an irrigation system, plumbing repairs, a new reinforced concrete stairway, landscaping, a power pole, a lock box and a new pressure tank.

**252**  The plaintiffs answer some of those claims. They note that the spa repair was the repair of a cable that was damaged during the retaining wall reconstruction. The satellite dish was related to the roof repairs because it had to be removed and then re-installed. The work on the irrigation system and the landscaping were both required because the existing system and landscaping were dug up during the retaining wall work.

**253**  The plaintiffs concede that the stairs were a new item and should be deducted. This was conceded at $36,000.

**254**  I agree that the amount claimed seems a very high amount even after taking into consideration that the new walls were much sturdier than the original walls. On that latter point, Mr. Ewert, in his cross-examination in court, said the new walls added size and width, the footings were bigger, and there was more reinforcing steel used. Of course, there was also additional work (as compared to the original walls) insofar as the old walls were demolished and the wall material removed. The invoices indicate charges totalling perhaps $40,000 for that work. There were also significant professional fees (about $24,000) incurred as part of the assessment of the problem and the design of the new walls. So to some extent it makes sense that the cost of the new retaining walls would be substantially more than the cost of the original walls.

**255**  I agree that some of items are outside the scope of actual repair or replacement of the retaining walls. I also agree that it is not reasonable to include the extra cost associated with doing the work in winter.

**256**  Having examined Mr. Ewert's invoices in some detail, I consider that $15,000 would be a reasonable deduction for such unrelated matters as plumbing repairs, lock boxes, the installation of a power pole and that portion of the irrigation system relating to the front of the house, which ought to have been unaffected by the excavation at the rear. Doing the best I can on the basis of the available evidence I conclude that the decision to have work done in winter added $35,000 to the overall cost. Doing the work in winter required the use of rented propane heaters, the running of propane lines for those heaters (with significant plumbing/gasfitting costs), the purchase and use of hoarding, snow removal, and extra labour for all of those things.

**257**  In summary, I would deduct sums totalling $86,000 from the claimed amount, which results in a net figure of $435,887 for what I consider to be the reasonable costs of redressing the failed original retaining walls.

**E. The Encroachment**

**258**  The plaintiffs assert that "Cornerstone and/or Linwood" were responsible for obtaining all necessary permits and surveys in order to carry out the work on the property. This is based on Mr. Kirkpatrick's affidavit evidence, which is really just an assertion as he does not set out evidence from which an agreement might be found or inferred. In making that assertion Mr. Kirkpatrick refers to excerpts from Linwood's web page and an email sent by Cornerstone to Mr. Kirkpatrick in October 2005, which attached a survey showing the siting of the house on the property.

**259**  The Linwood web page says "Linwood site specific design considers the following variables: ... Zoning / Architectural guidelines / Access / Setbacks".

**260**  The defendants note that the web page referred to by Mr. Kirkpatrick was not in place until 2007, well after the fact. They submit that there was no contractual obligation for Cornerstone to do any surveys and there was no contract at all with Linwood. The mere fact that Cornerstone sent Mr. Kirkpatrick a copy of a survey does not establish that Cornerstone or Linwood had the obligation to carry out surveys of the property. Finally, the defendants submit there is no admissible evidence that there actually is or was an encroachment.

**261**  I am satisfied that there is admissible evidence that one of the retaining walls encroached on the neighbouring property. I agree with the plaintiffs' reply submission on this point.

**262**  Establishing responsibility for surveying the property is a much more difficult issue. Mr. Kirkpatrick's evidence about Linwood's web page, which was created after the events in question, does not establish an obligation. Neither does the survey that was attached to an email. As to the latter, that survey, forwarded by Cornerstone in October 2005, indicates that a site survey was done. There is no evidence why it was done or who commissioned the survey. It shows only the footprint of the house and does not address the retaining walls. It might have been commissioned as part of the permit process (for which Cornerstone was responsible) but this is only supposition on my part as there is no evidence of this. I would add that there was no evidence at all about permits or inspections, which perhaps might have revealed more about what happened here and who was responsible.

**263**  On its face, the contract between Globalnet and Cornerstone excludes responsibility of Cornerstone for surveys. Under the contract heading "Adjustments" there is a list comprising eight items (including unrelated matters such as "utility connection" and "liability insurance"), as follows:

Contractor will be responsible for ... permits \_\_\_ surveys \_\_\_\_

**264**  "Permits" is checked; "surveys" is not. From this I conclude that Cornerstone was not responsible for surveys under the terms of the contract. The change order that added the retaining walls did not mention anything about surveys. It also included a term that "in all other respects the contract ... is confirmed". So the change order did not impose a surveying obligation on Cornerstone either.

**265**  It is indeed a puzzle as to how a builder could construct a retaining wall that encroached on neighbouring property. Obviously something went seriously wrong here. It is very tempting to conclude that the builder (Cornerstone) had to have been at fault in some way. Even if the builder itself had not done a survey in advance of the construction of the retaining walls and was not contractually bound to do so, one might expect that Cornerstone would have seen fit to remind the owner that a survey was needed. However, this is not a case where *res ipsa loquitur* applies and so there must be proof, and here the proof is wanting. The evidence simply does not reveal how it happened that the retaining wall was built where it was or, to put it in the vernacular, who dropped the ball on this issue.

**266**  The plaintiffs have not established that either Cornerstone or Linwood were under an obligation to survey the property. Accordingly, the plaintiffs have not established liability for the encroachment.

**XII. Damages**

**A. Damages in Contract**

*Positions of the Parties*

**267**  The plaintiffs submit that the proper measure of damages is the cost to remedy the defects. They acknowledge that the authorities also say diminution of value is another measure of damages that may be used, but they say the issue turns on the facts of each case and submit that where, as in this case, the structure is a residence and repairs have actually been carried out, the proper measure is the cost to remedy, provided that the wronged party has acted reasonably to mitigate damages arising from the breach.

**268**  The defendants cite the same or similar authorities, but note that the cost of remediation is not the default position for an award of damages for breach of contract. In cases where the cost of remediation is unreasonable or oppressive the preferable measure of damages is diminution of value. Here, in addition to arguing that the costs of repair are largely unproven, the defendants say the decision to reconstruct the roof and retaining walls was unreasonable and unnecessary. Other, more reasonable options were available. Accordingly, diminution of value is the proper measure of damages in this case but, here, the plaintiffs have led no evidence on diminution of value and therefore have not provided proof on which damages could be awarded.

*Legal Principles*

**269**  The parties did not disagree on the legal principles applicable to the assessment of damages for breach of contract in construction cases, as both cited *514953 B.C. Ltd. dba Gold Key Construction and Chiu v. Leung*, [*2007 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S40R-00000-00&context=). That case concerned a contract for the construction of a house. The house was completed, but the owner complained of deficiencies, which the trial judge found would cost about $7,000 to remedy. The owner had taken few, if any, steps to remedy the deficiencies and the trial judge noted there was no evidence he intended to do so. The cost to remedy would exceed any diminution in value, and so the trial judge concluded the owner had shown no loss.

**270**  The trial judgment was upheld on appeal. The Court of Appeal provided a useful analysis of the law, as follows:

[11] This case throws up a problem that arises not infrequently in these construction cases and is one that has admittedly no easy solution because facts differ so much from case to case. The essential question is: how should a court determine damages in a case of this sort? Running through the decided cases are two sometimes disparate principles from the law of contract. One principle is that the party who suffers from a breach of contract is entitled to be put back into the position he or she would be in if the contract had been performed according to its tenor. But that consideration is always to be balanced against another principle in this area of the law, namely, that a person who suffers damage by reason of a breach of contract is bound to act reasonably to mitigate damages arising from the breach.

**271**  The court referred to several authorities that generally confirm that there is no rigid rule. The court then quoted extensively from two English cases, *Radford v. de Froberville*, [1978] 1 All E.R. 33, [1977] 1 W.L.R. 1262 (Ch. D.) and *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1996] A.C. 344 (H.L.) [*Ruxley*]:

[13] Two cases from the English courts referred to by counsel in argument contain most helpful discussions on this issue. Those cases are *Radford v. de Froberville*, [1978] 1 All E.R. 33, [1977] 1 W.L.R. 1262, a decision of Oliver J. when he was in the Chancery Division, and the more recent case of *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1996] A.C. 344, [1995] H.C.L. No. 26 (QL), a judgment of the House of Lords. ... In the *Radford* case ... Oliver J. said, at 40:

As to principle, I take my starting point from what, I think, is the universal starting point in any enquiry of this nature - that is to say, the well-known statement of Parke B. in *Robinson v. Harman*, which is in these terms:

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

He went on to say, at 41-42:

One of the difficulties about any question of damages is that there are so few general principles and that such as there are have, at times, been expressed in ambiguous and even contradictory terms. The matter was well expressed by Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*:

In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonize. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. ...

...

There is, I think, a danger in elevating into general principles what are in truth mere applications to particular facts or situations of the overriding general principle as enunciated by Parke B.; and on more than once occasion attention has been drawn to the undesirability of the application in this area of rigid rules or practices ...

[14] In the *Radford* case, Oliver J. found that, because he was entirely satisfied that the plaintiff intended to carry out the work that had been contracted for, the plaintiff was entitled to damages equal to the amount needed to build the wall in the substantial fashion that had been contracted for in the original agreement. He found that the plaintiff was entitled to, so far as money could do so, be placed in the same position as if the contract had been carried out according to its terms.

[15] The case of *Ruxley Electronics and Construction Ltd. v. Forsyth* is an exemplar of the other approach, the approach ultimately adopted by the trial judge in the case at bar. ...

[16] The Court of Appeal, by a majority, allowed the appeal and awarded the householder damages based on the cost of demolition and reconstruction. The House of Lords restored the judgment of the trial judge. Lord Jauncey gave the leading judgment in the House of Lords. I find helpful the following passage from his judgment, at 357-58, as a statement of principle:

In *Bellgrove v. Eldridge* (1954) 90 C.L.R. 613, 617-618, the High Court of Australia in a judgment of the court after referring with approval to the rule stated in *Hudson on Building Contracts*, 7th ed. (1946), p. 343 stated that:

The measure of the damages recoverable by the building owner for the breach of a building contract is ...the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract...

and referring to a number of cases supporting this proposition continued, at p. 618:

In none of these cases is anything more done than that work which is required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss.

The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.

I take the example suggested during argument by my noble and learned friend, Lord Bridge of Harwich. A man contracts for the building of a house and specifies that one of the lower courses of brick should be blue. The builder uses yellow brick instead. In all other respects the house conforms to the contractual specification. To replace the yellow bricks with blue would involve extensive demolition and reconstruction at a very large cost. It would be clearly be unreasonable to award to the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks. Thus in the present appeal the respondent has acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. His loss is thus not the lack of a useable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.

...

[18] I also find helpful the following observations from the judgment, at 365-67, of Lord Lloyd of Berwick, who wrote a judgment concurring with that of Lord Jauncey:

The starting point is *Robinson v. Harman*, 1 Exch. 850, where Parke B. said, at p. 855:

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to compensate the plaintiff, not to punish the defendant.

This was never more clearly stated than by Viscount Haldane L.C. in the first of the two broad principles which he formulated in *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd*. [1912] A.C. 673, 689:

The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach...

Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a situation financially, so far as money can do it. This necessarily involves measuring the pecuniary loss which the plaintiff has in fact sustained.

In building cases, the pecuniary loss is almost always measured in one of two ways; either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract.

But it is not the only measure of damages. Sometimes it is the other way round. This was first made clear in the celebrated judgment of Cardozo J. giving the majority opinion in the Court of Appeals of New York in *Jacob & Youngs v. Kent*, 129 N.E. 889. In that case the building owner specified that the plumbing should be carried out with galvanized piping of "Reading manufacture." By an oversight, the builder used piping of a different manufacture. The plaintiff builder sued for the balance of his account. The defendant, as in the instant case, counter-claimed the cost of replacing the pipe work even though it would have meant demolishing a substantial part of the completed structure, at great expense. Cardozo J. pointed out, at p. 891, that there is "no general license to install whatever, in the builder's judgment, may be regarded as 'just as good.'" But he went on to consider the measure of damages in the following paragraph:

[2] In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing... It is true that in most cases the cost of replacement is the measure... The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. 'There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable.

Cardozo J.'s judgment is important, because it establishes two principles, which I believe to be correct, and which are directly relevant to the present case; first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award.

[19] In the instant case, the trial judge adopted the diminution of value test. In cases of this sort, which involve the building of a personal residence, it may often be the situation that the appropriate measure of damages will be the sum required to do the work that was originally agreed upon, as was the situation in the *Radford* case. A person building a dwelling house has contracted for a building in which he or she wishes to have installed certain amenities. If those amenities are not contained in the finished structure, the proper measure of damages may well be the sum required to achieve construction of the missing amenities.

[Emphasis added by the Court of Appeal]

**272**  From these comments, the following points emerge:

1. the starting point is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed;
2. it is a relevant consideration whether remedial work has been done or whether the wronged party intends to carry out that work;
3. not only must the remedial work be necessary to achieve the result contracted for but it must also be a reasonable course to adopt;
4. the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained;
5. where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement;
6. in many ordinary cases, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess; and
7. a person building a dwelling house has contracted for a building in which he or she wishes to have installed certain amenities. If those amenities are not contained in the finished structure, the proper measure of damages may well be the sum required to achieve construction of the missing amenities.

*Application of Principles*

**273**  The first step is to ascertain the loss occasioned by the plaintiffs as a result of the breach of contract by Cornerstone. I recognize that the defendants argue that there has been no loss at all given Globalnet's alleged role as a volunteer, but I will deal with that issue later. For present purposes I will analyze the question of loss generally.

**274**  I am satisfied that the plaintiffs (generally speaking) have suffered a loss by reason of the contractual breaches of Cornerstone. They have incurred large sums to remedy the defects in the roof and the retaining walls of the home. In this case there is no issue about whether repairs will ever be done because here they have been done.

**275**  I conclude that the defects in construction were not merely the loss of an esthetic pleasure, as with the hypothetical example given in *Ruxley* of a house built with a section of yellow brick instead of the blue brick specified in the contract. The roof failed in its essential purpose of keeping out water from outside. The retaining walls failed in their essential purpose of retaining the adjoining soil. These were important functional failures, not merely esthetic failures.

**276**  From my earlier discussion I conclude that the remedial work undertaken was reasonable to adopt. The remedial work was expensive, but following a close examination of the experts' evidence I am satisfied that, on the evidence, no reasonable alternatives were shown to be available.

**277**  I am not persuaded by the defendants' submission that the expenditure is out of all proportion to the benefit obtained. The evidence has satisfied me that the expenditure on the roof was necessary to achieve a properly-functioning roof. The expenditure on the retaining walls was necessary to achieve retaining walls that worked as they were supposed to work, without the threat of complete failure into the driveway area or potential damage to the rear area of the house through the loss of support from the retaining walls.

**278**  For these reasons I am satisfied that, on the facts of this case, the proper measure of damages for Cornerstone's breaches of contract is the cost of remediation or reinstatement, which in the case of the roof is $84,287.05 and in the case of the retaining walls is $435,887.00.

**B. Damages in *Negligence***

**279**  The defendants say that the current owners, the Trustees, are "subsequent purchasers" of the subject home, and so there is a limitation on recovery as set out in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [*[1995] 1 S.C.R. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=) [*Winnipeg Condominium*]. In that case the Supreme Court of Canada said:

[43] I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where ***negligence*** is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

[Emphasis added.]

**280**  The defendants submit that the plaintiffs have failed to show that the roof or retaining walls constituted a danger.

**281**  The plaintiffs say the Trustees are not "subsequent purchasers" of the property, and so the *Winnipeg Condominium* limitation on damages does not apply here. Alternatively, they say that if the Trustees are in fact subsequent purchasers then the defect in the retaining walls meets the *Winnipeg Condominium* test because the walls posed a significant risk of danger to the occupants of the house.

**282**  I leave, for the moment, the issue of "subsequent purchasers" as this is tied together with the "single economic unit" issue. On the face of things, the Trustees are subsequent purchasers.

**283**  The burden of proof is on the plaintiffs to demonstrate that: (1) there is a serious risk to safety; (2) the risk was caused by the ***negligence*** of the defendant; and (3) the repairs are required to alleviate the risk: *Winnipeg Condominium*, at para. 49.

**284**  It is not clear whether the plaintiffs maintain that the roof qualified as a real and substantial danger. It does not appear so, but at one point in their submissions they pointed the following extract from Mr. Gallant's report:

If left unattended, the frequency of occurrence of water ingress at the dormers would have increased and damages would have progressed.

**285**  This evidence is insufficient to establish the existence of a substantial danger to the occupants of the home.

**286**  On the matter of the retaining walls, the plaintiffs referred to the following:

1. the large cracks observed in the retaining walls, first observed in the spring of 2008;
2. Mr. Ewert's evidence that a 20-ton jack had to be installed at the base of the driveway (at the garage) to support the porch overhead because the retaining walls supporting that porch had moved inward;
3. Mr. Bosdet's observations at the site in June 2010 (at a time when backfill behind both walls had been removed):
4. the tops of the retaining walls had tilted away from the backfill toward the driveway. The extent of tilting ranged from .75 to 2.125 inches over a vertical distance of four feet;
5. the wall rotation occurred at the level of the driveway slab, and the wall had fractured at that point;
6. there was a set of continuous longitudinal cracks along the back side of both retaining walls;
7. one of the walls supported one end of a deck on the house, and at that location there was a small spalling of concrete;
8. in the transition area between non-tilted wall (near the house) to tilted wall there were a series of fractures, all at roughly at 45 degrees from the horizontal fractures;
9. Mr. Bosdet's opinion (report of October 28, 2010):

Based on our field observation, it is anticipated that the wall is damaged to such a degree that the walls cannot sustain the anticipated soil loading due to continuous cracks at the back of the walls at the driveway elevation.

1. Mr. Chakrabarti's opinion (report of May 4, 2013):

... The lack of weep holes and free draining backfill would have resulted in water accumulating, thereby inducing additional lateral load due to the hydrostatic pressure behind the wall, and if the top layer of the saturated soil froze it would have introduced addition[al] lateral load at the top of the wall. The wall cracked horizontally above the mid-height, at the back of the wall, where the vertical steel was terminated, because the unreinforced wall did not have the capacity to resist the lateral forces impressed upon it.

...

In summary, the wall failed because the wall was not adequately designed for the loads impressed upon it and due to poor construction of drainage behind the wall.

The walls were inadequately designed and had experienced significant damage. I concur with [Mr. Bosdet's report] that the walls should be replaced ...

1. Mr. Wills' evidence on cross-examination:
2. at his attendance on site in October 2010 he noted the [north] wall was generally curved near the base over a three-foot section, and there was a straight section that was tilted inward 1.375 inches over six feet;
3. the wall had been constructed straight, so the wall had curved and yielded based on being overstressed over that distance. This showed it had permanently yielded due to being overloaded;
4. there was a crack on the backfill side confirming the failure of the wall to resist high backfill pressures;
5. the forces were high enough to strain and bend permanently the rebar and curve the wall around the driveway slab;
6. the forces were so high that the rebar had permanently yielded and left a curvature in the bottom of the wall.

**287**  The defendants emphasize that none of the experts who commented on the retaining walls mentioned any safety concerns or risks. I should say that the plaintiffs acknowledged that the experts did not say that, but argued the Court should conclude, on all of the evidence, that the walls were dangerous.

**288**  The defendants also submit that the plaintiffs' claim should fail because they failed to plead that the alleged defects constituted a substantial danger to the occupants of the home. I am not convinced that they were obliged to plead that, certainly given the manner in which this case has unfolded. Even if such a pleading were necessary I would grant leave to amend because I am satisfied the defendants were fully aware of the case they had to meet.

**289**  More substantively, the defendants submit that the mere presence of cracks and "minor leaning" does not mean the walls posed a danger to the occupants of the house. In this regard they refer to the evidence of Mr. Wills, who described the leaning as "minor" and described the damage to the walls as "minor post-construction lateral movement". They also note the evidence that it proved difficult to demolish the walls, thus suggesting they were not going to fall over on their own.

**290**  Finally, the defendants say the plaintiffs have misconstrued the evidence of Mr. Ewert and the 20-ton jack. His evidence was that the last ten feet or so of the retaining walls nearest the house were not demolished but were reused, and the jack was utilised between those walls to push them back to plumb so that they would match the new walls.

*Legal Principles*

**291**  A party responsible for the design and construction of a building must take reasonable care in constructing the building to ensure that it does not contain defects that pose a foreseeable and substantial danger to the health and safety of the occupants. If defects caused by ***negligence*** have a reasonable likelihood of causing injury to the occupants then the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort: *Winnipeg Condominium*, at paras. 21, 36 and 54.

**292**  In *Vargo v. Hughes*, [*2013 ABCA 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JN6B-S237-00000-00&context=) [*Vargo*], the Alberta Court of Appeal summarized the policy justification given by the Supreme Court of Canada in *Winnipeg Condominium*:

[26] The main policy justification given by the Supreme Court in *Winnipeg Condo* for allowing the subsequent owner of a negligently constructed building to recover the cost of repairing defects which present a real and substantial danger was to encourage that subsequent owner to take preventative steps before physical damage to persons or property resulted. If a plaintiff can show a reasonable likelihood of a real and substantial danger to the building's occupants, there is no point in making the owner wait until the risk of injury or damage manifests itself before attending to the repair of the dangerous defect. Secondarily, the Court held that a rule permitting recovery of the cost of repairing dangerous defects also encouraged economic efficiency because it encouraged timely repair of such defects before damage occurs when the cost of repair would tend to be less than the cost of fixing the damage.

**293**  In *Vargo* the court considered whether the "real and substantial danger' to the occupants of the building must be *imminent* and concluded it need not be imminent:

[31] As *Winnipeg Condo* explains at paragraph 37:

the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast, the plaintiff who, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour.

[32] This goal could be frustrated by imposing an imminence requirement. If the plaintiff establishes at the time of the suit a reasonable likelihood of a defect causing real and substantial danger to the building's occupants and the danger is reasonably likely to occur within the useful life of the building, the time frame within which the harm is likely to occur may be irrelevant. Said another way, some dangers are real and substantial without being imminent whereas others must be imminent to present a real and substantial danger to the building's occupants.

[Emphasis added.]

*Application of Principles*

**294**  I agree that it would have been preferable to have expert opinion on the subject of danger to the occupants of the house, but I do not consider it to be essential. I conclude that the facts and existing opinions are a sufficient basis on which I may properly draw a conclusion on the subject.

**295**  On this issue I note the following:

1. the walls form the means of access to the basement garage of the home. As such they are a key and integral part of the general structure of the house and are not, for example, merely decorative structures or pleasing amenities;
2. these retaining walls are substantial: each wall is 100 feet long and nine feet high at the tallest point. For much of their length they would loom substantially over the head of even a tall person;
3. the cracks mentioned by all of the experts are not merely hairline cracks but, as the photographs disclose, there are cracks that show visible gaps;
4. certain parts of the walls had curved to such an extent that the reinforcing steel had permanently bent;
5. the upper parts of the walls were tilting inward, while perhaps not by a large amount certainly enough that the inward leaning is noticeable in the photographs;
6. the inward listing of the walls *increased over time*. Mr. Kirkpatrick's evidence, which I accept, is that in 2008 Mr. Gallant told him to monitor the retaining walls and a year later Mr. Kirkpatrick observed further movement in the walls in that "they continued to list inwards to the driveway"; and
7. the opinion of Mr. Chakrabarti, which I accept, is that the walls had failed.

**296**  Finally, I note that there is no expert, whether for the plaintiffs or for the defendants, who said that nothing need be done about the walls. In saying this I wish to reiterate my full appreciation for the fact that the plaintiffs bear the burden on this issue (and, of course, generally), but nonetheless the absence of that evidence places the other points I have listed in their proper context.

**297**  Given all of the above, and in particular the finding that the walls had in fact failed and the expert consensus that something had to be done about it, I conclude that the retaining walls posed substantial danger to the health and safety of the occupants of the house.

**298**  The defendants note that upon such a finding the damages are not the damages that an original owner might recover but are limited to the cost of putting the structure into a non-dangerous state. I agree that this is a correct statement of the law. However, this simply leads back to the previously-discussed debate between experts about what should have been done to address the failed retaining walls. I concluded then, as I do now, that the appropriate response was to replace the walls. No lesser measures were shown to be effective. Other methods were postulated but those methods were not shown to be viable or more economical alternatives.

**C. Is There a Recoverable Loss**?

*The Issue*

**299**  The defendants submit that the plaintiffs' claims for recovery of repair costs must fail because the current owners of the property (the Trustees) have suffered no loss and the former owner (Globalnet), which sold the property for fair market value (that is, without a loss), was under no obligation to pay for the repairs after having conveyed the property to the Trustees.

**300**  As noted earlier, the plaintiffs submit that Globalnet and the Trusts are sufficiently closely related that they should be treated as a single economic unit for the purpose of determining the loss that was occasioned by the ***negligence*** and breach of contract of the defendants.

*Relevant Facts*

**301**  The facts relating to this issue are as follows:

1. on November 25, 2008 Globalnet entered into a contract for the sale of the subject property to the Trustees of the two Trusts. The purchase price was $1,500,000. The sale contract contained a purchase price adjustment clause to ensure that the purchase price was equal to the fair market value of the property;
2. title to the property was conveyed to the Trustees on December 12, 2008;
3. the respective Trustees of the two Trusts acquired equal shares in the property as tenants in common;
4. at the time of sale Mr. Kirkpatrick and Mr. Dahl were the principals of Globalnet;
5. the two Trusts are the family trusts of Mr. Kirkpatrick and Mr. Dahl;
6. at the time of sale Mr. Kirkpatrick was a trustee and beneficiary of the Pacific Blue Global Trust (Mr. Kirkpatrick's family trust) and was a trustee of the Pleasantville Trust (Mr. Dahl's family trust). In May 2009 Mr. Kirkpatrick resigned as a trustee of each trust and at the same time he was removed as a beneficiary of the Pacific Blue Global Trust;
7. Mr. Kirkpatrick said:

At all material times I was authorized by the Trustees of the Pleasantville Trust and the Pacific Blue Global Trust to act on their behalf. Specifically, I was authorized by them to organize and oversee all aspects of the investigation into and remediation of the defects in the Property.

1. Globalnet (through Mr. Kirkpatrick) assumed responsibility for retaining and instructing contractors, and Globalnet paid the repair bills; and
2. the property was transferred to the Trustees after the water ingress and retaining wall damage were first noticed, but before the full extent of the loss was discovered. The repair invoices all post-date the transfer of title.

*Plaintiffs' Argument*

**302**  The plaintiffs say Globalnet may recover the repair costs paid because Canadian courts have not differentiated between present and former property owners when awarding damages for the costs of repair: *Sedco v. William Kelly Holdings Ltd*, [*[1990] 4 W.W.R. 134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JSXV-G0Y7-00000-00&context=) (Sask. C.A.), at paras. 66-68 [*Sedco*], and *Gentra Canada Investments Inc. v. Lipson*, [*2010 ONSC 1417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JGPY-X4R1-00000-00&context=) [*Gentra*], at para. 77. In *Gentra* the court held the plaintiffs were entitled to pursue damages as if a transfer (in that case, an assignment of mortgages in default by the defendants to the plaintiffs) had not been made. In *Sedco*, the Saskatchewan Court of Appeal allowed recovery in both contract and tort in favour of two plaintiffs where title had been transferred from one to the other and each of the parties had incurred repair expenditures due to a defective design.

**303**  The plaintiffs say that to decline to award damages to the plaintiffs would allow the defendants to take advantage of a "legal black hole" which would result in an injustice to the plaintiffs and an unwarranted benefit to the defendants.

*Defendants' Argument*

**304**  The defendants say Globalnet incurred no losses from the alleged defects since it sold the property to the trustees at fair market value. Globalnet paid for repairs after it had already sold the property. Globalnet had no proprietary interest in the property when it made these payments and therefore made these payments gratuitously.

**305**  The defendants submit that monies paid on a gratuitous or voluntary basis are not recoverable. They say the plaintiffs failed to show that Globalnet was liable to pay for the repairs. They note that Mr. Kirkpatrick "expressly admitted that Globalnet *voluntarily* agreed to do and pay for the repairs".

**306**  Further, the defendants disagree that Globalnet and the Trustees form a single economic unit. In addition to arguing that it would be inappropriate for this court to disregard the legal differences between a corporation and a trust, they allege there is, in any event, no proper evidence of a close relationship between Globalnet and the Trustees and no evidence that the trustees had any knowledge of or involvement in the repairs.

**307**  Finally, the defendants submit *Gentra* and *Sedco* are of no assistance to the plaintiffs. *Sedco* does not stand for the asserted proposition that former and current owners may be viewed as a single economic unit because in that case there were provisions in the sale contract which obliged the former owner to pursue recovery. They also say that *Sedco* has not been followed in British Columbia: *Vanguard Properties Ltd. v. Gauvin Construction Ltd.*, [*58 B.C.L.R. (2d) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62WY-00000-00&context=) (S.C.) [*Vanguard*].

*Is Globalnet a Volunteer?*

**308**  As noted earlier, the defendants say payments that are regarded at law as voluntary cannot be recovered. I am satisfied that this proposition is sound: *Society of Notaries v. Dowson* [*(1995), 4 B.C.L.R. (3d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M26M-00000-00&context=) (S.C.) [*Society of Notaries*]; and *British Columbia Hydro and Power Authority v. N.D. Lea & Associates Ltd*. [*(1997), 43 B.C.L.R. (3d) 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2B8-00000-00&context=) (C.A.) [*BC Hydro v. N.D. Lea*].

**309**  In *Society of Notaries* the court was asked for an opinion based on a stated case. There, the society, in the exercise of its discretion, had made payments to individuals who had made claims arising out of misappropriations of money by a former notary. The society commenced an action in ***negligence*** against the accountant who had audited the former notary's trust accounts, alleging that the accountant's ***negligence*** delayed the discovery of the former notary's misappropriations. Hall J. (as he then was) concluded that the society's claim was not sustainable because of the voluntary nature of the payments.

**310**  In *BC Hydro v. N.D. Lea* the plaintiff claimed in ***negligence*** against the defendant engineering firm for allegedly defective selection and design of a highway culvert that collapsed during a period of heavy rain. The culvert had been part of a larger project involving the relocation of a highway necessitated in turn by B.C. Hydro's plans to flood parts of the existing highway upon completion of the Revelstoke Dam. Pursuant to an agreement between the Ministry of Highways (MOH) and the plaintiff, MOH was fully reimbursed by B.C. Hydro for the cost of the design and construction of the new highway, including the subject culvert. After the collapse of the culvert in July 1983, B.C. Hydro also reimbursed MOH for the cost of the bridge that replaced it, purportedly pursuant to its agreement with MOH. One of the arguments made by the defendants was that the payment was voluntary and not recoverable because B.C. Hydro was not under any obligation to replace the bridge as that work was not related to the Revelstoke Dam project. At trial, reported at [*(1992), 69 B.C.L.R. (2d) 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M170-00000-00&context=), Newbury J. (as she then was) concluded that because B.C. Hydro was not contractually obligated to pay the claimed cost, its payment to MOH was a voluntary payment that was not recoverable against the engineers. This conclusion was affirmed on appeal.

**311**  Here, the plaintiffs do not dispute the proposition that a payment regarded in law as voluntary is not recoverable. Instead, they say that Globalnet was not a volunteer because the individuals behind the current legal ownership are the same individuals for whom the home was originally constructed. I will discuss this issue under the next heading.

*Single Economic Unit*

**312**  I begin by discussing *Sedco*. There, a Crown corporation (Sedco), charged with the responsibility of encouraging economic development in Saskatchewan, built a central laundry facility for use by all hospitals in the Regina area. Sedco contracted with Kelly, an architectural firm, for the design of the building. Kelly, in turn, contracted with a mechanical engineering firm, Briggs, for the design of the mechanical aspects of the building. Sedco leased the completed facility to Hospital Laundry Services, a non-profit company. Problems soon arose with the air conditioning and handling system and it was immediately evident there were defects in the mechanical design. Sedco incurred some expense in addressing the problems but then sold the building to Hospital Laundry Services without correcting the deficiencies. The sale price was equal to the costs of construction plus a contingency allowance, as originally planned. Hospital Laundry Services then expended sums of its own to remedy the problems, and it suffered other losses as well.

**313**  At the time of sale Sedco purported to assign to Hospital Laundry Services its rights under its contract with the architect, Kelly. As the Saskatchewan Court of Appeal put it:

[32] ... To the extent it could do so without Kelly's consent, the Crown corporation assigned its contract with the architect to the laundry company. To the extent it could not do so, it undertook to pursue an action at the expense and for the benefit of the laundry company.

**314**  The trial judge dismissed Sedco's claim, saying that Sedco had recovered its costs of construction just as it had planned to do from the very beginning, and so there was no diminution in value or loss to Sedco attributable to the deficiencies.

**315**  The Saskatchewan Court of Appeal reversed that result. It found that Sedco's causes of action were complete at an early stage and Sedco's claimed losses fell within those causes of action. The court said:

[67] As for the cause of action on the contract, it must be understood that there was but one such cause. It lay entirely in the alleged breach by Kelly of his contract with SEDCO, and extended only to SEDCO's loss, to so much thereof as flowed from the breach and was compensable in law. It is not as though Hospital Laundry, through the medium of the action on the contract - assuming an effective assignment in its favour of the cause of action -- could recover in relation to its own losses, yet that is the position which the two companies appeared to be taking. Whatever their positions respecting their claims in tort, in relation to which they set up independent causes of action, it was not possible for them to take that position in the context of the action on the contract.

[68] The point I want to emphasize is this: whichever of them had the right of action, and whichever of them might have been entitled to the fruits of the action, the losses in issue with respect to the cause of action on the contract were those of SEDCO. On one basis or another the damages, if any, in relation to those losses were to go to Hospital Laundry -- to the extent that is the two companies had agreed that would be so. It is, of course, entirely up to them, as between themselves, to determine the extent of their agreement, and I do not propose to comment on that. And so the only relevance of the matter in the context in which it was raised lies in understanding that whatever the effect of the assignment, Hospital Laundry was in no position to graft its own losses onto the claim against the architect in contract.

[Emphasis added.]

**316**  For present purposes the key aspect in *Sedco* is in the court's discussion of damages. The court had no difficulty with an award to compensate Sedco for its actual expenses incurred prior to the transfer. The difficult issue lay with Sedco's claim for damages for the cost of bringing the plant up to the standard originally intended. Here, the court concluded that there ought to be an award of damages, both in contract and in tort, to compensate "for the estimated cost of refitting the plant according to the requirement set out by Sedco at the outset" (para. 134). The court concluded that the measure of damages could be either be based on diminution in value or the cost of performance, with the latter being the *prima facie* measure in building cases.

**317**  *Sedco* is not an easy read and it is a difficult task to discern points of principle arising from it. But it is even more difficult to discern much support in *Sedco* for the plaintiffs' assertion that recovery in the present case can be based on the notion of a "single economic unit". *Sedco* did not turn on a close relationship between the former owner and the subsequent owner. The words "single economic unit" are found nowhere in the judgment.

**318**  The plaintiffs say that, in *Sedco*, since both owners were before the court the court "did not need to differentiate between the owners" and "the owners could collectively claim for the loss that flowed from the architect's breach". I do not read *Sedco* that way. The court analysed the claims in contract (against the architect) and in tort (against the engineer). The court found it "immaterial" to determine the effect of the *assignment* between Sedco and Hospital Laundry Services since "both were before the Court" (para. 66) and they could work out between themselves who would reap the fruits of the action (para. 68). While both plaintiffs might have had a *right* of action, it was plain that the cause of action in contract was Sedco's alone (para. 67). For these reasons, the court allowed Sedco recovery in contract against the architect and in tort against the engineer for the losses it suffered, and Hospital Laundry Services recovered in tort for the losses it suffered.

**319**  The existence of an assignment in *Sedco* appears to have been a relevant factor in the court's decision. There is, of course, no assignment in this case. To the extent that *Sedco* suggests there may be recovery by a former owner for the estimated cost of refitting the facility those comments may be *obiter* given the fact that there was in fact an assignment between the plaintiffs in that case and so those comments were arguably unnecessary.

**320**  Perhaps the more relevant issue in *Sedco* was the court's award of damages to Sedco for the estimated cost of bringing the facility up to the standard originally intended. It appears to have been an important consideration for the court that the facility had been planned in conjunction with Hospital Laundry Services and on completion Sedco had entered into a 33 year lease with that company. The court said:

[142] The [design] error placed the appellants in an extremely difficult position. SEDCO, especially, was in a tight spot when it became apparent, well after the lease had been entered into, that the Crown Corporation might have to spend some additional $450,000.00, more or less, overcoming the design flaws. Whether it could have recovered that cost from Hospital Laundry through increased rents was not argued and is uncertain given the provisions of the lease, but that the Crown corporation was then in a very real bind is certain.

**321**  Whether this means that Sedco had an obligation to make things right by Hospital Laundry Services, either by through the terms of its lease or other contract or by the imposition of some other duty or obligation, is not clear from the reasons. Again, it is difficult to discern a clear point of principle here.

**322**  The plaintiffs in this case also rely on *Gentra*. In that case the plaintiff was the assignee of two mortgages from Royal Trust. The mortgages were prepared for Royal Trust by a law firm. The mortgages fell into default and enforcement proceedings were taken. Certain deficiencies in the mortgage provisions were discovered in the course of those enforcement proceedings. When Gentra took its assignment it was aware of those deficiencies. Gentra then sued the law firm for ***negligence***. Various issues were argued but for present purposes the relevant issue was whether Gentra could recover because at the time of the assignment Royal Trust had not suffered any loss. The defendants argued, based on *Sedco*, that an assignee can only recover to the extent of the loss that the assignor suffered up to the time of the assignment.

**323**  The motions judge said:

[68] I do not take the court in *Sedco* to be saying, as the defendants argue, that it is only the damages sustained by the assignor that can be recovered. Rather, what is being said is that an assignment does not create a separate cause of action so that what can be recovered by the assignee is no more than the losses that flowed from the breach of the contract with the assignor.

**324**  Ultimately, the judge concluded that that the argument of the defendants in that case was based on a mischaracterization of what was conveyed by way of the assignment. She said it was not a *loss* that was conveyed by the assignment but instead it was a *cause of action* for breach of contract and tort against the defendants and the legal remedies for them.

**325**  The plaintiffs submit *Gentra* stands for the proposition that where separate entities are sufficiently closely connected it may be appropriate to treat them as a single economic unit for the purposes of establishing the liability of another. I do not read *Gentra* as supporting the proposition they advance.

**326**  The court in *Gentra* did refer to another case that the plaintiffs here also rely on. The following is from *Gentra*:

[69] The same concern as to the damages an assignee may recover was addressed in *Technotrade Limited. v. Larkstore Limited* [[2006] EWCA Civ 1079] I find the reasoning in that decision to be compelling. In setting out the issue, the court adopted the following quote as representing the question to be asked:

...whether... a contract-breaker can avoid an otherwise inescapable liability in damages as a result of the accident of the transfer of the property and assignment of the benefit of the relevant...contract to a third party, either by arguing that the original contracting party or assignor, having parted with the property at full value, has suffered no loss and that the assignee cannot be in a better position, or conversely that an assignee, in a case where he alone can sue, has paid a reduced price, equally suffering no loss. In other words, does the accident of transfer and assignment create a "legal black hole" into which the right to damages disappears, leaving the contract breaker with an uncovenanted immunity?

[70] In *Technotrade*, this question arose in the context of the assignment of a contract claim for an allegedly negligent soil investigation report obtained by the original owner of a building site for a residential development. After the soil investigator, Technotrade, submitted its report to the original owner, that owner sold the building site to Larkstore, a property developer. Larkstore used the report, but had no contact with Technotrade regarding its use. While building was being done on the site, a landslip occurred causing damage to adjacent property. In order to continue with the development, Larkstore was required to undertake extensive stabilization work.

[71] Larkstore was sued by the adjacent property owners. In response, Larkstore commenced proceedings against Technotrade, basing its claim in part on the assignment of the original owner's cause of action against Technotrade. One of the issues with which the court dealt was whether Larkstore could recover the damages it sustained from Technotrade, relying on the assignment from the original owner.

[72] Technotrade took the same position that is being taken by the defendants in this action. It maintained that Larkstore could claim no more by virtue of the assignment of the cause of action than the original owner could have recovered from Technotrade at the time that it sold the property. The original owner's damages were nominal.

[73] The Court of Appeal of England and Wales rejected Technotrade's argument on the basis of it having the effect of enabling Technotrade to escape all potential contractual liability for the substantial damage caused by the landslip. As Mummery LJ stated, "As a matter of legal principle and good sense, this cannot possibly be the law...".

[Emphasis added in *Gentra*. Footnotes omitted.]

**327**  I do not find support for the plaintiffs' submission in that excerpt either. Both *Gentra* and *Technotrade* (referred to in *Gentra*) involved assignments of a cause of action. There are no assignments in this case.

**328**  The defendants point out that *Gentra* was appealed: *Gentra Canada Investments Inc. v. Lipson*, [*2011 ONCA 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S230-00000-00&context=). While the decision in the trial court was largely upheld, the court set aside the judgment below insofar as it concerned a subsidiary. Gentra had incorporated a company, 1327622 Ontario Limited ["132"], to purchase (from a receiver) the leasehold interest in the property that had been the subject of the two mortgages in question. 132 was named as a plaintiff in the subject lawsuit along with its parent company, Gentra.

**329**  The Ontario Court of Appeal allowed the defendants' appeal as to 132:

[66] 132 is not a party to the assignment. It is a subsidiary of Gentra Canada and no more. It is a separate legal entity. It was incorporated for the purpose of purchasing the leasehold interest in the Park Tower's property from the receiver. There is no suggestion of a solicitor-client relationship between 132 and the appellants which could give rise to any cause of action against the appellants in either tort or contract. I would allow the appeal in respect of 132.

**330**  The defendants say this supports their submission in that the Trustees are not assignees of any cause of action in this case, and the Trustees themselves have incurred no loss.

**331**  As noted earlier, the defendants also cited *Vanguard*. There, on a stated case, the court was asked whether the plaintiffs were entitled to recover the cost of future repairs to a 32-suite building which the defendants had built pursuant to a contract with the plaintiffs. Problems were noticed after completion. At some point, the plaintiffs sold all of the suites in the project and ceased to hold any interest in it. None of the owners of the individual units had yet commenced legal action. The plaintiffs relied on *Sedco*, among other cases.

**332**  Anderson J. declined to follow *Sedco*, and in doing so commented adversely on the reasoning in that case.

**333**  The facts in *Vanguard* are different from those the present case in that the former owners in *Vanguard* had not incurred any repair expenses to that point. Nonetheless, it does mean that *Sedco* has not been followed in at least one decision in this province.

**334**  In this case the plaintiffs, in effect, invite the Court to lift the corporate veil with Globalnet and conclude that the individuals behind the company are the same as those associated with the Trustees and the Trusts. The defendants say that the separate legal character of corporations and shareholders is a firm principle that is not displaced by mere unfairness. Having opted for the benefits of incorporation, Globalnet (and its shareholders) must bear the corresponding burdens. They cite several cases in this regard, notably *Kosmopoulos v. Constitution Insurance Co.*, [*[1987] 1 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23CM-00000-00&context=) and *Houle v. Canadian National Bank*, *[1990] 3 S.C.R. 122*.

**335**  To that list I might add *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd*. [*(1989), 60 D.L.R. (4th) 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X241-00000-00&context=) (B.C.C.A.) where the Court of Appeal rejected the conclusion that courts should lift the corporate veil wherever "fair play and good conscience" indicate.

**336**  I am not satisfied that the authorities support the proposition advanced by the plaintiffs, namely that the Court may consider the individuals behind Globalnet, on the one hand, and those associated with the Trusts and Trustees on the other, as a single economic unit for the purposes of deciding entitlement to compensation. I also conclude it is not appropriate to disregard the separate legal status of Globalnet or to effectively disregard the transfer of title from Globalnet to the Trustees.

**337**  Since Globalnet paid all of the repair and related expenses, the Trustees have suffered no loss. Globalnet was under no obligation to pay these expenses as it no longer owned the property and there was no other obligation imposed on it to do so. Globalnet itself suffered no loss because it was paid market value on the sale of the property. Given these circumstances, I conclude that the monies expended by Globalnet are not recoverable.

**XIII. Conclusion**

**338**  The plaintiffs' claim is dismissed. The parties may speak to costs.

M.B. BLOK J.

**End of Document**

[***Martin v. Lavon, [2015] B.C.J. No. 900***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G0H-TGD1-JP9P-G072-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.J. Beames J. (In Chambers)

Heard: March 16 and 17, 2015.

Oral judgment: March 26, 2015.

Dockets: M075609, M141641

Registry: Vancouver

**[2015] B.C.J. No. 900**

Between Eric James Martin, Plaintiff, and Rahm Lavon and Itzhak Lavon, Defendants And between Itzhak Lavon and Nitza Lavon, Plaintiffs, and Eric Martin and Rahm LavonDefendants

(51 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Duty of care — Motor vehicles — Motor vehicles — Liability of driver — Passengers — Rules of the road — Action by motorist for damages for injuries sustained in motor vehicle accident and action by defendant motorist's passengers for damages for injuries sustained in motor vehicle accident allowed in part — Plaintiff was struck by defendant as he made left turn — Plaintiff alleged light was red; defendant alleged light was yellow — Plaintiff was negligent in failing to yield to defendant's vehicle — Defendant was negligent in failing to stop — *Negligence* apportioned 80 per cent to plaintiff and 20 per cent to defendant.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Intersections — *Negligence* — Turns — Left turn at intersection — Liability — Civil actions — Operator — *Negligence* — Contributory *negligence* — Action by motorist for damages for injuries sustained in motor vehicle accident and action by defendant motorist's passengers for damages for injuries sustained in motor vehicle accident allowed in part — Plaintiff was struck by defendant as he made left turn — Plaintiff alleged light was red; defendant alleged light was yellow — Plaintiff was negligent in failing to yield to defendant's vehicle — Defendant was negligent in failing to stop — *Negligence* apportioned 80 per cent to plaintiff and 20 per cent to defendant.**

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| Action by Martin for damages for injuries sustained in a motor vehicle accident and action by defendant Lavon's passengers for damages for injuries sustained in motor vehicle accident. Martin was at an intersection waiting to make a left turn. As the light turned yellow, oncoming vehicles continued to proceed through the light, so he continued to wait. When the light turned red, he started his left turn. He was struck by Lavon's vehicle as it proceeded through the intersection. Lavon alleged that when he proceeded into the intersection, the light was yellow and he did not believe he could safely stop.  HELD: Actions allowed in part.  At the time that Martin commenced his turn through the intersection, Lavon's vehicle constituted an immediate hazard. Martin was negligent in failing to yield to Lavon's vehicle. Lavon was not speeding as he approached the intersection and his driving was normal. Given the distance between his vehicle and the intersection when the light turned yellow, and the steady volume of traffic, Lavon should and could have been aware that there may be oncoming left-turning vehicles. The court was not satisfied that Lavon could not have brought his vehicle to a stop before the intersection and therefore he, too, was negligent in concluding that he could not safely come to a stop and in deciding to make the light. ***Negligence*** was apportioned 80 per cent to Martin and 20 per cent to Lavon. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, RSBC 1996, CHAPTER 318, s. 128, s. 129, s. 174

***Negligence*** Act, RSBC 1996, CHAPTER 333, s. 3

**Cases cited:**

*Faryna v. Chrony*, [*[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.).

*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=).

*Henry v. Bennett*, [*2011 BCSC 1254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-626K-00000-00&context=).

*Lee v. Tse*, [*2013 BCSC 1740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23K1-00000-00&context=).

*Kokkinis v. Hall* [*(1996),19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) (C.A.).

*Chang v. Alcuaz*, [*2011 BCSC 843*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22C8-00000-00&context=) Burgess v. Fisher, [*2009 BCSC 1766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24YS-00000-00&context=).

*Carich v. Cook* [*(1992), 9 B.C.A.C. 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=).

*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=).

*Hynna v. Peck*, [*2009 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6229-00000-00&context=).

*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=).

*Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.).

*Ruscheinski v. Biln*, [*2011 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6275-00000-00&context=).

*Walker 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.).

**Counsel**

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Counsel for R. Lavon in both actions: J.L.S. Hodes.

Counsel for I. Lavon in Action M075609: J.L.S. Hodes.

Appearing on her own behalf in Action M141641: N. Lavon.

**Oral Reasons for Judgment**

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| **A.J. BEAMES J. (orally)** |

**1**   On January 3, 2006, two vehicles collided at the intersection of Knight Street and 49th Avenue in Vancouver. Eric Martin was the driver of one of the vehicles, a Honda Civic, and Rahm Lavon was the driver of the other, a Mercedes SUV. Mr. Martin commenced an action claiming that Mr. Lavon and the owner of the vehicle, Mr. Lavon's father, were negligent and liable to compensate him for injuries, losses, and damages that Mr. Martin alleged he sustained in the accident.

**2**  Mr. Lavon's passengers, his mother, Nitza Lavon, and his father, Itzhak Lavon, who is now deceased, commenced an action claiming that Mr. Martin and Mr. Lavon or one of them were negligent and liable to compensate them for the injuries, losses, and damage they sustained as a result of the accident.

**3**  By previous court order, liability and quantum in each action were severed and the issue of liability in the two actions were ordered to be heard together. I have now heard the liability trial.

**4**  The accident occurred between approximately 6:30 and 7:00 p.m. Mr. Martin was driving northbound on Knight Street. It was dark out and his vehicle's headlights were on. He was on his way home from work and in no particular hurry to get home.

**5**  He testified that he intended to turn left onto 49th Avenue and that he was in the lane closest to the centreline. He testified that when he arrived at the intersection, the light was green. He entered the intersection and came to a stop because there were oncoming vehicles on Knight Street southbound. He testified that in the southbound lane closest to the centreline, there were vehicles waiting to turn left onto 49th Avenue eastbound. His vehicle was encroaching into the oncoming left lane as he waited.

**6**  He testified that he waited on the green light for approximately 15 seconds and then the light turned yellow. He said that additional southbound cars travelled through the intersection on the yellow light so he continued to wait. When the light turned red, he testified, he looked past what he estimated were approximately 10 oncoming left-turning vehicles, could see the road was clear, and approximately one to two seconds after the light turned red, he started his left turn. He looked northbound again and could see headlights coming quickly toward him and then the collision occurred almost immediately.

**7**  The impact, everyone agrees, was significant. Mr. Martin says his vehicle ended up on the southwest corner of the intersection on, or partially on, the sidewalk. He testified that he could see no oncoming headlights when he started his turn, and that he saw no headlights until immediately before the collision when he was at approximately a 45- to 90-degree angle to Knight Street.

**8**  He does not recall seeing any other oncoming headlights. He cannot recall seeing any oncoming cars slowing down for the light before the impact. The impact was to the passenger side of his vehicle near the front wheel well and the front passenger door.

**9**  Mr. Martin concedes he was in a bit of shock after the accident and it is clear that there are some details of the events which occurred at the time of, or at least immediately after, the accident that he does not recall or he does not recall clearly.

**10**  Mr. Lavon was travelling southbound on Knight Street. His mother, father, and brother were passengers in the vehicle, with his mother in the front passenger seat and his brother and father in the rear. The family had been on an outing together at the Metrotown Mall and, after dinner at the mall, they were on their way home.

**11**  Mr. Lavon says he was driving with the flow of traffic at approximately 50 kilometres per hour in the centre of the three southbound lanes on Knight Street as he approached the intersection with 49th Avenue. He intended to travel straight through the intersection.

**12**  He testified that in the left lane closest to the centreline, there were between three and five vehicles waiting to turn left onto 49th. He believes one of the vehicles was in the intersection and the others, which he estimates at three in total, were behind the crosswalk line. He testified that when he was beside the last of the line of vehicles in the left lane, he saw the nose of an oncoming vehicle blocking the southbound left lane, but not encroaching onto his lane. He braked slightly and he saw the light turn yellow.

**13**  It is his evidence that he saw the nose of the oncoming vehicle dip down as if the brakes had been applied. He believed that the vehicle was stopping and he judged that he would be unable to safely stop before the intersection so he released the brake. He testified that he did not accelerate. He then saw the other vehicle accelerate forward and Mr. Lavon says he had no time to react except to reapply his brakes and to try to turn at least slightly to the left.

**14**  The collision occurred with his right front bumper striking the other vehicle on its right front side. Mr. Lavon testified that he did not ever see the light turn red. He denied that there were any vehicles driving in the right lane southbound beside him and he recalls seeing a parked car in the right lane between the alley and 49th which is posted as a no-parking area.

**15**  Ms. Lavon and her other son, who was in the back seat, also testified at the trial. Ms. Lavon recalls they were driving in the middle lane on Knight Street southbound. She testified that she saw the light turn yellow as their vehicle entered the intersection and that there was enough time to clear the intersection on the yellow. There were vehicles stopped in the left southbound lane waiting to turn. Those vehicles, she testified, blocked her view of the northbound vehicles at the intersection.

**16**  When they were very close to the intersection, she saw Mr. Martin's vehicle turn left in front of them. She did not see Mr. Martin's vehicle starting from a stopped position. She testified that it looked to her like the vehicle was on the move from the time she first observed it. She testified that it looked like the vehicle hesitated or slowed down as if the driver was considering stopping and then the vehicle increased speed and turned left in front of them.

**17**  She looked over and saw her son pushing on the brake, but they could not stop and the impact occurred.

**18**  She recalls that there was a dark-coloured car parked in the right-hand lane southbound close to the alley. She testified that there were no vehicles driving in the right lane beside them as they approached the intersection. She testified that when she saw the northbound car, they were approximately beside the second or third of three cars in the southbound left lane stopped and waiting to turn left.

**19**  She did not ever look at the speedometer in their vehicle, but she says they were travelling normal speed, that her son did not accelerate as he approached the intersection, and that she saw him attempting to brake.

**20**  Ms. Lavon's younger son, Rahz Lavon, was not paying much attention to his brother's driving as they travelled south on Knight Street. He testified that he heard his brother curse, he looked up, and he saw a vehicle nearly perpendicular to them just a moment before impact. He testified that when he heard the curse, he felt, before the impact, the brakes of their vehicle being applied "pretty strong".

**21**  There was also an independent witness to the collision, Damir Sabitov, who testified at the trial. He testified that he was driving on Knight Street southbound before the accident. He says that the Lavon Mercedes vehicle was to his left with his front bumper probably about even with the Lavons' back bumper. He thinks he may have been in the Lavon vehicle's blind spot. He testified that it was his belief that he was in the centre lane and the Lavon vehicle was in the left lane, but he candidly admits that even after reviewing two statements he gave, one on March 22, 2006, and the other on July 25, 2006, he has very little memory for most details from that evening over nine years ago.

**22**  He recalls that as he approached 49th, he saw the light turn yellow. He estimates that he was about 30 metres from the intersection with the Lavon vehicle to his left and in front of him. He began to brake to stop. He testified that the Lavon vehicle started to accelerate. He could see a Honda Civic, which he testified "decided to turn left", that had been northbound, and he saw the two vehicles collide in the intersection. He was able to stop before the intersection.

**23**  He has no clear recollection of where in the light sequence the Honda Civic tried to turn left or the colour of the light when the Lavon vehicle entered the intersection, except that he said "it should have been red". He said the light was red when he gave his statement some two-and-a-half months after the accident, but his statement did not assist in refreshing his memory. He believes he told the truth when he gave his statement as he had no reason to lie, but he was not asked if his recollection was clear when he gave his statement two-and-a-half months after the accident. His statement was not given, I find, close in time to the events and I was not asked to admit his 2006 statement or statements into evidence.

**24**  Mr. Sabitov described his evidence about the Honda turning on a red light as being his opinion. From where he was when the light turned yellow, about 30 metres from the intersection, on his estimate, he felt that he should brake because it would be too dangerous for him to enter the intersection because of the northbound lane that he saw waiting to turn left.

**25**  In terms of what he clearly recalls, he says he has a clear recollection of the Honda Civic up on the curb after the collision; of the Lavon vehicle accelerating; and of the Lavon vehicle being to the left of his vehicle.

**26**  The statutory duties of drivers in situations like this are clearly set out in ss. 128 and 129 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 relating to the duties of drivers approaching intersections where the light turns yellow and when the light turns red and in s. 174 of that Act with respect to turning left.

**27**  I was provided with case authorities by all of the counsel, which case authorities I have read, involving intersection collisions like this one. I will attach a list of the authorities if a transcript of my decision is ordered. Each case clearly turns on its own facts.

**28**  In this case, I accept the evidence of Mr. Lavon and Mr. Sabitov that their vehicles were approximately 30 metres from the intersection when the light turned yellow, Mr. Lavon's vehicle approximately one-car length closer to the intersection than Mr. Sabitov's.

**29**  As part of the agreed-upon admissions, I know that the light sequence at the intersection was programmed so that the light remained yellow for 3.5 seconds before turning red. On simple math, given the speed, distance, and timing, I find that the light at the intersection was still yellow, although perhaps a stale yellow, when Mr. Lavon's vehicle entered the intersection. By necessity, that means Mr. Martin moved into his turn across the centre lane of the oncoming traffic on the yellow light and before the light turned red.

**30**  Mr. Martin is clearly mistaken about his estimate of the number of cars that were southbound waiting to turn left. He could not have looked as far up Knight Street as 10 car lengths, as he testified, and seen a clear road when at least both of the Sabitov and Lavon vehicles were oncoming within approximately 30 metres and both were there to be seen.

**31**  Mr. Martin has no explanation for not seeing the Lavon vehicle headlights until immediately before the impact. Mr. Lavon's vehicle was so close at the time Mr. Martin commenced his turn through the intersection that Mr. Lavon's vehicle, I find, constituted an immediate hazard. Mr. Martin was negligent in failing to yield to Mr. Lavon's vehicle.

**32**  With regard to Mr. Lavon, the evidence is clear that he was not speeding as he approached the intersection and that his driving was normal. He was just barely in front of Mr. Sabitov's vehicle, I find, and Mr. Sabitov was able, upon seeing the light turn amber, to bring his vehicle safely to a stop before entering the intersection.

**33**  I accept Mr. Sabitov's evidence that there was at least some degree of acceleration of the Lavon vehicle after the light turned yellow. Mr. Sabitov testified he had a clear recollection of that and he was very careful and candid about what he recalled and what he did not recall.

**34**  Given the distance between the Lavon vehicle and the intersection when the light turned yellow, and the steady volume of traffic, Mr. Lavon could and should have been aware, even before he saw the nose of the Martin vehicle, that there may be oncoming left-turning vehicles, a very common phenomena everywhere and particularly in Vancouver not long after the end of the rush hour.

**35**  I am not satisfied that Mr. Lavon could not have brought his vehicle to a stop before the intersection, albeit the stop may have needed to be an abrupt one. He, too, I conclude, was negligent in concluding that he could not safely come to a stop and in deciding to make the light as opposed to staying on the brake once he saw Mr. Martin's vehicle.

**36**  The ***negligence*** of Mr. Martin exceeds that of Mr. Lavon, in my view, and I apportion liability 80 percent to Mr. Martin and 20 percent to Mr. Lavon.

**37**  That concludes my decision. With respect to the issue of costs, does anyone seek to make submissions.

**38**  MR. HODES: My Lady, it is John Hodes here. With respect to costs, I would simply submit that they should be apportioned as per s. 3 of the ***Negligence*** *Act* in the same proportion as liability.

**39**  MR. KUSHNERYK: Yes, My Lady, that would seem to make sense.

**40**  THE COURT: That will be the order of costs. Amongst the Martin and the Lavon defendants, Mrs. Lavon will have her costs in their entirety on Scale B proportionately collected from each defendant.

**41**  Counsel, there were no submissions about this, and in my view it is not the kind of case where I ought to seize myself of the quantum trial or trials if they are necessary, but I am prepared to hear submissions on that if you like.

**42**  MR. KUSHNERYK: Pardon me, My Lady? You cut out for a moment.

**43**  THE COURT: I said I am not of the view that this is the sort of case where I need to seize myself of the quantum portion.

**44**  MR. KUSHNERYK: Oh, right.

**45**  THE COURT: Anyone have a view to the contrary?

**46**  MR. BURGOYNE: I do not have any contrary view, My Lady. It is John Burgoyne.

**47**  MR. HODES: No, My Lady, I do not think there is anything requiring it. Your Ladyship does have the background, but I suspect that quantum and liability are sufficiently distinct that it is not necessary to seize yourself.

**48**  MR. KUSHNERYK: I am in agreement with that.

**49**  THE COURT: All right. Given the fact that I am not a Vancouver-resident judge and given the fact that a transcript of my decision can be ordered if necessary for any judge that hears any quantum trial, I will not seize myself. If either action need to proceed to a quantum trial, then I am not seized.

**50**  Thank you very much.

A.J. BEAMES J.

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**Appendix**

**51**

*Faryna v. Chrony*, [*[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.).

*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=).

*Henry v. Bennett*, [*2011 BCSC 1254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-626K-00000-00&context=).

*Lee v. Tse*, [*2013 BCSC 1740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23K1-00000-00&context=).

*Kokkinis v. Hall* [*(1996),19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) (C.A.).

*Chang v. Alcuaz*, [*2011 BCSC 843*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22C8-00000-00&context=).

*Burgess v. Fisher*, [*2009 BCSC 1766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24YS-00000-00&context=).

*Carich v. Cook* [*(1992), 9 B.C.A.C. 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=).

*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=).

*Hynna v. Peck*, [*2009 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6229-00000-00&context=).

*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=).

*Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.).

*Ruscheinski v. Biln*, [*2011 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6275-00000-00&context=).

*Walker 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.).

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